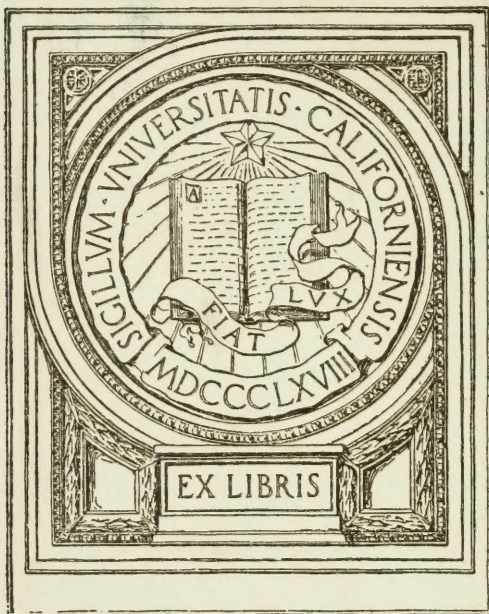


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A
PRACTICAL TREATISE
ON
THE LAW
OF
CORPORATIONS
IN GENERAL,
AS WELL AGGREGATE AS SOLE.

INCLUDING

MUNICIPAL CORPORATIONS,
RAILWAY, BANKING, CANAL AND OTHER
JOINT STOCK AND TRADING BODIES,
DEAN AND CHAPTERS,
UNIVERSITIES,
COLLEGES,
SCHOOLS,

HOSPITALS,
WITH QUASI CORPORATIONS AGGREGATE,
AS GUARDIANS OF THE POOR, CHURCH-
WARDENS, CHURCHWARDENS AND OVER-
SEERS, ETC., AND ALSO
CORPORATIONS SOLE, AS BISHOPS, DEANS,
CANONS, ARCHDEACONS, PARSONS, ETC.

BY JAMES GRANT,
OF THE MIDDLE TEMPLE, ESQ.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

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P R E F A C E.

THIS work is the result of an attempt to compile the law as affecting corporate bodies in general.

Upwards of half a century has elapsed since a treatise with the same object has been offered to the profession and the public. In that period vast alterations have been made by legislation, introducing some principles wholly new, some modifications of established ones, and engrafting many new branches on the old stock of corporation law. Besides, an immense body of decisions, both at common law and in equity, have materially qualified parts of what formerly passed for law on this subject, or have richly illustrated that which is fundamental in it. Add to this the great multiplication of corporate bodies to which obvious causes have given rise within the above period, and the multifarious forms in which, as a consequence, questions are perpetually brought before the courts in cases where one or other of the parties is a corporation or a corporator suing or sued as such, and we have sufficient grounds to anticipate the wide utility of a work which should succeed in comprehending and displaying in a practical form the whole of the law of corporations.

With the object—which however he is painfully sensible he has no right to ask credit for having attained—of rendering his undertaking generally useful, the Author has endeavoured, by the devotion of much time and very great labour, to comprehend in his plan not only an exposition of the principles regulating corporate bodies in general, but to state the law respecting particular species of corporations, as municipal, railway, canal, and trading corporations, with ecclesiastical, eleemosynary and other corporations aggregate, and quasi corporations aggregate, and also that of corporations sole and quasi corporations sole, so fully that every one who, either as a member of such body, or being called upon to advise respecting it, wants information, may find in this volume a directory to authorities bearing on the point in question. In furtherance of this view,

the author has collected a number of decisions on subjects not of necessity exclusively connected with corporations, though in practice arising, for the most part, in connection with corporate interests. Thus in treating of municipal corporations it was, for the purpose stated, obviously not enough to state the effect or even the words of the various acts for the regulation of matters connected with municipal corporations which have been passed of late years, together with the decisions of the courts upon them, not even in addition to a full account of the law, so far as it remains unaltered, respecting majorities, and elections, amotions, restorations, &c., to office generally, with the indissolubly connected subjects of mandamus and quo warranto, and many other points; but there has been added, what it is hoped will prove a useful collection of decisions respecting markets, and market and other tolls, port dues, prescriptions, customs, courts, parliamentary franchises, and several other matters, together with all such decisions on points of pleading, evidence and practice, especially all questions of costs and forms of proceeding, as might tend to facilitate the labours of persons who have hitherto been obliged to look through a large number of reports and authorities before they could arrive at full information on these subjects. The Author's hope has been, that by bringing together a body of such matters,—to be found in a digested shape, as he believes, in no other single volume,—he might venture to present a book calculated to be of service to a very numerous class of persons.

Possibly it may be required of the author to indicate the sources of the authorities on which his statements of the law rests. These are the following. Numerous decisions and even dicta in the Year Books appear to him, and he submits will be found to throw much valuable light upon this part of the law; and he has accordingly thought it right to bring forward many cases from the Year Books as authorities for the doctrines advanced, trusting that they will demonstrate their own value upon examination; in the meantime a single instance may suffice to support what has been said. In Trinity Term, 5 Vict., the Court of Common Pleas,^(a) decided that an action of trespass may be maintained against a corporation aggregate; but the same appears to have been the law as early as the reign of Edward III., and there are certainly not fewer than a dozen cases reported between that period and the termination of the Year Book Reports, in which the principle was either expressly recognised or tacitly assumed as the basis of decision.

In addition, the Common Law Reports, from the beginning of the series to the present time, have been searched—the Author ventures to hope this work will show—with great care and labour.

Within the last half century an enormous mass of decisions has been

(a) Vid. *infra*, p. 278.

made in Equity settling various points in the law of corporations, not only with respect to charitable corporations, as hospitals, schools, &c., and trusts for charitable purposes vested in corporations, and questions of mortmain, but with respect to railway, canal, and other joint stock or trading corporations, and also respecting the property of municipal corporations. An earnest, very long continued, and laborious endeavour has been made to collect these decisions and state the proper effect of them and of others touching the subject to be found in the Equity Reports of previous periods, in such a manner as seemed calculated to prove of most practical utility. As for the whole, so especially for this portion, of the volume is it that the Author hopes for the indulgent candour of the profession, being fully aware that he cannot ask credit for more in respect of it than perhaps that of being the first to bring together, more fully than it is to be found elsewhere, a large mass of luminous expositions of principles in the law regulating these bodies, which are of the utmost value, and without an attempt to compile and arrange which any work on this subject would obviously, in these days, have been, in a principal part, defective and unsuited for general use.

Again, very many statutory enactments have the most important bearing on this subject; these in large numbers, together with such decisions as have been made in elucidation of them, will be found in their proper places: the principal sections of all the acts relative to municipal corporations will be found either cited at length, with judicial comments appended, or, where it seemed unnecessary to do the former, the substance is stated, with such decisions as have occurred fixing the proper interpretation. The Index at the end of the volume will show the page on which each section of every statute, with its judicial illustration, is to be found.

With respect to those parts of the work which treat of Universities, Charitable Corporations, Hospitals, Colleges, Schools, &c., the object aimed at has been to bring together, from a widely scattered *sylva* of authorities, such a body of decisions as, it is hoped, may serve to lighten the labour of persons whose duty it may be to ascertain the law on subjects connected with the interests and rights of such bodies, or their members, by indicating, as fully as very anxious labour enabled the Author to do, the sources of the law respecting them, including a variety of interesting questions regarding the visitatorial power in Universities, Colleges, Schools, &c., with questions of mortmain, the recent legislation as to schools, and various other matters.

So under the respective heads of Dean and Chapter; and Quasi Corporations, as Guardians of the Poor; Churchwardens; Churchwardens and Overseers; and of Corporations Sole, the reader will find the principal

decisions from the earliest times down to the present, together with the statutory enactments, ascertaining the rights of such bodies, and particularly in the last case ascertaining the rights of the successors, and the rules respecting grants of bishops' and parsons' leases, and other matters, collected from a great number of reports and a few books of authority.

The author cannot but earnestly desire to find the candour, with which the merits of a new work are usually scanned by the profession, extended to this undertaking. It has no pretensions to notice, except that his endeavour in completing it has been to exhaust this branch of the law; to state nothing positively, except what appeared to him to rest upon the best authority; to render authority for every statement put forward, whether directly, or only collaterally, connected with the main subject; and, in doing so, to avoid burdensome and tedious details of the circumstances of particular cases,^(a) placing before the reader the points decided with as much brevity as appeared to be consistent with accuracy, clearness, and the adaptation of the book for practical reference as a guide and indicator to the sources of information and authority on the various subjects of which it treats.

With a view to secure more effectually this great object of the Author's labours, a very copious Index has been added, which no pains have been spared to render accurate and otherwise complete.

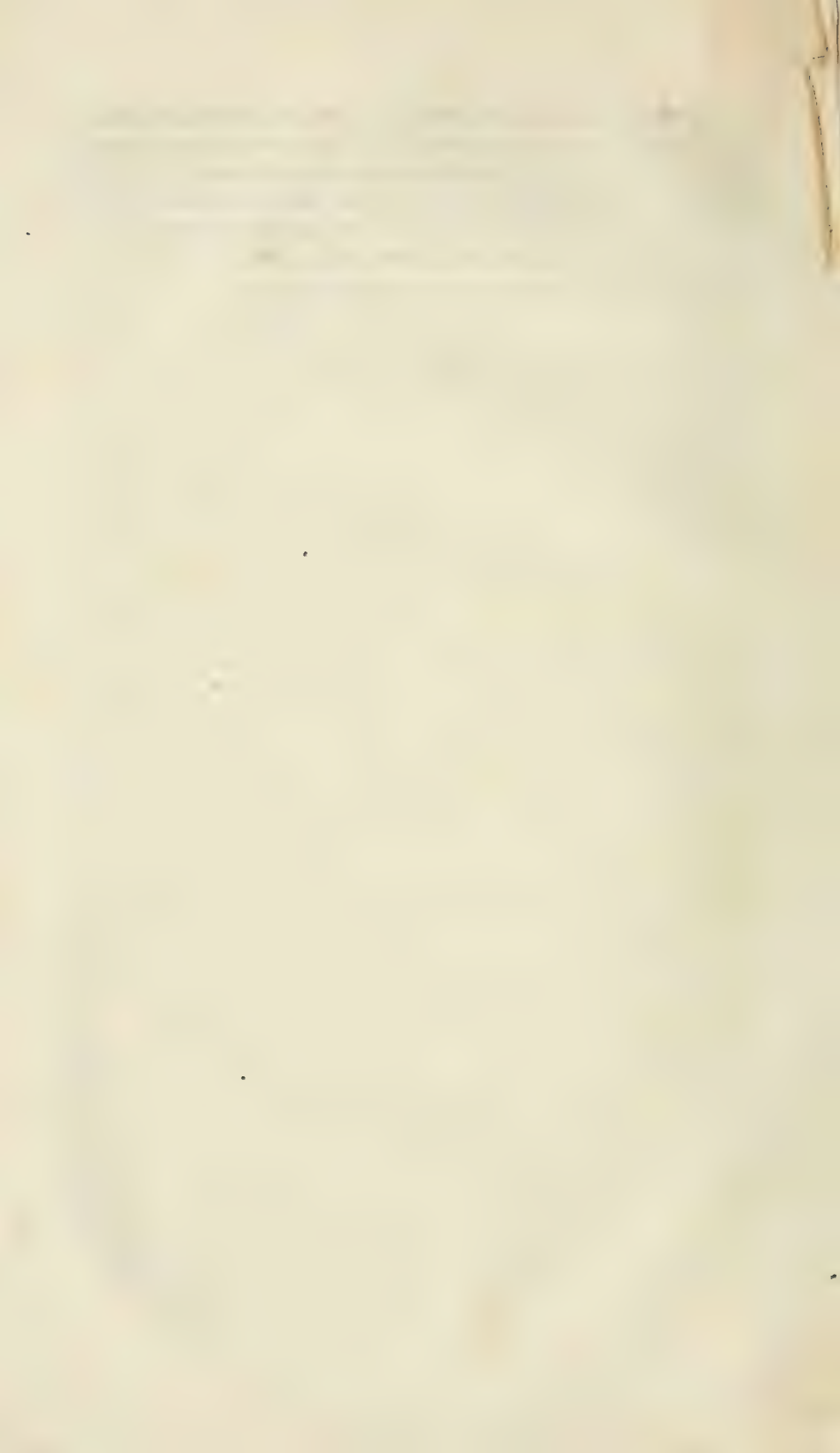
It will, perhaps, be asked why the Author has departed from the usual practice in not printing a "Table of Cases cited." The reasons are these. The utility of such a compilation seems much less easily appreciable in connection with a work on Corporation Law than in almost any other branch of the law; for as is well known to any one who has looked below the surface of the subject, the names of cases by no means *here* serve the purpose of a *memoria technica* with the precision, and success, and utility that follow from so applying them elsewhere, inasmuch as in numerous instances the same conjunction of names of plaintiff and defendant indicates different decisions, sometimes to the extent of a dozen, or even a score. Thus *Attorney-General v. Mayor, &c., of Litchfield, Rex v. Mayor, &c., of London*, represent respectively a great number of decisions, in the latter case, spread over several centuries. It would obviously, therefore, have been impracticable to have afforded the learned reader that additional facility of consulting the work for which alone a "Table of Cases cited" is, it is submitted, valuable:—to the layman, the student, or even to persons of practical acquaintance with the law, but not accustomed to refer their learning to cases, such a compilation is of no manner of use:—without stating along with each case the volume and page of the report in which it was to be found,—a process which,

(a) Vid. Sugd. Powers, Preface 1st edit., p. ix.

not to speak of the labour of it, would have had the effect of swelling the volume to an unwieldy size, without adding in the slightest degree to its utility in the hands of those for whose use it is principally designed. Besides, the Author ventures to hope that the Index of matters will be found so fully adapted for the purpose of consulting the work with ease, as to compensate for the absence of what, perhaps, is at best little else than an expedient to help out a defective index.

NO. 2, FLOWDEN BUILDINGS, TEMPLE,

July 27, 1850.



CONTENTS.

The pages referred to are those between brackets [].

IDEA of a Corporation aggregate, 1-4; definition, 4; members, 5; origin, 6, 7.

CHARTERS, 9; royal, 10, 11; others, 11, 12; power of the crown to incorporate, 16, 17; acceptance of charters, 18-24; effect, 24, 25; construction, 25-37; evidence, 37-39; voidance, 39-45; surrender, 45-47.

NUMBER of corporators, 48, 49.

NAME, 50-54; by reputation, 50; by prescription, 51; in leases, devises, &c. to, 51; by, 53; new name, 52; geographical truth of, 53.

COMMON SEAL, 55; use of, 55; acts requiring, 56, 57; what is, 59; not to be changed, 59, 60; exceptions to use of, 60, 61; as to contracts, 61, 62; effect of affixing, 63, 64; how limited, 65; proof of, 66; cannot be detached.

MAJORITY, 68; binds the body, 68; the legal majority, 69; of the council in boroughs, &c., 70; thrown away votes, 71; relief in equity against majority, 71-73; stat. 33 Hen. 8, c. 27 . . 74; casting vote, 75.

BYE-LAWS, 76; power to make, when incident, 76; definition, 76; obligatory on whom, 76, 77; by whom to be made, 77; custom setting up bad, 78, 79; power to make, to be strictly pursued, 79; general rule of, 80; limiting a discretion bad, 81; as to official eligibility, &c., 81; cannot annul customs, 83; in restraint of trade, 83; in regulation, 84; affixing forfeiture, 84, 85; imprisonment, 85; disfranchisement, 86; penalties, 86, 87; construction of 88, 89; mode of questioning validity, 89; evidence of, 90; repeal, 91; restraints on making, 91; of London, 92; under Companies Clauses Consolidation Act, 93; Railways Clauses Consolidation Act, 93, 94; Municipal Corporations Act, 95-97.

PROPERTY, 98; mortmain, 98, 99; alienation in, gives no right of action, 100; grant in, not void, but voidable, 100; entry for, 100, 101; license in, 101; ad quod damnum, 101; corporations holding lands beyond their license, 103; unless lords, &c., interfere, corporations may hold, without license, 106; what estates may take by purchase, 107-111; by devise, 112-126; by demise, 127-129; whether may grant in fee, 129-139; how to convey, 139; municipal corporations, how restricted, &c., in dealing with their real property, 140-142; demises by corporations, 143-149; void and voidable, 149; how to demand rent, 150; their lease, how determined, 151; surrendered, 152.

ACTS AND PROCEEDINGS by Corporations, 154; how corporate acts performed, 154, 155; notice of meeting, 155, 156; privilege from arrest, 156; form of notice or summons, 157; acts beyond competency of, 157, 158; ap-
OCTOBER, 1853—2

plying to parliament to change constitution, 159; acts relieved against, 159; suing for duties, 159; port dues, 160-162; distress for, 163; toll-traverse, 164; pannage, passage, &c., 164; toll-thorough, 165; definition of market 165; market tolls, 166-170; distress for, 170, 171; action on the case for, 171; ownership of soil of market, 172, 173; stallage, 173-176; piecage, 176, 177; murage, 177; action for interfering with ancient market, 178; quo warranto, 179, 180; scire facias, 180; Pie Poudre Court, 181; bill in equity for tolls, 181, 182; exemption from tolls, 182; as to boroughs, &c., now, 183, 184; rights of common vested in corporations, 185; ferry, 186; several fishery, 186, 187; land cheap, 187; manor tolls, 187, 188; ejectment by a corporation, 189, 190; trespass, 190; claim on tithes, 191; covenant, 191; account, 192; assignment of auditors in, 192; how to enforce exemption of serving on juries, 193; may indict for refusal to serve offices, &c., 193; action for interruption of right of way, 193; for entry of sheriff, 194; tribunals in which to bring actions, 195; judge and officer, 197; proving debts in bankruptcy, &c., 197, 198; suing as a common informer, 198; faculty to use pew, 198; suing in equity, 199, 200; foreign corporations suing here, 200; domicile of a corporation, 201; whether corporation suing is to show how incorporate, 201; judicial notice, 201; suing in Ecclesiastical Court, 202; may be executor, 202; limitations of actions, 202; elections, 203; lost votes, 205; disqualification, 206; if patent, 207; thrown away votes, 207; lists of candidates, 209; oaths, 210; validity of election of corporate officer, 211; requisites of good electoral assembly, 211, 212; of due election, 213; mandamus and quo warranto, 213-216; swearing in, 217; corporator to take notice of election, 217; who to be electors, 218; what a majority, 219; a definite number of elector quorum A. and B. are to be two, 220; refusal of office in boroughs, &c., 221-223; resignation, 223; fines, 225; mandamus and quo warranto respecting cases of corporate elections, 226-232; bribery at, 232; in boroughs, &c., 233-236; mandamus to admit, 236-239; returns, 239, 240; amotion, 240; causes, 241, 242; necessity, 243; summons, 244, 245; mandamus to restore, 245-247; returns, 248; when mandamus goes respecting officers, 251; when quo warranto, 252-258; pleadings in, 258, 259; judgment, 259, 260; costs, 260, 261; disfranchisement, 262-264; causes, 264-273.

ACTIONS, PROCEEDINGS, &c., against Corporations, 274; appearance, 274; service of writs, 274, 275; indictment, 275; actions on bills of exchange, &c., 276; debt on bye-laws, 276; action on case, 277; trespass, 278; ejectment, 278-280; detinue, &c., 280; suits in equity, 280; corporators where liable, not the corporation, 281; persons claiming to be a corporation, 281-283; indictment, 283, 284; removing, 284; liable to poor and other rates, 285; suits in equity, 286-290; injunction, 291-294; Statute of Limitations, 294.

DISSOLUTION, 295; scire facias, 295; quo warranto, 296-300; crown cannot dissolve at pleasure, 302; three modes of, 303; effect on lands, 303; personalty, 304; writ of restitution, 305; of corporation by prescription, 307; by statute, 307, 308.

EVIDENCE, 310; of being a corporation, 310; corporate seal, 310; means of, 311; inspection, 312-314; admissions by corporators, 315; admissibility of, as witnesses, 315, 316; of corporate books, 317-319.

CUSTOMS AND PRESCRIPTIONS in corporations, 320; pleading and proof of, 320, 321; operation of statutes on, 322; of inconsistent charter, 323, 324; pleading prescription, 325-327; prescription different from custom, 327-329; various customs of boroughs, &c., 330-336; may be enforced against the corporation, 334; differing from general law, 335; in opposition to it, 336; pleading customs, 337; customs in borough courts, 337-339.

MUNICIPAL CORPORATIONS, 341; abolition of usages, &c., inconsistent with the Municipal Corporations Act, 341, 342; style of corporations, 342; limits of jurisdiction; 343-347; counties of cities, 348-352; sheriffs, 353-

355; the council, 355; functions of, 357-358; delegation, 359; trustees, 360; paving, lighting, &c., 361, 362: bye-laws, 362-365; disposing of real property, 365-367; police magistrate, 367; watch committee, 367; constables, 368-374; superannuation fund, special constables, 374; watch rate, 375-377; appointment of officers, 378; compensation, 379-382; responsibility, 382-385; baths and washhouses, 385; museums, 386; nuisances removal, 386; burgesses, 387-390; list, 390, 391; revised, 392; roll, 393-395; election of councillors, 396; exemptions, 397; disqualifications, 397, 398; questions at election, 400; refusal to take office, 401; election in wards, 402-404; extraordinary vacancies, 404-406; declarations by councillors, 407, 408; mandamus to try right, 408; quo warranto, 409; parliamentary franchise in boroughs, &c., 411; bribery, 413; resignation of officers, 414; aldermen, 415; qualification, &c., 416, 417; declarations by, 417-419; refusal of office, 419; mandamus to try election of, 419; amotion, 420; quo warranto, 420; resignation, 420; the mayor, 421; election of, 421; refusal of office, 422; duties, 423; precedence, 424; liabilities, 425; declarations by, 425; amotion, 426; mandamus to restore, 427; quo warranto, 427; acts of de facto, 428; protection of, 429; assessors of boroughs, 431; direction of mandamus, 432; town clerk, 433; duties, 433; liabilities, 437; amotion, 437; his office new, 457; mandamus to restore, 437; resignation, 438; treasurer, 439; duties, 439, 440; indictment, 439; bill for an account, quo warranto, 441; auditors, 442; clerk of the peace, 443; duties, 443; mandamus to, 443; coroner, 444; quo warranto, 445; recorder, 446; deputy, 447; declaration, 447; quarter sessions, 449; second court, 449; sci. fa. to repeal grant of, 450; matters cognizable, 450, 451; certiorari, 451; exemption from county rates, 452; ale licenses, 453; prosecution of prisoners, 454; contracts for maintenance, 455-457; what offences not cognizable, 457, 458; courts of record, 459; judge, 460; attorneys of, 461; rules, 461; new trials, 462; quo warranto, 462; habeas corpus cum causa, 463; jurors, 465; cause of action, 465; pleading, 466; privilege from arrest, 467; mandamus, 467; Pie Poudre Courts, 467; prescribing for court of equity, 468; borough justices, 469; not corporate officers, 470; powers, 471; convictions, 472; certiorari, 473; justices' clerk, 473; his fees, 474; petty sessions, 474; quo warranto, 475; actions against them, 475; jurisdiction, 475-477; concurrent with county justices, 478; jurors, 479; in counties of cities, &c., 480; freemen, 481; goals, 482-486; borough fund and borough rates, 487; jurisdiction of equity respecting, 489; estimate for a rate, 490; rate bad for excess, 491; retrospective, 491; sale of church patronage, 492; management of corporate property, 493; district rates, 493-495; museum rates, 495; baths and washhouses rates, 495; poor rates, 496-498; pauper lunatics, &c., 499; expenses of obtaining act of parliament, 499; rates generally, 500; bridges, 500, 501; highways, 501; protection of persons acting in pursuance of Municipal Corporations Act, 503; freemen, 504-506; parliamentary franchise of, 506; list of freemen, 507; mandamus to admit, 509; right of common of, 509, 510; charitable trusts, 511; legal estate where now vested, 511, 512; account against corporations, 513, 514.

THE UNIVERSITIES, 515; what are, 515; lay bodies, 515; incorporation of, 516; how visitable, 517, 518; offences against statutes of, 519; Chancellor's courts, 520, 522; privilege of members, servants, &c., 521-523; pleading, 524; claiming, 525, 526; Vice-Chancellors justices, of peace, 527; presentation to livings, 528, substitution of declarations for oaths, 528; colleges, 529; founder's will, 530; foundership, 531; visitor, 531-537; suspension from fellowships, 537; expulsion, 538; mandamus to restore, 538; quo warranto, 539; ejectment, 539; declaration by head of college, 539-540; name in grants, &c., 540; poor rates, 541; common seal, 541; admission to college, 541; increase to foundation of, 542; grant to fellow, 543; cross-presentations, 543; leases, 544; consuance for rent, 544; devises to colleges, 545-547; account in equity, 547, 548; disposition of college lands, 548-550; funds, 550; decisions respecting particular colleges, 550.

FREE GRAMMAR SCHOOLS, 552; powers of equity over, 553-556; of visitation, 557; conveyance of sites for schools, &c., 558; corporation of a school may consist of two persons, 558; devises to schools, 558, 559; disposition of surplus, 559-561; equity and a visitor, 562, 563; setting aside disposition of lands, 563; lapse of time, 564, 565; appointment to schools in boroughs, &c., 566.

HOSPITALS, 567; local bodies, 568; founder, 568; name, 568-571; manner of founding, 571; under the statute, 573, 574; power of leasing, 574, 575; master, 576, 577; elections, 577; quo warranto, 577, 578; majority, 578; common seal, 579; individual corporators liable, 579; equity marshalling assets, 579; relief in equity, 579, 580; women members of, 580; rateability, 580.

DEAN AND CHAPTER, 581; visitor, 582; powers, 582, 583; founder's statutes, 583; head, 585; no negative voice, 586; acceptance of rent, 587; actions by, 587; estates vested in Ecclesiastical Commissioners, 588; bond given to dean, 589, 590; patronage, 590; installation of dean, 591; scire facias on judgment by, 592; waste, 592; canons, 592; archdeacon, 594; proxy, 595; majority, 595; surrender of possessions, 596; chapter house, 597, 598; superstitious use, 598.

QUASI CORPORATIONS AGGREGATE, 600; churchwardens, 600; suing, 601, 602; mandamus, 602, 603; bill in equity, 603; bond to, 603; no common seal, 603; quo warranto, 604; pleading general issue, &c., 605; cannot hold lands, 605; cannot lease, 606; churchwardens and overseers, 607; may hold lands, &c., 608; have no common seal, 609; majority, 610; mortmain, 611; bonds to, 611; mortgage by, 614; information in equity against, 615; notice of action, 615; guardians of the poor, 616; contracts of, 617-619; name, 619, 620; poor rates, 620; dissolution, 620, 621; quo warranto, 622; mandamus to admit clerk, 622; estate in parish property, 623; district board of guardians, 623; no common seal, 624; visitor and guardians of the poor, 624; board of ordnance, 624; directors of a company, banking copartnerships, 624, 625; joint stock corporations, 625; commissioners of sewers, 625.

CORPORATIONS SOLE, 626; queen, 627, king, 627-629; bishop, 629-631; grant of office to, 631; of options, 632; of land, 632; mortmain, 633; corporate seal, 633; deans, &c., 633, 634; parsons, 634; resignation, 635; corporations sole suing, 635, 636; prescribing, 636; leasing, 636, 637; equity prevents waste, 637; excommunication, 637; scire facias on judgment by predecessor, 638; quo warranto, 638; disposal of property how binding on successor, 638-640; confirmation of bishop, 640; of patron, 640; usurper's leases, 641; concurrent lease, 641; bishop's leases, 641-643; leases good against grantor, 643; successors' rights, 643-647; usurpation, 647; grant of offices, 647, 648; subjects of demise, 648, 649; corporation sole lord of a manor, 650, 651; agreement for tithes, 651, 652; renewals of leases, 652-654; building leases, 655; grants for sites of schools, 656; archdeacon, 656; perpetual curates, 657-659; mortmain, 657, 658; resignation of corporation sole, 659; chamberlain of London, 659, 660.

QUASI CORPORATIONS SOLE, 661.

INDEX OF MATTERS, 663, et al.

A TREATISE

ON THE

LAW OF CORPORATIONS.

IN no branch of the law is it of more importance to set out with correct and definite ideas of principles, than in that which relates to corporations.

So much confusion has arisen, and so much discussion has been wasted for want of attending to this fact, that we consider it indispensable to devote some space to the consideration of the nature and attributes of a corporation, before proceeding further.

It has been said, in language which has attracted more animadversion for its quaintness than acquiescence in its accuracy, that a corporation aggregate is only in abstracto, and rests only in intendment and consideration of the law—is invisible, immortal, has no soul, neither is subject to the imbecilities or death of the natural body.(a)

But it is quite true that a corporation aggregate is an abstract being, or a metaphysical body, and something altogether distinct from the aggregate of the individual members, as much so as they are from the rest of her Majesty's subjects.(b) We may here mention some instances to show this; numbers will occur in the course of the work. A suit in chancery by a corporation is not rendered defective by the death of one or more of the corporators,(c) which it would be, if a corporation consisted of its members in the same way that a partnership consists of the aggregate of

(a) Sutton's Hospital Case, 10 Rep. 32 b.

(b) Bligh v. Brent, 2 Y. & C. 268; Bradley v. Holdsworth, 3 M. & W. 422; Marriott v. Mascal, And. 210. Where a bond was given to A., B., C., &c., governors of a voluntary society, which was afterwards erected into a corporation by charter: held, the obligor was not liable in an action by the corporation, for it was a different body from the society; Dance v. Girdler, 1 N. R. 34; vid. Metcalf v. Bruin, 12 East, 400. In equity it is different, Edwards v. Grand J. Railw. Co., 1 M. & Cra. 650.

(c) Blackburne v. Jepson, 3 Swanst. 138. So if a commonalty is disseised, and then every one of the corporators release for himself, it is not good, because it ought to be under the common seal; 18 Vin. Abr. 303, pl. 7.

its partners. A corporation may be seised in fee of a freehold, but in such case each corporator is not seised in fee of the land, or of any portion of it; the entire inheritance is in the corporation,^(d) which is something abstract from the body of existing *corporators, and resides [^{*2}] and is invested in, and "stands upon"^(e) that body and their successors for ever. So in respect of personal property vested in the corporation, the individual members are not owners of that property, nor is each of them owner of any part of it, nor are they joint owners of the whole, although they are each interested in the property, as they may derive individual benefit from its increase, or loss from its destruction, but the abstract entity, the corporation, is the owner and the only owner of the property.^(f) If the whole body of members existing at any given time be collected together within our view, we do not see the corporation, although we see all the existing corporators; for the corporation is identified not with them, but with them, their predecessors and their successors. A corporation may be rated to the poor,^(g) to the land-tax,^(h) to repair bridges,⁽ⁱ⁾ in respect of its possessions as a corporation, but that does not imply that the whole or any of the corporators shall be personally liable in respect of any rates upon the lands, &c., of the corporation. If a corporation is summoned to a court of justice to appear before it, though every living member of the corporation should appear, the exigency of the writ is not satisfied, for the persons appearing are not the corporation, which is vested not in them alone, but in them, their predecessors from its creation, and their successors forever.^(k)

By the civil law, from which much of our law of corporations has been derived, the goods and rights of a corporation belong in such manner to the corporate body, that particular persons who are members of it have no manner of right or property in them, or can dispose thereof.^(l)

But this is not exactly true in our law, it fails with respect to municipal corporations in this respect, that in them every corporator has a freehold in the corporation, as it has been expressed, or, as it seems more accurate to say, in his corporate character, though he cannot alienate such corporate character, and every corporator can enjoy individually various rights which are vested in the corporation only, as a right

(d) 7 M. & Gra. 210; Ex parte Lancaster Canal C., Mont. & B. 94; vid. 2 Peckw. El. Cas. 99. 113. A strong instance to show this is found in the principle, that a corporation may be a British subject, though it be composed wholly of aliens: Reg. v. Arnaud, 16 Law J. (N. S.) Q. B. 55; 12 Car. 2, c. 20. So an abbot, prior or prioress alien shall have actions real, personal or mixed, for any thing concerning the possessions of his monastery here in England, though he be an alien born, &c.; Co. Litt. 129 a.

(e) 10 Rep. 32 b. If a lease be granted to a corporation aggregate for their own lives, this is a fee simple; for it is equivalent to a grant made to them while they continue a corporation, which the law looks upon to be for ever; 2 Rol. Abr. 843.

(f) Reg. v. Arnaud, 16 Law J. (N. S.) Q. B. 55.

(g) Reg. v. Gardner, Cowp. 79; vid. 3 Q. B. 233.

(h) Royal Exchange Assurance Company v. Vaughan, 1 Burr. 155.

(i) Reg. v. Birmingham and Gloucester Railw. Co., 3 Q. B. 233.

(k) Vin. Abr. Corporations, U. pl. 4, 5. So a grant to a mayor and all the other corporators of a corporation is not good to vest the thing granted in the corporation, vid. case cited Cro. Eliz. 338.

(l) Naylor v. Brown, Finch, Rep. 83, marg.

of common, or an exemption from toll.^(m) Still, however, in [*3] *respect to real property corporeal, it is strictly true that, according to our law, it is the whole body—the abstraction of law—that is seised of the realty. The members are no more seised than the members of a man's body could be said to be seised of his estate.⁽ⁿ⁾

This idea of a corporation, namely, that it is in fact an abstraction of law, having no existence or power of action but what the law gives it, serves to explain many of the attributes, especially of a negative character, which have been laid down as belonging to corporations. Thus, when it is said that a corporation cannot commit treason,^(o) we find at first view a difficulty in realizing the proposition, because instances suggest themselves, such as levying troops against the crown under the common seal, which it appears would involve the body politic in the guilt of treason; but the truth is, that all such acts, being wholly beyond the scope and object of the institution of any corporation, are considered, even when authorized under the common seal, as wholly uninvested with the corporate character, that is to say, void as corporate acts, and precisely as if they had been done by the individuals constituting the corporation in an aggregate character merely. The individuals, therefore, and not the corporation, are the guilty parties in such cases.^(p) So a bond by and in the name of all the existing corporators is not the bond of the corporation, although it be sealed with the common seal; the aggregate of the members not being the same thing as the corporation.^(q) So if a corporation be disseised, and afterwards every one of the members releases for himself, that is not a good release; for the release, to be good, ought to be under the common seal; the aggregate of the members not being the same thing as the corporation aggregate.^(r)

Perhaps enough has been said to show that a corporation is something of an abstract nature, having a metaphysical existence only, and therefore not tangible, visible, or the object of any of the senses. With respect to duration, it may perhaps be said, that the least accurate part of what is cited above from Sir Edward Coke consists in the term immortal as applied to a corporation. Yet in this inaccuracy there is nothing more substantial than is involved in the circumstance that corporations

(m) Such exemption conveyed by royal grant to a corporation seems to operate to exempt not only the corporation, but each individual member of it; *Vaugh. R.* 349; *Bailiff of Tewkesbury v. Bricknell*, 2 Taunt. 141; *City of London v. Vanacre*, 5 Mod. 440; *vid.* 12 Rep. 120; *Hob.* 15; or a right may be vested in the corporation, and may be enjoyed only by a select portion of the corporators. Thus a corporation may prescribe that time out of mind the corporation did repair the aisle of the church, by virtue whereof the mayor and aldermen sat there; *Jacob v. Dallow*, 6 Mod. 231; 17 Vin. Abr. 573.

(n) *Per Maule, J., Baxter v. Brown*, 7 M. & Gra. 210; *vid.* definition of seisin. *Harg. Co. Litt.*, note 285, sect. 611.

(o) *Yearb.* 21 Edw. 4, 14; *Vin. Abr. Corporations (Z)*, pl. 2; *vid.* *Reg. v. Great North of England Railw. Company*, 9 Q. B. 315.

(p) 21 Edw. 4, 14; *Quo. Warr. Cas.*, Pollexf. arg. p. 95; *Treby's arg. id.* p. 38, 39; *Bentley v. Bishop of Ely*, *Stra.* 912, 2d Resol. For the rule that a corporation cannot do any act beyond the scope and purpose of their creation, *vid.* *Broughton v. Manchester Waterworks Co.*, 3 B. & Ald. 1; *vid.* *etiam*, 4 B. & Ad. 322; 1 Salk. 32, 4th resolution.

(q) 14 Vin. Abr. 28, pl. 6.

(r) 18 Vin. Abr. 303, pl. 7.

are not of course immortal *a parte ante*, although they may be so *a parte post*, speaking with reference to the periods of their creation. A corporation is an institution calculated for and capable of duration as [*4] *long as the world lasts, though it may be brought to a termination by certain accidents or by certain defaults of duty on the part of its members at any period; but however long its duration, the corporation always continues the same; and the same rights, privileges, duties and liabilities attach to it as it had at the first moment of its creation, precisely as though it were an individual. *Personæ vice fungitur.*(s)

This unbroken personality, this beautiful combination of the legal characters of the finite being with the essentials of infinity appears to have been the primary object of the invention of incorporations,—an invention which, perhaps more than other human device, has contributed to the civilization of Europe, and the freedom of its states. By this means municipalities were furnished with a form of government that never wore out; charitable trusts were secured to the objects of them so long as such objects should continue to be found; the protection, improvement and encouragement of trades and arts were permanently provided for; and learning and religion kept alive and cherished in times through which, probably, no other means can be mentioned that would appear equally well qualified to preserve them. The ideal being, called a corporation, we may thus define to be a continuous identity; endowed at its creation with capacity for endless duration; residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time, acting within the limits imposed by the constitution of their

(s) A corporation is so far considered to have a personality of its own that the word person in acts of parliament has often been construed to include corporations; 2 Inst. 722; 32 Hen. 8, c. 7; vid. Dyer, 83 b; Boyd v. Croydon Railw. Co., 4 Bing. N. C. 669; Cortes v. Kent Waterworks Co., 7 B. & C. 314; Att.-Gen. v. Newcastle, 5 Beav. 307; S. C. in error, 12 C. & F. 402. 419; 1 Will. 4, cc. 60. 65; 3 & 4 Will. 4, cc. 27. 74. 105, 106; 4 & 5 Will. 4, c. 115; 10 Vict. c. 14, s. 3, c. 15, s. 3, c. 16, s. 3; Vin. Abr. Corporations, pl. 10; vid. 11 & 42 Vict. c. 45, s. 3; 2 Inst. 75. *Liber homo non amercietur*, &c. Magn. Chart. c. 14, held to extend to corporations sole, but not to corporations aggregate; 2 Inst. 169, 170; vid. 8 Rep. 39 b. So although in all cases where a thing is forbidden by any statute, the old law was that the offender shall be fined and imprisoned, *Beecher's case*, 8 Rep. 60 b.; yet a corporation aggregate is not within the rule, as it cannot be imprisoned; 2 Vin. Abr. 452, pl. 18, 465, pl. 9. The word *persona* seems to have been used in the Constitutions of Clarendon to signify ecclesiastical corporations sole; 1 Reeves's Hist. Law, 76. 79. Puffendorf, lib. vii. c. ii. s. 13, applies it to a state, which he calls *persona moralis composita*. The personality of a corporation aggregate is recognised in a striking and novel manner in the late Act for promoting the Public Health; by s. 20 of which corporations aggregate are empowered to vote by proxy under their common seal at the election of local boards of health; 11 & 12 Vict. c. 63.

However, the contrary construction has been put upon the word in 7 Geo. 2, c. 7; vid. 2 Inst. 722; Stra. 1241, marg.; 2 M. & W. 882; the Factors Act, 6 Geo. 4, c. 94, s. 2. Whether in a prescription the word *persona* may be construed collectively has been much debated; vid. Dyer, 149 a. The corporation of Queen's College, Oxford, is composed of the provost, fellows and scholars of Queen's College, yet it is a single person; and if they are spoken of in their leases or grants as a single person, that is correct; Lev. 134, pl. 183; 6 Vin. Abr. 272, pl. 10; Queen's College, Oxford, case, 1 Leon. 134.

body politic, such will being signified to strangers by writing under the common seal; having a name, and under such name a capacity for taking, holding and enjoying all kinds of property, a qualified right of disposing of its possessions, and also a capacity for taking, holding and enjoying, but inalienably, liberties, franchises, exemptions and privileges; together with the right and obligation of suing and being sued only under such name.

*This is the definition of the ideal creation—the ens rationis called a corporation; and it will be found to measure and describe [*5] accurately the attributes of a corporation proper, that is to say, a corporation created merely as a corporation, without any restrictive or limiting clauses in the instrument of creation. It is not by any means true, however, that all existing corporations come up fully to the whole extent of the above definition, because corporations are held to be in this country the creatures of the crown or of parliament, and consequently there is scarcely any limit to the variety of forms in which they may be produced. But continuous identity, a name,^(t) and a common seal, seem indispensable requisites to the creation of a corporation proper.

The principal distinctions between a corporation, and any other body of persons associated together for specific purposes, are, besides the attributes above mentioned, these further important characteristics, namely, that corporators in general are not liable, either civilly or criminally, for any share they may have taken in a regular corporate act within the competence of the corporation to perform; and that corporators, where the corporation is possessed either of personalty or real property, have in general no individual share, right, title or estate to or in any specific part or portion thereof, which is wholly vested in the ideal entity or abstraction, the corporation, and not in the body of persons who happen to be at any given time the existing corporators, either jointly, severally, or as joint tenants, or tenants in common, or in any other mode or way whatsoever.

The members of corporations may be natural persons, i. e. in municipal corporations males of years of majority; in others, sometimes females sole are eligible, if of age; or natural persons joined with a corporation or corporations aggregate or sole, so that corporation A. may be composed of other corporations, B., C., D., &c., and a number of individuals not bound together among themselves by the corporate union, independently of corporation A.; or the members may consist wholly of corporate persons, or of certain officers of a corporation; or the members may be made up of part of the members of a corporation and other persons; or they

(t) That the identity is complete may be seen from this, that, on an obligation given to the predecessors, the successors might bring debt in the *debet et detinct* just as the predecessors would have done; 7 Vin. Abr. 358. 363.

The expression continuous identity seems more correct than perpetual identity, which has been generally used with reference to corporations, because several corporations have been created originally for limited periods, as the Bank of England, the South Sea Company, the London Gas Light and Coke Company; vid. 50 Geo. 3, c. clxiii. s. 1; 5 Beav. 382. 385.

The Bank of England seems to have been the first corporation that the crown was empowered by statute (A. D. 1694) to grant a charter to incorporating it for a limited period.

may be composed entirely of persons who succeed to a place in the corporation in right of offices held independently of the corporation.^(u)

[*6] Instances will occur of all these kinds of corporations *in the course of the work. They tend to show that corporations aggregate are something different from the aggregates of their members respectively.

But the most usual mode of constituting a corporation is to erect it in natural persons, who, with their successors, are then called corporators or members, as opposed to all other persons, who are called strangers or foreigners.

In general, women cannot be corporators, although in some hospitals they may be so; and there is one instance in the books of a corporation consisting of brethren and sisters, and invested with municipal powers to a certain extent.^(x) So in general infants cannot be corporators; but in certain cases, i. e. by devolution or devise, they may become members of railway and other trading joint stock companies constituted by act of parliament;^(y) nor aliens, (they are expressly excluded from becoming members of municipal corporations by 5 & 6 Will. 4, c. 76, s. 9;) but there are, nevertheless, cases in which they may be corporators of trading corporations.^(z)

Corporations are said to exist, either

- I. At Common Law.
- II. By Prescription.
- III. By Act of Parliament.
- IV. By Charter.
- V. or by Implication.

Corporations are either sole or aggregate. Sole corporations, which reside always in single persons, are mostly corporations at common law. The full discussion of their nature and attributes will be taken more conveniently hereafter: at present we shall confine ourselves to corporations aggregate. These may be either by prescription, which in fact, as prescription always implies a grant, resolves itself into the 4th mode of origin, viz. royal charter; or by act of parliament;^(a) or by implication.^(b)

^(u) Vid. 10 Rep. 31 b. By statute the Master and Wardens of the Company of Haberdashers, London, were incorporated to be governors of the Free School of Newport, Shropshire; vid. 3 T. R. 602; vid. etiam, The Company of Carpenters, &c. v. Hayward, Dougl. 359.

Sometimes the same body of natural persons, who are incorporated under one name for one purpose, are again incorporated under another name for another purpose; e. g. "The Principal and Scholars of Brazen Nose College, Oxon," are again incorporated as "The Governors of Middleton School, Lancashire;" vid. Att.-Gen. v. Brazen Nose Coll. Oxon, 8 Bli. N. S. 377. So "The Mayor, Aldermen, and Burgesses of Bristol," were made by a charter of Queen Elizabeth into the corporation of "The Governors of the Hospital of Queen Elizabeth of Bristol;" 11 M. & W. 913; vid. Rex v. Mayor, &c. of Colchester, cited 3 T. R. 234.

^(x) The Pontenarii of Maidenhead, Palm. R. 77; and vid. 10 Rep. 30.

^(y) Leeds and Thirsk Railw. Co. v. Fearnley, 18 Law, J. (N. S.) Exch. 330.

^(z) Reg. v. Arnaud, 16 Law J. (N. S.) Q. B. 55.

^(a) It has been contended that upon strict legal principles there is no such thing as a corporation by prescription; but the contrary doctrine has been so long in existence, having originated apparently in respect to the corporation of Godmanchester (2 Hen. 7, 13; vid. Plowd. Com. 12 B. 13; 10 Rep. 27,) in the reign of

^(b) See next page for note ^(b).

*A corporation by prescription has as such no title or claim to any powers, privileges, exemptions or rights, greater or more extensive in their nature, than any other corporation has as such; in other words, when once a corporation is constituted, all the attributes or incidents (as they have been named) of a corporation immediately attach,^(c) and belong alike to all corporations, except where the provisions of their constitution contained in the instrument of creation have expressly limited, varied, or curtailed those attributes. In the case of a corporation by prescription, no such instrument is in existence; it being supposed, in contemplation of law, to have been lost by time or accident; and such a corporation must prove that it is a corporation, and has exercised the corporate rights, privileges, &c., to which it lays claim in any case, in a course of immemorial, uniform usage.^(d)

A corporation by act of parliament is a corporation constituted by statute, having all the rights, privileges, powers, and in general all the attributes of an ordinary corporation, except so far as they may be inconsistent with, or expressly limited and qualified by the enactments of its constituent statute, and having, in addition to the ordinary powers of a corporation, whatever supplementary rights or privileges may be conveyed to it by the statute.^(e)

What has been said, however, must not be understood as implying that a body incorporated by virtue of an act of parliament, may, in virtue of their corporate character, put the public in a different situation, with respect to the corporation, than parliament has left them. Therefore, if a corporation established by parliament is empowered by its statute to impose certain tolls upon those who make use of its property, &c., it cannot impose any further tax upon them, or claim any thing beyond that which the statute empowers it to claim; and such statutes, like statutes imposing a general tax, will be construed so as to ease the public as much as is consistent with the obvious meaning of the legislature.^(f) At any rate, this is the case where it was manifestly intended by the

Henry 7, has been so frequently acted upon, and so frequently recognised by our courts, and in the case of the city of London, by the legislature, that it is quite useless, except as a matter of antiquarian curiosity, to insist upon facts or arguments calculated to shake it; vid. Merew. & Ste. Hist. Boroughs, 2172; Anon. Lofft, R. 556. As to what is evidence of a corporation by prescription, vid. Jenkins v. Harvey, 2 C. M. & R. 339. ●

(b) A body is said to be a corporation by implication, when, being constituted by any legal means, it is found that the purposes intended cannot be carried into effect without attributing the corporate charter to such body; Conservators of River Tone v. Ash, 10 B. & C. 349; Jefferys v. Gurr, 2 B. & Ad., 841; Att.-Gen. v. Day, 2 Atk. 212; Ex parte Newport Marsh Trustees, 16 Sim. 346.

(c) Co. Litt. 2 a; Com. Dig. Franchises, F. 15. 18.

(d) Therefore, in pleading an incorporation by prescription, the corporation must have averred to have existed time out of mind; Reg. v. Durham, 10 Mod. 146; and if a prescription or prescriptive right is pleaded, it seems that this should be introduced by averring the corporation to be a corporation by prescription: Bagg's case, 11 Rep. 94, marg. Vid. tam. infra.

(e) A statutory corporation cannot be subsequently altered (it is said) by a royal charter alone, R. v. Miller, 6 T. 268; but this rule has not always been observed, vid. Royal Exch. Ass. Company v. Vaughan, 1 Burr. 155; et vid. 5 B. & C. 410.

(f) Proprietors of Stourbridge Canal v. Wheeley, 2 B. & Ad. 792.

legislature to make a bargain between the corporation it was constituting and the public, and where, as is mostly the case, the terms of the bargain are contained in the statute itself; for then the corporation can claim no rights or powers to tax or levy money from the public except what their statute gives them.^(g) And this principle of construing statutes laying [*8] a charge upon the people most favourably for them is carried so far, that where a statute *incorporating a dock company gave it power to levy by distress certain wharfage rates, it was doubted whether a custom of general lien for such wharfage prevailing in the city where the docks were situate could be made available by them in addition to the mode of recovery given them in the statute.^(h)

Formerly it was held that a corporation could not be divided into two corporations without a charter from the crown; and it seems that by this means the priory of Westminster was severed from the former corporation of the abbot and convent of Westminster, so as to constitute two distinct and independent corporations;⁽ⁱ⁾ but more recently, when it has been desired to make two corporations out of one, consisting of several component parts, the practice has been to resort to parliament, as was done on occasion of the separation of the Surgeon-Barbers' Company into two companies of Surgeons and Barbers respectively by the statute 18 Geo. 2, c. 15, s. 12, repealing the statute of Henry 8.

On the other hand, two corporations may be made one by uniting one to the other, and that by charter from the crown (if accepted by both corporations), and in such case the corporation to which the accretion is made may sue upon a cause of action arising in respect of a thing in possession, or a right vested in the other previously to the junction.^(k) In like manner, where a right of action existed before the union against one of the corporations, it still subsists, and may be sued upon against the compound corporation.^(l) But of late the practice has been generally to make these unions of corporations by statute, and thereby to give the resulting corporation express power to sue, &c., for the debts, &c., of the former.^(m) Whether, when two corporations having each statutory powers of raising money for their respective objects are amalgamated by a third statute, the compound corporation can apply funds raised for one object to the other is left a question.⁽ⁿ⁾

It has been held, that a body will be taken to be a corporation when it is constituted by an act of parliament in such a way and for such purposes as show that the meaning of the legislature was that the body should have a perpetual duration, although no express words are used constituting it a corporation.^(o) This is called a corporation by implication.

(g) Hull Dock Company v. La Marche, 8 B. & C. 52.

(h) Green v. St. Katherine's Dock Company, 19 Law J. (N. S.) Q. B. 53.

(i) Case of the Whitawers of London, Lib. Assis. 49 Ass. pl. 8; S. C. Yearb. 49 Edw. 3, fol. 4, A.; vid. Att.-Gen's. argumt. Qu. Warr. Cas. p. 9.

(k) 6 Vin. Abr. 286, pl. 10.

(l) Yearb. 20 Edw. 4, fol. 6, pl. 7.

(m) Vid. instance in Cooper v. Shropshire Railw. Company, 13 Jurist, 443; London and Brighton Railway Company v. Goodwin, 3 Exch. 320.

(n) Bagshaw v. Eastern Counties Railway Company, 7 Hare, 114.

(o) Ex parte Newport Marsh Trustees, 18 Law J. (N. S.) Chanc. 49; S. C. 16 Sim. 346; vid. sup. p. 6, note (b).

And this agrees with the old law, that if the crown grant land to the men of Islington, *without saying to them and their successors*, rendering rent, this incorporates them for ever for the purpose of the farm; for without such incorporation the intention of the grant could not be fully carried into effect.(p)

*Corporations may also be characterized as private or public corporations. Private corporations are where a body of traders, or a [*9] scientific or other society aiming only at objects of their own, and not contemplating the conferring any immediate benefit on the public, or the taking upon themselves any public government, duty, or responsibility, are incorporated by charter. Such body, however, if incorporated by public acts of parliament, must be regarded as a public corporation. Public corporations are such as are established (mostly of late years by act of parliament) to serve great purposes of state, and holding out advantages and benefit either to the public without restriction, or to every one who chooses to comply with their conditions. Such are the Bank of England, the East India Company, the Railway, Light, Water, Coke, and other Companies, the Hudson's Bay Company, the Universities, and other bodies. Free or Public Schools, though founded by charter, seem to be public corporations. To this class seem to belong all ecclesiastical corporations, whether sole or aggregate.(q)

CHARTERS.

A CORPORATION by charter depends for its origin upon a grant contained in a charter from the crown. A royal charter is a written instrument, containing a grant by the crown to persons therein designated, either of *jura regalia*, or other franchises or liberties, rights, powers, privileges or immunities, or of chattels, or estates in land, or any of these, made in the form of letters-patent with the great seal(r) appended to it, and directed or addressed to all the subjects of the crown.(s)

(p) Anon. Dyer, 100. A lease of lands for years granted by the crown to inhabitants, has not the same effect of rendering them a corporation by implication; Aldermen of Chesterfield's case, Cro. Eliz. 35. In modern times it is considered that inhabitants (not being incorporated) cannot take lands; Co. Litt. 3 a: Lockwood v. Wood, 6 Q. B. 62, 63; Fowler v. Dale, Cro. Eliz. 362; Foley v. Att-Gen., 6 Vin. Abr. 262, pl. 8; and vid. recital of a patent of Charles 2, Mad. Firm. Burg. 239, note (m).

(q) Considered in another point of view, corporations form a division of the subjects of the crown, who are either individuals or bodies politic; per Littledale, J., in Rex v. Derby, 3 B. & Ad. 151; vid. Reg. v. Arnaud, 16 Law J. (N. S.) Q. B. 55. A corporation differs from an individual in this respect, that if an obligation be made to a corporation and J. S., and J. S. die, it shall not survive, so that the corporation and executors of J. S. shall sue upon it; Low v. Woodward, Ley's R. 82; but the corporation alone takes it.

(r) The charter of William the Conqueror to the city of London, was sealed with a seal, which it was recited was "bitten with his tooth, in token of sooth;" Vin. Abr. Prerog. A. b, pl. 4. It is not necessary, though it is the better course, to state in pleading letters-patent that they passed under the great seal; Stone v. Newman, Cro. Car. 461; vid. tam. Kingdon v. Barne, Cro. Eliz. 117.

(s) In the county palatine of Lancaster a charter must be passed under the great

[*10] *An instrument of grant, with a recital that it was made *de assensu prælatorum, comitum, baronum et totius communitalis in instanti parlamento convocato*, has the effect and authority of an act of parliament, and such a charter can only be repealed by another act of parliament.^(t) But it seems there is ground to think this must be understood to hold only where such instrument was not under the great seal; for in that case, notwithstanding the words *de assensu*, &c., it would only have the effect of an ordinary charter, and there is nothing in such case to prevent the crown from granting a new charter varying the provisions of it.^(u) Where, however, a charter has been confirmed by act of parliament, it cannot be varied by the grant or acceptance of a fresh charter inconsistent with it.^(x) This principle, however, has not always been strictly acted upon.^(y) Also a charter granted under the provisions of an act of parliament authorizing the crown to make the grant cannot be altered without another act of parliament.^(z)

It is at the pleasure of the crown to grant or withhold a charter of incorporation; but when once granted and accepted, the charter is irrevocable, except with the full, and perhaps the unanimous concurrence of the grantees or their successors; for the crown cannot, by its prerogative, destroy or dissolve a corporation; nor can the crown resume an

seal of the county palatine; *Mayor, &c. of Liverpool v. Chancellor of Lancaster*, cited *Stra.* 151. Sometimes two charters were granted; one by the crown under the great seal; the other by the King, as *Duke of Lancaster*, under the duchy seal; both charters being to the same intent. The borough of Pontefract was incorporated in this way by Henry 4; *vid.* 2 *Luder's El Cas.* 17. And it seems it will not suffice if passed under the great seal of England alone; *Fleetwood v. Pool*, *Hardr.* 171; *vid. tam. Rutter v. Chapman*, 8 *M. & W.* 13; whence it appears that the charter of Manchester passed under the great seal only. The duchy seal is used for the possessions of the duchy which lie without the county, in which possessions the Duke of Lancaster has not *jura regalia*, and therefore a corporation situate there must be erected under the great seal of the United Kingdom; *Vin. Abr. Prerogative*, B. b. pl. 6, E. b. 2, pl. 6; *vid. Cotton v. Johnson*, 3 *Salk.* 111; *Astelle v. Clerke*, 2 *Lutw.* 1236; 17 *Vin. Abr.* 71, pl. 7; *id.* 71, D. b. pl. 1; *id.* 73. In the county palatine of Chester it seems charters of incorporation pass as well under the great seal as the seal of the county palatine; *vid.* 1 *T.R.* 576. 582. But that is not indispensable, *per Buller, J.*, 1 *T.R.* 586.

(t) *In re The Islington Market Bill*, 3 *Cl. & F.* 513; *The Prince's case*, 8 *Rep.* 8; *Hale's Jurisd. of the Lords, &c.* Harg. edit. pp. 20, 21, 22; *Qu. Warr. case*, *Pollexfen's argument*, 83. So a charter *de assensu prælatorum et procerum in instanti parlamento nostro*; *Case of Duchy of Lancaster, Plowd. Com.* 214; *vid. tam. per Taunton, J.*, in *R. v. Attwood*, 4 *B. & Ad.* 506; *Dyer*, 144, B. pl. 60.

(u) *Rex v. Haythorne*, 5 *B. & C.* 418; *vid. tam. The Prince's case*, 8 *Rep.* 26 b, 2nd Resolution.

(x) *Rex v. Miller*, 6 *T.R.* 268. If a charter has the words "by authority of Parliament" in it, that gives it the force of a statute; *Prince Henry's case*, 8 *Rep.* 20.

(y) Thus the Royal Exchange Assurance Company was constituted a corporation for a certain limited purpose, and with a certain limited fund, by act of parliament, but by subsequent charters was empowered to multiply those purposes and increase its funds; *vid. Royal Exchange Assurance Com. v. Vaughan*, 1 *Burr.* 155.

(z) The most important and celebrated charter of this kind is that granted to the Governor and Company of the Bank of England under date July 27, 1694; *vid.* 5 & 6 *W. & M. c.* 20. Where a subject has been empowered by act of parliament to erect a corporation, his charter granted in pursuance of that act can only be altered by another act of parliament; 1 *Q.B.* 368.

interest once granted, unless the grantees or their successors concur.(a) A charter of the crown granted before the time of legal memory is of no avail now,(b) as it is said.

All the incidents of a corporation necessarily follow from such an instrument, although they are not specifically enumerated and stated in it. Amongst the rest, the essential of perpetuity necessarily attaches, and *does so, it is conceived, even though a limitation as to the time [*11] of the duration of the body should be contained in the charter; for the prerogative of the crown does not extend to erect a corporation with any limitation on the continuance of its existence, and a corporation so erected must have the attribute of perpetual identity, and stand on the footing of a *κτῆμα εις αἰ* to the grantees and their successors; yet the crown, by act of parliament, may be authorized to incorporate for a period, limited and ascertained in the charter, as is the case to this day in respect to the Corporation of the Governor and Company of the Bank of England, among other instances which might be stated.

It has been laid down, without qualification, that none but the king can make a corporation.(c) This, however, is incorrectly stated, for a subject having a franchise with jura regalia is entitled to create corporations.(d) Also the Pope might, and was used to incorporate ecclesiastical bodies of friars, &c., and this was acknowledged for law as late as the 14th of Hen. 8;(e) and there are many instances in which charters of incorporation, and even charters of municipal incorporation, have been granted by subjects having jura regalia.(f)

Thus, A. D. 1565, Pilkington, Bishop of Durham (the bishops of

(a) Rex v. Larwood, Salk. 168; Bro. Abr. Corporation, pl. 78; Palm. 501; Stat. of Gloucester, 6 Edw. 1; 2 Inst. 280; Merew. & Ste. Hist. Boroughs, 2201. The mode of obtaining a charter under the Municipal Corporation Act, and of opposing the grant is fully discussed and explained in Rutter v. Chapman, 8 M. & W. 1. As to the mode of obtaining a charter of private incorporation from the crown, vid. Hindm. Pat. 509. As to the hearing before Att.-Gen., id. 513. As to mode of opposing the grant in case of a private corporation and as to entering caveats at the offices of Att.-Gen., id. 524; Privy Signet, id. 527; Privy Seal, id. 528; Lord Chancellor, 530.

(b) Yearb. 8 Hen. 6, fol. 4, B.

(c) 49 Edw. 3, fol. 4, per Candish, J., and Knivet, C.: and vid. 49 Assis. pl. 8; Sutton's Hospital Case, 10 Rep. 33 b; Com. Dig. Franchise, F. 2; Bacon Abr. Corporations, B.; Anon. Lofft. 556; Jenkin's Cent. 88, p. 270. It is scarcely necessary to state that no foreign potentate at present, as such, can be found a corporation in this country; Greystock College case, Dyer, 267, cited 4 Rep. 107; Vin. Abr. Corporations, A. pl. 8. "Anciently a guild, either religious or secular, could not be set up without the king's license;" Madox, Firma. Burg. 26, where a number of instances are given of bodies who were amerced for the presumption of setting themselves up as corporations without authority.

(d) Vid. 1 T. R. 581; et vid. Goodyer v. Shaw, Styl. 298.

(e) Per Fineux, C. J., Yearb. 14 Hen. 8, fol. 3. Ecclesiastical incorporations are mentioned in Domesday Book, Merew. & St., Hist. Bor. Introd. xv. 322. 575; vid. Finch. Law, 92.

(f) The statute of Gloucester, 6 Edw. 1, appears to recognise the principle that municipal franchises might originate otherwise than by royal charter; *touts ceuz que ascuns franchises claiment aver per les charters les predecessors le roy, royes d'Engleterre, ou en auter maner, &c.*, 2 Inst. 278. And so the Municipal Corporation Act, s. 1, repeals "so much of all royal and other charters, grants and letters-patent, now in force relating to the several boroughs," &c., obviously recognising the force and obligation of charters other than royal.

Durham then having *jura regalia* within the county palatine of Durham and Sadberge), granted a charter of incorporation to the city of Durham. (*g*) A. D. 1602, Bishop Tobie Mathews granted a fresh charter to the same city; and the governing charter of the city up to the passing of the Municipal Corporation Act, was that granted by Bishop Egerton, A. D. 1780. (*h*) The bishops of Durham have also exercised the power of incorporating various trading bodies within the county palatine. Thus, A. D. 1559, Bishop Tunstall incorporated the company of Barkers and Tanners of Gateshead; and many other instances might be mentioned. (*i*) However, the palatine [*12] jurisdiction, *and all its rights and royalties, were separated from the bishopric of Durham, and vested in the crown by 6 & 7 Will. 4, c. 19, s. 1. Corporations have also, at various early periods of our history, exercised the right of constituting other corporations. Thus, A. D. 1575, we find the mayor, aldermen and sheriff of Newcastle-on-Tyne incorporate a fellowship of Cooks, giving them a perpetual succession, and the power to sue and be sued. (*k*) So the mayor, aldermen and sheriff of Newcastle-on-Tyne, 17 Eliz., incorporated the Company of Coopers of that borough. (*l*)

There do not appear any traces of an exercise of this power of incorporating by any other aggregate corporations in modern times; and two propositions may be safely stated with respect to the above cases. First, that if they are to be considered as valid exertions of an authority legally vesting in the bodies who granted the charters, it can only be on the ground that a grant from the crown, or by statute, of such power of incorporation may be presumed to have been made to them; and, secondly, that no such power would be granted at present to a corporation either by the crown or by parliament. (*m*)

That the crown might have granted to a corporation the power of creating by charter other corporations was apparently well settled. (*n*) The power of incorporating other bodies may be conferred upon a corporation by act of parliament, and by 39 Eliz. c. 5, is conferred generally on all corporations (having power to aliene) so far as to enable them to found, incorporate and endow hospitals, &c. (*o*) It is remarkable also

(*g*) Vid. 1st Report of Corporation Commissioners, Append. 1511.

(*h*) Id. *ibid*.

(*i*) Id. 1525. Vid. *Goodyear v. Shaw*, Styl. 298; Merew. & Steph. Hist. of Boroughs, 1403. Gilbert de Clare, 7 Edw. 2, granted a charter to the burgesses of Tewkesbury and their successors, reciting former grants of William and Robert, formerly Earls of Gloucester; 2 Taunt. 122. The corporation commissioners mention one borough which claimed to be incorporated by charter from Walter de Lacy; vid. 1st Report. Edward the Black Prince also appears to have granted charters of incorporation, and so of many other subjects; vid. Brady on Boroughs, 45; Att.-Gen. v. Corporation of Cashel, 3 Dru. & Warr. 298, 299.

(*k*) Merew. & Steph. Hist. of Bor. 1322. 2061; vid. Comberb. 372; Lord Kenyon's Notes, 524.

(*l*) Vid. 7 T. R. 544. A corporation may create a fraternity; *Cudden v. Eastwick*, Salk. 193; vid. *Fazakerly v. Wiltshire*, Stra. 462.

(*m*) It has been held that the crown by charter by express words may grant to commonalty to make commonalty; Vin. Abr. Prerogative of the king, M. b. pl. 16.

(*n*) Com. Dig. Franchise, F. 5; Bac. Abr. Corporations, B.; vid. 8 M. & W. 89; 1 Black. Com. 474; Vin. Abr. Corporations, B. pl. 3; Id. Prerogative, M. b. pl. 16; Id. Prescription, R. pl. 6.

(*o*) Vid. Att.-Gen. v. Mayor, &c., of Newcastle, 5 Beav. 307; 39 Eliz. c. 5; 2 Inst. 720; S. C. 12 Cla. & F. 402. 419.

that the corporations so empowered were unable to erect these hospitals for any limited period; they must either confer a perpetual succession or nothing; if their grant was not a grant of incorporation, it was invalid.^(p) It has always been the law that one municipal corporation could not create another municipal incorporation; for commonalty cannot make commonalty.^(q) So a custom in London that a guild or fraternity may make another guild is void.^(r)

We may remark here, in confirmation of a principle already laid down, that the endowment, when once made by a corporation acting in pursuance of the act of Elizabeth, is wholly beyond their power, and unalterable *by them or the crown, or any one else, except by virtue of an act of parliament,^(s) just as the king's grant when once made [*13] is not revocable at the pleasure of the crown.

A charter of incorporation is the written instrument by which the crown institutes the body politic, and conveys to it its peculiar constitution, its rights, privileges, powers or estates, &c.; imposes a name upon the corporation, defines its objects and purposes, and assigns such conditions and limitations upon the exercise of the powers, privileges, &c., conferred, as to the crown seems fit. The crown may even impose in the charter restrictions upon the exercise of the incidental rights, privileges and powers of corporations; but if it does not, then, immediately on the corporation being erected, all the incidents of corporations immediately attach; and all other powers which a corporation exercises must be contained in the charters, or claimed in virtue of the immemorial usage or prescription, which supposes a grant by a charter which has been lost. No corporation can pursue any other objects than those specified in its charters. There alone can the peculiar purposes of its establishment be discovered. This principle will be found of the utmost importance for the solution of various questions respecting the law of corporations, and especially of trading corporations.

Besides the charter of incorporation, a body politic frequently has granted to it other charters, by which the crown from time to time adds to or modifies its powers, &c. The crown, however, cannot obtrude a new charter on a corporation which is already in existence and capable of performing its functions; the existing corporators may either accept or reject the new charter at their pleasure.^(t)

(p) 2 Inst. 723.

(q) Vin. Abr. Corporations, B. pl. 3, marg. A corporation cannot be divided into two corporations but by royal charter; Bro. Abr. Corporations, 45; Grants, pl. 81, or act of parliament. The word commonalty is used in the above maxim for corporation; but in many old records it is used more loosely to signify any separate body. Thus communia is applied to the body of Jews residing in England; Mad. Hist. Exch. 153. 177, 178; 8 Hen. 6, c. 27, makes a distinction between commonalty and commonalty incorporated. Et vid. as to the use of communia in ancient charters, 2 Kemble's Saxons in England, 310.

(r) Paramore v. Verrall, 2 Ander. 152; 49 Edw. 3, fol. 4; 49 Assis. pl. 8.

(s) Att.-Gen. v. Mayor, &c., of Newcastle, 5 Beav. 307; S. C. 12 Cl. & F. 402. 419. The act 39 Eliz. c. 5, appears to be repealed so far as it empowers municipal corporations to incorporate and endow hospitals by s. 1 of the Municipal Corporations Amendment Act, as being inconsistent with its enactments, e. g. s. 92.

(t) R. v. Pasmore, 3 T. R. 240.

Nor can a charter be forced on any body of persons who do not chose to accept it.^(u) But if a corporation accept a second charter, that does not necessarily abrogate the former, and most corporations of old standing have several charters, all in force at the present day.^(v) The general rule with respect to the name of the corporation is as stated above, viz., that every charter of incorporation ought to name the corporation, because the name is an essential part of the corporation; nevertheless there are decisions which seem to show that a corporation may be named by implication from the words of a charter, and that where the intention that such should be the name is clearly discoverable from the language of the instrument, that supplies the place of and renders unnecessary a direct and specific naming.^(x)

[*14] *Or it is said it may be implied in the nature of the thing, as if a royal charter purport to incorporate the inhabitants of D., with power to choose a mayor annually, without giving any name, that is a good incorporation of them by the name of "The Mayor and Commonalty of D."^(y)

The old law was that every corporation must be constituted of some place.^(z) But it is presumed that this rule has long been obsolete, if it ever held good, except in the cases of corporations entrusted with some local jurisdiction, or with powers and privileges, the exercise of which was from their nature connected with some locality. In all such cases it was considered (and it is presumed rightly, the same being the law at the present day,) that the corporation must be created as of the place or district to which they were to be attached; and it seems that in such case the place ought to be designated in the charter, but need not in general be specified with minute accuracy. Thus it has been decided that a charter fixing the place of meeting of a corporation to London and Westminster, and within three miles thereof, sufficiently established the local limits of the corporation, and that the charter was good, although it did not name the corporation as of any particular place.^(a)

That the crown may delegate to an individual the power to name the first corporators in a corporation, and the officers who are to govern the corporation, if it be a corporation of a private nature, is quite clear;^(b) but it has been thought to be not altogether free from doubt, whether the crown can do this in case of a public corporation, e. g. a municipal corporation, although it has been decided by a majority of the judges that the

(u) According to the maxim *quod nostrum est sine facto sive consensu nostro amitti non potest*; Francis's case, 8 Rep. 92; Anon. 2 Brownl. 100. But such a corporation may be divided into two, without its concurrence. Vid. Quo. Warr. case. Att.-Gen.'s arg. p. 9, qu. tam.

(v) Where a corporator of a corporation which has several charters, or a stranger pleads in justification, he need not state any of them, except such as relate to the matter of justification pleaded; per Powell, J., Kerby v. Whichelow, 2 Lutw. 1498.

(x) Pits v. James, Hob. 124; Ayray's case, 11 Rep. 19.

(y) Anon. Salk. 191; Com. Dig. Franchise, F. 9.

(z) 10 Rep. 29 b, 32 b; Bac. Abr. Corporations, C. 2.

(a) Tobacco Pipe Makers' Company v. Woodroffe, 7 B. & C. 838; vid. Trinity College case, 2 Brownl. & G. 244; Mayor, &c., of Stafford v. Bolton, 1 B. & Pul. 40; Croydon Hospital v. Farley, 6 Taunt. 467; vid. inf. p. 16, for the decisions relating to charters of municipal incorporation.

(b) Sutton's Hospital case, 10 Rep. 32 b, 33 b.

crown may by the grant of a charter of incorporation made in the exercise of its common law prerogative,^(c) (although such grant also extends to the new corporation, the powers of the Municipal Corporation Act, 5 & 6 Will 4, c. 76, which the crown has power to do only by virtue of the 1 Vict. c. 78, s. 49,) delegate to an individual the power of appointing the first members of such corporation, or may, at all events, appoint a person to ascertain the individuals who compose the class designated in the charter as the persons intended to be the immediate grantees of the letters-patent.^(d)

The crown may also grant a charter to certain named individuals, incorporating them by a name, and giving them power to admit others to be members of the corporation along with them; and in the parties named, *those they may admit, and the successors of the conjoint body, [^{*15}] the corporation will be resident and vested.^(e)

This power, it will be observed, falls very far short of the power of incorporating, but the right and power of incorporating by charter may be conferred on an individual by parliament.^(f)

The crown also may grant by charter to an individual the power of erecting a particular corporation or fraternity, the charter only being available *pro hac vice*; or the crown may grant by charter to an individual and his successors in a particular office, a general power of erecting, within a certain locality, corporations of a private nature, not invested with powers of local government, at his discretion, and that of his successors in his office. The Chancellor of the University of Oxford has by charter this power, and has actually exercised it in many instances of matriculated companies of tradesmen resident within the limits of the University.^(g)

With respect to incorporated hospitals, colleges, and other foundations, the usual mode of establishing such of them as have their rise in private benevolence, is for the crown to grant a license by letters-patent to an individual to found and incorporate.^(h)

These charters, or as they are usually called in this case, licenses, granting to individuals the power of incorporating, founding and endowing, will be most appropriately considered more in detail when we come to the subject of hospitals.

(c) *Rutter v. Chapman*, 8 M. & W. 1. 78, 79.

(d) *Rutter v. Chapman*, 8 M. & W. 1; *vid.* 5 & 6 Vict. c. 111, s. 1.

(e) *Rex v. Askew*, 4 Burr. 2200; per Buller, J., 1 T. R. 587, 588.

(f) 13 Eliz. c. 14, empowered Robert, Earl of Leicester, to found and incorporate a hospital at Warwick, (*vid.* 1 Q. B. 367,) for such head members and members of poor and needy, &c., as should be named by the Earl, &c., *vid.* *Rex v. Bishop of Worcester*, 4 M. & Selw. 415. The charter was passed under the seal of the Earl; 1 Q. B. 367. Another act of parliament was passed to alter the charter, 53 Geo. 3; *vid.* 1 Q. B. 368. By the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, the power of incorporation is given to the certificate of the registrar, *vid.* *Banwen Iron Company v. Barnett*, Q. B. Michaelmas Term, 1849, 19 L. J. (N. S.) C. B. 17.

(g) 1 Black. Com. 477. *Vid.* grant of Hen. 5 to John Barstaple to found a guild or fraternity in Bristol, Madox, Firm. Burg. 25.

(h) This usage is very ancient. Rich. 2 licensed, by letters-patent, Sir Richard Abberbury to incorporate a hospital at Donnington, Hob. 122. *Vid.* "Hospitals," "Colleges," and other titles, *infra*.

It is necessary, however, to mention that the old law undoubtedly was, however modern decisions may point to a different conclusion, that no secular guild or fraternity, that is to say, in modern language, no trading corporation, nor any corporation which, though it might not actually trade by buying and selling out of a common stock, professed to be established for the security or good government of the members of a particular trade, art, craft or calling, could be erected without the king's license.⁽ⁱ⁾

As we have seen the idea of perpetual duration is implied in the word corporation, and therefore at common law the crown has no power [*16] *to incorporate for a limited period. Accordingly, when it was proposed to establish the Bank of England as a corporation for a certain time by way of experiment, the aid of the legislature was called in to effectuate that purpose; but now it is lawful for the crown in any charter of incorporation to limit the duration thereof for any term or number of years, or for any other period whatsoever;^(k) and also in any charter of incorporation to make the corporation thereby formed, and the officers and members thereof, subject to all the provisions, liabilities and directions in the stat. 1 Vict. c. 73, contained and authorized to be imposed on or required of any unincorporated company or body, or its officers or members, and also to confer on such corporation, or its members and officers, all the powers and privileges thereinbefore authorised to be conferred on any unincorporated company or body, or its officers or members.^(l)

These provisions are calculated to effect great changes in the attributes of corporations hereafter to be constituted, by making them partake in many respects of the character of partnerships.

With respect to the question of what are the powers of the crown to grant charters of municipal incorporations since the Municipal Corporations Act, it has been decided, upon the construction of the 141st section of that act,^(m) and the 49th section of 7 Will. 4 & 1 Vict. c. 78, amending the former section⁽ⁿ⁾—

(i) Madox, Firm. Burg. 26; where see a large collection of instances of bodies of men fined for setting themselves up as corporations or fraternities. Et vid. id. p. 35; 49 Edw. 3, fol. 4, per Candish, J., and Knivet, C. To be guildated and to be incorporated were synonymous terms temp. Hen. 6, Madox, Firm. Burg. 29, which is the era of our charters of incorporation according to some authorities.

(k) 1 Vict. c. 73, s. 29.

(l) Ib.

(m) Sect. 141. And whereas sundry towns and boroughs of England and Wales are not towns corporate, and it is expedient that several of them should be incorporated: be it enacted, that if the inhabitant householders of any town or borough in England and Wales shall petition his majesty to grant to them a charter of incorporation, it shall be lawful for his majesty by any charter, if he shall think fit, by the advice of his privy council, to grant the same, to extend to the inhabitants of any such town or borough within the district to be set forth in such charter, the powers and provisions in this act contained: provided nevertheless, that notice of every such petition, and of the time when it shall please his majesty to order that the same be taken into consideration by his privy council, shall be published by royal proclamation in the London Gazette one month at least before such petition shall be so considered.

(n) Sect. 49. And be it enacted, that if the inhabitant householders of any town or borough in England or Wales shall petition his majesty to grant to them a charter of incorporation, it shall be lawful for his majesty by any such charter, if he shall think fit, by the advice of his privy council, to grant the same, to extend

I. That the grant of a charter of municipal corporation is still an exercise of the common law prerogative of the crown, although such charter invests the corporation with the functions conferred by the act upon the then existing municipal corporations, which the crown has only power to do by virtue of the latter of the acts (7 Will. 4 & 1 Vict. c. 78).^(o)

II. That the crown may grant the charter to a part only (to be defined *therein) of a town or borough, and need not grant it to the whole of the inhabitants of such town or borough, although the prayer [*17] of the petition is for a grant of a charter of incorporation to the inhabitant householders of the said borough.^(p)

III. That a petition, to be within the meaning of the acts, need not proceed from a majority of the inhabitant householders of the place, or of the male inhabitant householders of the place.^(q)

IV. That whether such petition was, under all the circumstances, the petition of the inhabitant householders within the meaning of the acts, was a question of fact for a jury.^(r)

V. That where the whole number of inhabitant householders was 48,000, and a petition was presented to the crown signed by 4000 in favour of a grant of a charter of incorporation, and another was subsequently presented signed by 6000 against it, the jury were quite right in their verdict, that the former petition expressed the wish of the inhabitant householders within the meaning of the acts, the direction of the learned judge at the trial being, that, notwithstanding such last petition, her majesty had power, in his opinion, to grant the charter by virtue of the first petition, which direction was also correct.^(s)

VI. That the crown in the charter, besides defining the district within which the powers and jurisdiction of the corporation are to be exercised (which it is expressly bound to do by the statute, although, as it seems, the common law practice was always to do so, and that therefore this provisions of the statute is merely inserted *ex abundanti cautela*,) may, by its common law prerogative, appoint the number and set out the limits of the wards in the new borough.^(t)

VII. That a charter so granted was valid (having been accepted), but that the determination of the privy council to advise the Queen to grant the charter is not decisive of the question as to the sufficiency of the petition in favour of the charter.^(u)

VIII. That the crown may in the charter delegate to an individual

to the inhabitants of any such town or borough within the district to be set forth in such charter, all the powers and provisions of the said act for regulating corporations, whether such town or borough be or be not a corporate town or borough, or be or be not named in either of the schedules to the said act: provided nevertheless, that notice of every such petition, and of the time when it shall please his majesty to order the same to be taken into consideration by his privy council, shall be published in the London Gazette one month at least before such petition shall be so considered, but such publication shall not need to be by royal proclamation.

(o) *Rutter v. Chapman*, 8 M. & W. 1.

(p) *Rutter v. Chapman*, 8 M. & W. 1.

(q) *Id. ibid.*; *Reg v. Boucher*, 3 Q. B. 656; *vid. Bagge's case*, 1 Rol. 226.

(r) *Rutter v. Chapman*, 8 M. & W. 1.

(s) *Id. ibid.*

(t) *Id. ibid.*

(u) *Id.* Such determination throws upon the party who impeaches the charter the burden of proving its illegality; *per Patteson, J.*, in *Reg. v. Boucher*, 3 Q. B. 654.

the power of appointing the first members of the corporate body; or may, at all events, appoint a person to ascertain who are the individuals possessed of the qualifications which the corporators are to have, in other words who are to be the burgesses; and may appoint in the charter another person to revise the list of burgesses, and to act as the returning officer at the first election of officers under the charter.(x)

There appears to be no limit to the power of the crown to grant a [*18] *charter of municipal incorporation as regards the size or the character of the town to be incorporated; this rule must, however, be observed for the sake of order and peace, viz., that there cannot be two corporations for the same purposes with co-extensive powers of government extending over the same district; and therefore a charter is void purporting to create A., B., C., &c., a body corporate for the municipal government of a town where there is already in the place another corporation in possession of its full powers, acting under a legal charter.(y)

It may be well before proceeding to the discussion of acceptance of a charter, to close this part of the subject of municipal charters by pointing out that the act to provide for the regulation of municipal corporations in England and Wales, (5 & 6 Will. 4, c. 76,) commonly called the Municipal Corporations Act, after declaring that it is expedient that the charters by which the municipal bodies corporate were constituted should be altered, proceeds to enact that so much of all royal and other charters, grants and letters-patent then in force, relating to the several boroughs named in the schedules A. and B. to the act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of the act, should be repealed and annulled.(z) Consequently the actual constitution of a corporation in those schedules must be collected from a careful comparison of its charters with the provisions of the statutes. The enactments of statutes, creating corporations are to be looked to in order to discover the extent and limits of the powers of such bodies,(a) and the Municipal Corporations Act may be looked upon, in this respect, as re-constituting the municipal corporations of England and Wales.

ACCEPTANCE OF CHARTERS.

Having thus explained the nature of a charter of incorporation, and

(x) *Rutter v. Chapman*, 8 M. & W. 1. 5 & 6 Vict. c. 111, makes valid all charters theretofore passed in pursuance of the Municipal Corporation Act. It is said in *Bagge's case*, Rol. R. 226, that a charter procured by some few persons shall not bind the rest. 11 & 12 Vict. c. 93, makes valid certain other charters of municipal incorporations granted since the passing of the former act.

(y) *Rex v. Pasmore*, 3 T. R. 243; *Rex v. Amery*, 2 Bro. P. C. 336. Considerable inconvenience has been felt at times in both universities of Cambridge and Oxford, in consequence of the powers of the two corporations, the university and the municipality, clashing. Other instances of the soundness of the rule will occur in the course of this work.

(z) 5 & 6 Will. 4, c. 76, s. 1.

(a) *Hull Dock Company v. La Marche*, 8 B. & C. 1.

shown to whom and how it may be granted, we now turn to consider the parties upon whom it is to operate. Here the fundamental rule is this, no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it.(b)

*So no fresh charter to an already existing corporation is effectual until it be accepted by a majority of the old corpora- [*19] tion(c) provided the old corporation be in full possession of its powers; but such acceptance by a majority of an old corporation is not necessary where the powers of government of the corporation are defunct from any cause, as in consequence of their having allowed the governing body to fall so low in numbers that a legal meeting of the corporation could not be held.(d) And, whether the charter be one of creation or one granted to a pre-existing corporation, part of it cannot be accepted and not the whole; at least unless it is manifestly the intention of the crown, to be gathered from the terms of the instrument itself, that the grantees shall have the option to accept in part and reject in part;(e) otherwise, as has been well observed, the corporation would be a corporation created by themselves and not by the king.(f)

Another rule to which there is no exception is, that a charter cannot be accepted for a time and then repudiated; if there be once a valid acceptance that is conclusive for ever, and it cannot afterwards be contended that there was no acceptance.(g) But an existing charter may

(b) Bagge's case, 2 Brownl. & G. 100; S. C. 1 Rol. Rep. 224; Dr. Askew's case, 4 Burr. 2200; Rutter v. Chapman, 8 M. & W. 25; per Wilmot, J., *Rex v. Vice Chancellor of Cambridge*, 3 Burr. 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate; *Townson v. Tickell*, 3 B. & Ald. 31. But though a corporation is not bound to accept an accession to its endowments, it may consent to accept it as a trust, with qualifications; *Att-Gen. v. Drapers' Company*, 6 Beav. 382. On an application for an information in the nature of *quo warranto*, suggesting that defendants were elected contrary to the provisions of the charter, there must be an affidavit stating the acceptance of the charter, or that the usage has been in conformity with the charter in this respect; *vid. Rex v. Barzey*, 4 M. & Selw. 253; *Reg. v. Slatter*, *Reg. v. Quayle*, 11 A. & E. 505, 508.

(c) Bull. N. P. 212 (The corporation of Penryn refused to accept a fresh charter offered by James 2); *Rex v. Pasmore*, 3 T. R. 240, 242. Much of the reasoning of Buller, J., 1 T. R. 588, must now, it is apprehended, be considered as of no authority. Semble, that in case of a corporation having a capital or joint stock, in which each member is individually interested, a new charter altering the constitution of the body can only be accepted by the whole body; *Ward v. Society of Attorneys*, 1 Coll. 370.

(d) *Rex v. Hughes*, 7 B. & C. 708.

(e) *Rex v. Westwood*, 2 Dow. & Cla. 21. The general principle is, that he who accepts letters-patent consents to all things therein; *Lord Eure v. Strickland*, Cro. Jac. 240; *Bret v. Cumberland*, Cro. Jac. 399; *Mayor, &c., of Lynn v. Henley*, 1 Scott, 39; affirmed 2 Cla. & F. 331. Between subject and subject the maxim is *quicquid recipitur, recipitur ad modum recipientis*. So there seems to be good ground for holding that the founder's statutes cannot be accepted in part and rejected in part; *vid. Harg. Co. Litt. 94 a*, note (104); *Opinion of Att-Gen. and Sol-Gen. 1720*.

(f) Per Buller, J., 1 T. R. 589; per Littledale, J., in *Rex v. Westwood*; and the contrary doctrine as to a pre-existing corporation, laid down in *R. v. University of Cambridge*, 3 Burr. 1647, is overruled.

(g) *Vid. dict. per Buller, J., R. v. Amery*, 1 T. R. 587.

be varied by the acceptance of a new one inconsistent with it, and in this way there is nothing to prevent the crown from re-incorporating a corporation already in existence, by granting them a charter containing altered or additional powers, and, in fact the crown has frequently exercised this right, subject to the acceptance of the old body.(h)

A corporation may if they please, render binding, by their acceptance of it, a charter curtailing their powers, privileges, &c., conferred by former charters; for *quilebet potest renunciare jure pro se introducto*.

So an usage, however ancient, is totally overthrown and abrogated by the acceptance of a charter inconsistent with it.(i) But though the grantees are not obliged to accept a charter, yet when once the charter [*20] *has been duly accepted, the body politic by such acceptance are bound to perform the terms and requirements upon which it was granted.(k)

Acceptance by the grantees in this respect, binds them and their successors for ever; for in contemplation of law the grantees and their successors to the latest posterity are one; the fundamental idea of corporation being continuous, unfailing, identity. Even where the object of the crown in granting the charter and erecting the corporation is not expressly stated in the charter, yet if it be apparent from a consideration of the terms of the charter, the acceptance of it creates an obligation on the grantees and their successors to perform the object.(l) But the acceptance must be clearly proved; for even where an act of parliament erected a corporation and named the corporators, it was held to be necessary to shew the express consent of one of them, who was a member of parliament at the time of the passing of the act.(m)

It is obviously a question of the utmost importance, whether the converse of the proposition, that, without acceptance, no charter of incorporation is operative, be true; that is to say, whether acceptance renders binding and valid, *in all respects*, a charter which the crown had no authority to grant, or which was defective in itself.(n)

Now it has been said in a late case to be "clear that the acceptance, however complete, merely concludes the bargain with the crown, and cannot remove any defects inherent in the charter which render it

(h) *Hayward v. Fulcher*, Palm. 491; *S. C. W. Jones*, 166; *R. v. Haythorne*, 5 B. & C. 410. A body corporate by charter may be re-incorporated by act of Parliament, as the universities of Oxford and Cambridge were by 13 Eliz. c. 29; 4 Inst. 227; Com. Dig. University. B. C.

(i) *Powell v. Reg.*, 2 Bro. P. C. 298. On the other hand, all the ancient usages and bye-laws will still be in force as to all matters not specially provided for by the charter; *Haddock's case*, Sir T. Raym. 435; *Ventr.* 355.

(k) *Vanacre's case*, 1 Ld. Raym. 498; per Buller, J., 1 T. R. 589.

(l) *Brett v. Cumberland*, Cro. Jac. 399; *Mayor, &c., of Lyme Regis v. Henley*, 2 Cl. & F. 331.

(m) *Scott v. Berkeley*, 3 C. B. 925.

(n) In the *Bewdley case*, a sci. fa. was brought to repeal and cancel the charter, and a verdict was returned upsetting the charter, and a new trial granted; yet proceedings were dropped, and the parties acquiesced in the charter and returned members to parliament in virtue of it until the passing of the Reform Act; vid. 2 *Luders*, El. Cas. 231. The charter had been declared illegal and void, and destructive of the constitution of parliament, by a resolution of the House of Commons, 13 Dec. 1710. Vid. *infra*.

invalid as a legal instrument. Indeed, no question on the legal authority of a charter could ever arise, unless it were in fact accepted."^(o) Nevertheless there appear to be some, and those not inconsiderable, grounds for dissenting from the above view, at least in its generality; or perhaps it is more proper to say, that some remarks are necessary in order to render clear the meaning of the terms, and prevent misconception arising from the unlimited phraseology in which the position is laid down. In the first place, it is well known law, that generally, if the king be deceived by the grantee, there the grant is void; but if the facts suggested by the grantee be true, though the crown be mistaken in its inference of the law, the grant shall not be avoided.^(p) In other words, if the crown, being misled by the representations of the grantees to conceive that it had power to grant a charter of incorporation, under the circumstances, proceeds to grant such charter, that grant is void, and no acceptance of the grantees will suffice to set it up and render it valid; but if, the facts stated by the grantees being true, the crown is *mistaken in the legal inference to be derived from them, and [*21] conceives that it has the power to grant a charter of incorpora-
tion, then although the crown had in truth no such power, the acceptance under these circumstances render the charter valid, at least as against the grantees and their successors; though the crown may have a *sci. fa.* to repeal its own grant in such case.^(q)

When, therefore, there has been no misrepresentation of facts on the part of the grantees, their acceptance suffices to render valid as against themselves and their successors a charter which the crown had no power to grant, and which therefore was in itself void.^(r)

In accordance with this principle are the decisions which were come to shortly after the Revolution, when the attention of the profession and the courts had been devoted with great earnestness for a length of time

(o) Per Lord Denman, C. J., *Rutter v. Chapman*, 8 M. & W. 116.

(p) 2 Freem. 17; 2 M. & W. 561.

(q) 17 Vin. Abr. 99, 100; *Swaine v. Holman*, Hob. 404; vid. *Earl of Rutland's case*, 8 Rep. 55; Co. Litt. 27 a; *Rex v. Kemp*, 12 Mod. 73; S. C. 1 Ld. Raym. 499; *Leggatt's case*, 10 Rep. 109; *Rex v. Pasmore*, 3 T. R. 249; per *Grose, J.*, and per *Ld. Hardwicke, C. J.*, cited 1 T. R. 637; *R. v. University of Cambridge*, 3 Burr. 1647; vid. 2 M. & W. 561. But a mere mistake of a matter of fact in the recital of a royal charter is immaterial; Vin. Abr. Prerogative, N. b, pl. 8; *Rex v. Blunt*, Andr. 295; *Ld. Chandos's case*, 6 Rep. 55 b. As to the import of the words *Ex certâ scientiâ, mero motu, et speciali gratiâ*, in a royal charter, vid. 10 Rep. 112 b, 113; *Anon. Dyer*, 269 a, pl. 19; *Rex v. Capper*, 5 Price, 261. Perhaps it may be questionable, whether a grant in a charter made under the authority and by virtue of an act of parliament, can be avoided on the ground that the crown was deceived in its grant; vid. 2 H. Bla. 500. Probably such charters are only repealable by parliament, in case they are found to have issued improvidently. A royal grant is avoided—1st, where the king has by his grant professed to give a greater estate than he has himself in the subject-matter of the grant; 2d, where he has already granted the same estate, or part of the same estate, to another; 3d, where he has been deceived in the consideration expressed in his grant; *Gledstanes v. Earl of Sandwich*, 5 Sc. N. R. 689; *Mead v. Lenthall*, 2 Rol. Abr. 189; *Rex v. Bishop of Chester*, Carth. 350; vid. *infra*.

(r) Vid. Vin. Abr. Prerogative, O. b, pl. 1, marg.; *Englefield's case*, 7 Rep. 12. it is to be observed, that it has been stated to be a rule, that letters-patent, whether rightly granted or not, are in force until repealed by *scire facias*; vid. *infra*; Bro. Abr. Sci. Fa. 58, 63, 173; 3 Lev. 220; *Keilw.* 134.

to questions of corporation law, and principles were laid down which have never been departed from since. It is true that the charters of Charles 2 have never been looked on with favour in Westminster Hall; and Lord Hardwicke, C. J., declared that he would never give an opinion in support of them, unless the strongest evidence in the world were laid before the court of their being accepted and uniformly acted under ever since.^(s) But this observation shows that Lord Hardwicke's opinion was clearly in favour of the principle, that acceptance sets up an illegal charter.

The charters which had been granted by Charles 2 and James 2 to various of the then existing municipal corporations, and which all of them more or less interfered with and curtailed the rights, liberties and privileges of those bodies politic, many containing illegal provisions, were after the Revolution divided into two classes by the decisions of the courts; those which had been granted in consideration of a valid surrender by the corporations of their previous charters (that is, a surrender *enrolled*,) and which had been accepted by the corporations, were held to [*22] be valid, although containing regulations which but for the *acceptance would have been void as being illegal, and such as the crown had no power to impose; and secondly, those which had been granted in consideration of a surrender never perfected by enrolment, were held to have been void, as granted on a misrepresentation of the grantees, which had deceived the crown; in other words, as having been granted without authority.^(t)

Several of those charters which were so held to be made good and valid by acceptance (there having been a surrender enrolled previous to the grant,) contained provisions for the removal of corporators by the crown at discretion, a thing which it is not within the competency of the prerogative to effect; for every corporator has a freehold in his franchise,^(u) and by Magna Charta, chap. 29, it was amongst other things expressly provided, that no one shall be disseised of his freehold, or liberties, or franchises and privileges, except by judgment of his peers or by the law of the land. It certainly seems in those cases to have been broadly laid down by the courts, that the acceptance of a charter, even though the charter might be illegal in itself and therefore void, was sufficient to give it force (at least to bind the grantees and their successors.) Perhaps, therefore, the explanation of the apparent discrepancy between the doctrine of Lord Denman and of the courts in the cases referred to, may be found in the circumstance that the courts in those cases were dealing with questions arising among the grantees or their successors,

(s) *Rex v. Johnson*, 2 Lud. El. Cas. 173; S. C. cited 1 T. R. 367.

(t) *Vid. Fulmerstone v. Steward*, Plowd. Com. 105; *Butler v. Palmer*, Salk. 191, 3d Resol.; *Com. Dig. Patent, G*; *Newling v. Francis*, 3 T. R. 197; per *Ld. Hardwicke*, in *Rex v. Johnson*, B. R. Hil. 7 Geo. 2, cited per *Ld. Mansfield*, C. J., 1 T. R. 367; *Piper v. Dennis*, 12 Mod. 253; S. C. *Holt*, 170; *Rex v. Osbourne*, 4 East, 327; *Rex v. Amery*, 2 T. R. 568; *vid. 13 East*, 382; *Ld. Brook v. Goring*, Cro. Car. 198; *Earl of Devon's case*, 11 Rep. 90; *Vin. Abr. Prerogative, N. b.*, pl. 1, 3, 4. The grant of a charter in consideration of the surrender of a former void charter, is wholly nugatory; *Rex v. Haythorn*, 5 B. & C. 410; *Merew. & Steph. Hist. Boroughs*, 1953; *Vin. Abr. Prerogative, Q. b.*, pl. 2.

(u) *Bagge's case*, 11 Rep. 98 b; *Warren's case*, Cro. Jac. 640.

while in *Rutter v. Chapman* the question was in effect between them and a third party having an interest.(x) For it may be, that, though acceptance may confer upon the crown the right of enforcing the provisions of a charter against its grantees and their successors, whatever may be the nature of them, yet it may not follow that a similar principle holds with respect to claims by third parties, who have relinquished none of their rights by virtue of the acceptance or other act of theirs, and who cannot therefore be affected by any compact between the crown and its grantees.

The maxim of the law is *non poterit rex gratiam facere cum injuriâ et damno aliorum; quod enim alienum est dare non potest per suam gratiam.*(y) An instance is found in the well known rule, that a royal *charter (the crown not being thereto authorized by statute) cannot impose a forfeiture of goods.(z) It may be observed that the [*23] distinction between a charter which is good as between the grantees and the crown, though not effective as against third parties, is of considerable antiquity; for it has been held that a grant to aliens to be a corporation was good as between the grantees and the crown, though not effectual to constitute them a corporation as regards the subject.(a)

With respect to the question of what is acceptance of a charter, it is to be observed that the law has not provided any specific form of acceptance; and therefore any unequivocal act, showing a desire and intention to accept a charter, will be sufficient, provided it is done by a majority of the grantees.(b) Acceptance of a charter is not one of those acts which a corporation is required to perform under seal.(c)

The mode in which acceptance is most usually proved is by showing

(x) *Vid.* the distinction between a charter good as against grantees, and a void charter recognized, 2 T. R. 568; 2 M. & W. 561; and *vid.* per Lord Denman, C. J., 3 Q. B. 652; *Lord Mulgrave v. Mounson*, 2 Freem. 17; *Rex v. Hanger*, Rol. Rep. 148.

(y) *The Case of the Monopolies*, 11 Rep. 86 b; 3 Inst. 236. Another rule of a similar effect is, that every gift or grant of the crown has this condition either expressly or impliedly annexed to it—*ita quod patria per donationem illam magis solito non oneretur seu gravetur*; *vid.* 11 Rep. 86 b; *Vaugh.* 345. Also a charter contrary to an express statute is void; 12 Rep. 18; *Bac. Abr. Prerogative*, D. 7; 2 Hawk. P. C. c. 37, s. 28.

(z) 2 Inst. 46; *Nightingale v. Bridges*, 1 Show. 135. The charter in this case is remarkable as containing a clause of non obstante, yet the plaintiff had judgment upon it, *Mich. T. 1 Will. & M.*; *vid.* 1 W. & M. sess. 2, c. 2 (the Bill of Rights); *Waltham v. Austin*, cited 8 Rep. 125; *Com. Dig. Prerogative*, D. 38; *Horn v. Ivy*, 1 Ventr. 47; S. C. 1 Mod. 18; *Vin. Abr. Prerogative*, Y. b, pl. 8, E. e. pl. 14, are also authorities in support of the rule.

(a) *Rex v. Hanger*, 1 Rol. R. 148. It was laid down in the same case that all charters in hindrance of trade are void; *vid.* *Nightingale v. Bridges*, 1 Show. 135; *Com. Dig. Trade*, D. 1; *The East India Company v. Sandys*, 2 Show. 366; *Taylor's of Ipswich v. Sherring*, 1 Rol. R. 4; *East India Company v. Evans*, 1 Vern. 307. The crown cannot grant by charter the exclusive right of printing any book the property in which is not royal property; *Miller v. Taylor*, 4 Brown, 2401; *Stationers' Company v. Carnan*, 2 W. Bla. 1004; *vid.* 3 Evans's Statutes, 15; *Vin. Abr. Corporations*, F. pl. 15. So the crown cannot by charter alter the common law rules as to the inheritance and descent of lands, 49 Edw. 3, fol. 4, per Candish, J., and Knivet, C.

(b) *Rex v. Hughes*, 7 B. & C. 718, 719; and this is equally true whether the grantees be or be not a corporation before the grant of the charter.

(c) *Yearb.* 12 Hen. 7, 25, 26; 5 M. & Gra. 183, note.

that the grantees have acted under the charter, and this whether the charter is an original or a fresh charter.(d) A person who has been admitted a member of an incorporated trading company, and has acted as such, cannot be heard to dispute the acceptance of the charter by a majority of the grantees;(e) nor can any corporator plead ignorance of the contents of the charter, or of the law arising therefrom.(f)

Where a new charter is given which professes to confirm a former one, in the provisions of which it nevertheless introduces variations, the having acted according to the new provisions is evidence that the corporation have accepted the new charter, not as a confirmation of the old one, but as a fresh grant.(g) And in such cases it does not appear that a formal surrender of the old charter has been thought necessary to give [*24] validity to acts done under the new one.(h) If a later charter *can be shown to be inconsistent with a former one, both cannot stand, and the latter must prevail,(i) if it has been duly accepted, but if it be not inconsistent it will prevail (it is said,) either totally or partially, as the case may be; and with respect to charters as well as statutes the rule holds that *leges posteriores priores contrarias abrogant*.(k)

(d) *Rex v. Hughes*, 7 B. & C. 718, 719; vid. 3 T. R. 198; Bull. N. P. 212.

(e) *Tobacco Pipe Makers' Company v. Woodroffe*, 7 B. & C. 838.

(f) *Rex v. Trevenen*, 2 B. & Ald. 339.

(g) *Rex v. Larwood*, Salk. 168; vid. *Earl of Cumberland's case*, 8 Rep. 167. The qualities of a deed of confirmation by a subject are stated Co. Litt. 295 b. It does not appear that there have occurred any judicial decisions on the form to be adopted in a royal charter of confirmation; and as no particular form is requisite in a charter of incorporation, the inference is a fortiori that none is requisite in the less important instrument.

(h) *Rex v. Larwood*, Salk. 168, per three judges, S. Eyres, J. dissentiente; Bull. N. P. 213. Perhaps it was with a view to avoid difficulties on this ground that new charters were mostly drawn in the form of confirmations of the old ones; for a corporation may use a new charter touching ancient privileges either by way of grant or of confirmation; S. C. Comb. 316; Lord Raym. 32. To plead a charter as a grant and confirmation is double; *Rex v. Trinity House*, 1 Siderf. 86; vid. Latch, 113, acc. In pleading a charter every part of it must be set out on which the party pleading means to rely; the court will not take notice of more than is pleaded, nor will they intend anything further to be contained in it; *Rex v. Smith*, 2 M. & Selw. 596, 597. By 4 & 5 W. & M. c. 22, s. 1, no corporation having grants by charter who have enrolled and had them allowed in and by the Court of King's Bench, shall be compelled to plead the same to any inquisition returned by any coroner. Nor shall any corporation who thereafter shall have any charters or grants from the crown for felons' goods and other forfeitures, be compelled to enrol and enter upon record all the said charters, but only so much as may express and set forth the said grants; and from and after such enrolment no corporation shall be compelled to plead the same in the said court to any inquisition thereafter filed therein touching any goods found thereby. This act was made perpetual 7 & 8 Will. 3, c. 36, s. 4.

(i) *Rex v. Massory*, Andr. 295.

(k) *Rex v. Abell*, 3 D. & Ry. 395. The greatest extension of this principle seems to be that of a corporation established by act of parliament for a certain purpose and with a certain fund, being afterwards empowered by royal charters to enlarge the fund and add to the purposes for which they had been originally incorporated; *Royal Exchange Assurance Company v. Vaughan*, 1 Burr. 155; vid. another instance of charter varying previous grant by act of parliament, *R. v. Haythorne*, 5 B. & C. 410. That a charter "by assent of the prelates, earls, barons and commonalty," &c. is equivalent to an act of parliament, vid. Yearb. 7 Hen. 7, fol. 14, pl. 1; 9 Hen. 7, fol. 2, pl. 3; 12 M. & W. 21, 22; sup. p. 19.

EFFECT OF CHARTERS.

When a new charter changing the name merely is given, the corporation retains all its privileges, franchises, hereditaments, claims, &c., as fully as before, provided no surrender of the old charter is made,^(l) and the new corporation retains the same, even where further changes are made by the new charter than the mere change of name, provided such further change does not necessarily involve an abridgment of the powers, rights, &c., of the old corporation.^(m) Nor does such change of name determine rent-charges, annuities, or other liabilities to which the corporation may have been subject previously to the alteration.⁽ⁿ⁾ But if after the change of name a fresh charter be granted to the new corporation calling them by the old name, such new charter, it is said, is void.^(o)

With respect to the question of the operation of a new charter on the name of the corporation, it has been held that the old name may [*25] *be lost by accepting a charter giving a new name, when such new charter alters the constitution of the body politic in the integral parts; as if "bailiffs and burgesses of A." are made by the new charter "mayor and aldermen of A.;" in such case the style of the corporation is altered; but if a corporation whose style is "bailiffs and burgesses *villæ de Gippo*" accept a new charter which styles them "bailiffs and burgesses *villæ Gipwici*," then this is only an additional name, the corporation remaining the same in respect to its integral parts, and the old name remains as well as the new one.^(p) Also where a corporation has had its functions suspended, owing to the simultaneous ouster of several members, and a new charter is granted, although not to the old corporators exclusively, the new corporation succeeds to the rights and liabilities of the old one precisely as they stood at the moment of suspension, provided that there is nothing to the contrary in the new charter.^(q)

(l) Lutterell's case, 4 Rep. 87 b; Bull. N. P. 213; Co. Litt. 102 b; Jenk. 99, pl. 94; Vin. Abr. Corporations, I. 3, pl. 1, and all shall be enjoyed in the last name that was gained by grant or prescription in the precedent name; Moore, 581; Mellor v. Spateman, 1 Wms. Saund. 344, and note (1); Mayor, &c. of Scarborough v. Butler, 3 Lev. 237, e. g. the right of holding an ancient court; Weld v. Wiggett, Freem. 321. And the corporation may plead that they were immemorially a body corporate by the name of, &c., until, &c., when they were incorporated by charter, &c., by the name of, &c.; Mellor v. Walker, 2 Wms. Saund. 2; vid. Adney v. Vernon, 3 Lev. 243, that the charter by which the change was made ought to be fully described in pleading.

(m) Lutterell's case, 4 Rep. 87 b; Bull. N. P. 213; Haddock's case, 1 Ventr. 355; S. C. T. Raym. 439; Vin. Abr. Corporations, I. pl. 18.

(n) Vin. Abr. Corporations, I. 3, pl. 4, 6, 8; Bishop of Rochester v. Dean and Chapter of Rochester, 2 And. 107; Mayor, &c., of Colchester v. Seaber, 3 Burr. 1866. The new name ought to be used in suing on a bond given by the corporation before the change of name; Vin. Abr. Corporations, I. 4, pl. 1.

(o) Jenk. Cent. 100, pl. 94.

(p) Per Holt, C. J., Reg. v. Bailiffs, &c., of Ipswich, Salk. 435; S. C. Ld. Raym. 1239; vid. Mellor v. Walker, 2 Wms. Saund. 2; In re Sheffield, &c., Insurance Company, 16 Law J. (N. S.) Q. B. 409; Dean, &c., of Christ Church v. Parrott, 4 Leon. 190.

(q) Mayor, &c., of Colchester v. Brooke, 7 Q. B. 336. Semble, the doctrine of suspension is only true when the old corporation has lost its magistrates, not being

The difference between suspension and total dissolution of a corporation is material to be borne in mind, but cannot be fully elucidated at present. *Vid.* "Dissolution."

CONSTRUCTION OF CHARTERS.

We come now to the construction of charters.

It is an established rule in construing royal charters, that if two constructions can be made of the terms, and by one construction the grant be adjudged good by the rules of law, and by the other be adjudged void, then "for the king's honour and for the benefit of the subject, such construction shall be made that the king's charter shall take effect, for it was not the king's intent to make a void grant."^(r)

Where the charter may be taken to two intents, each of which are good and effectual, in many cases it shall be taken to such intent as is most beneficial to the king.^(s) And generally the grant of the king is to be taken more strongly against a stranger, and more favourably for

[*26] *himself, contrary to the rule of the common law in the case of a grant by a subject.^(t)

It is said by Sir E. Coke, that a charter may enure to three intents; *ex grâ.* to erect a corporation; to create a succession; and to grant a rent; these intents being expressed on the face of the charter;^(u) and

an integral part of the corporation. The corporation of Colchester was "the mayor and commonalty;" and the corporation had no integral parts, only a head; but on the vacancy of the headship the corporation is not dissolved, though it has often been decided that a corporation is dissolved by failure of one of its integral parts; *vid.* *R. v. Mayor, &c. of Colchester*, 2 Dougl. Elect. Cas. 66; *Jenk. Cent.* 100; *R. v. Pasmore*, 3 T. R. 241. That a corporation of mayor and commonalty has only one integral part, 6 Vin. Abr. 268, marg.; 14 id. 35. The above case of *Mayor, &c. of Colchester v. Brooke* appears therefore to be incorrect in speaking of a corporation as being *suspended* by loss of an integral part.

^(r) Case of *St. Saviour's, &c.*, 10 Rep. 66 b; *vid.* 1 Rep. 45; 2 Inst. 496, 497; *The Earl of Rutland's case*, 8 Rep. 56 b; the stat. of *Quo Warranto*, 18 Edw. 1; the *Earl of Cumberland's case*, 8 Rep. 167; *Priddle v. Napper*, 11 Rep. 11 b. But this rule does not extend to give effect to a non obstante clause in a royal charter, so as to frustrate acts of parliament; *Prince Henry's case*, 8 Rep. 29 b; *vid.* *Lord Brook v. Goring*, Cro. Car. 188, except in the case of the statutes of mortmain.

^(s) Vin. Abr. *Prerogative*, O. c. pl. 1. 11; *Priddle v. Napper*, 11 Rep. 11; *Knight's case*, 5 Rep. 56; *Com. Dig. Grant*, G. 12.

^(t) *Willion v. Barkley*, Plowd. C. 243. Where, however, a royal charter contained a grant of exemption from tolls to a corporate body, it was held to bind the crown, although the words "his heirs and successors" were omitted in the charter, which only, on the face of it, went to exempt from tolls payable to the grantor; *Wood v. Hawkhead*, Yelv. 15. As to effect of royal charters on third parties, *vid.* *Molyn's case*, 6 Rep. 6 b.

^(u) *Sutton's Hospital case*, 10 Rep. 28, note on 3rd resolution. The same charter may certainly grant lands and also incorporate; but the incorporation must be considered to take place first, for lands cannot be granted to a vill or body of persons not incorporate; Vin. Abr. *Prerogative*, G. b. 2, pl. 2; *Year Book*, 10 Hen. 4, fol. 3 b, pl. 5. Nevertheless a royal grant cannot enure to a double intent. Where the words grant one thing they shall not be taken also to grant another thing; thus a grant *tenere placita coram ballivis, &c.*, is bad, if there be no bailiffs, and the king shall be taken to have been deceived, and it shall not be intended that he meant to create bailiffs, as well as to grant consuance of pleas by the above words; *Com. Dig. Grant*, G. 11; *Finch*. 101; *Plow. Com.* 336; *vid. tam.* Vin. Abr. *Court*, pl. 1, *contra*.

the intent, and not the precise words, is to be observed in the grants of the crown.(x)

Accordingly it has been held that a charter incorporating the burghesses of A., without mentioning their successors, was good.(y) It is probably on this ground that the doctrine can be supported (if at all), that a charter incorporating the inhabitants of D., and giving them power to choose a mayor, must be construed as naming the corporation by implication, Mayor and Commonalty of D.(z)

However, a charter incorporating the *inhabitants* of the place, as many of the old municipal charters did,(a) does not make every one who becomes an inhabitant of the place through all future time ipso facto on becoming so a member of the corporation,(b) unless the charter expressly points out that to be the mode by which the succession is to be kept up; for in general the power of keeping up its succession by election is incident to every corporation;(c) and, therefore, where it is thought expedient to open trading and other corporations to every one *who [*27] chose to become a member on payment of a certain sum, an act of parliament is necessary.

With respect to the means of arriving at a proper construction of a charter—

The best means that can be resorted to for the interpretation of charters containing dubious or obscure expressions, is contemporaneous usage; for *optimus interpret rerum usus*; and contemporaneous usage is always admissible for obtaining the true intention of such expressions; and generally it may be laid down that the uniform course of modern decisions fully establishes the rule, that however, general the words of ancient grants may be, they are to be construed by evidence

(x) Per Jones, J., in *Evans v. Ayscough*, Latch. 248; *Whistler's case*, 10 Rep. 65; *Earl of Rutland's case*, 8 Rep. 56 b; *Molyn's case*, 6 Rep. 6. They are to be construed liberally to support them, not strictly for their overthrow; *illi qui habent chartas regales secundum earundem plenitudinem judicentur*; 2 Inst. 496, 497. stat. Quo Warranto; vid. 9 M. & W. 567. Charters are to be construed secundum intentionem domini regis, in order to uphold, but not to avoid them; *Lord Zouch v. More*, Godb. 425. *Principis beneficium decet esse mansurum*; *Jenk. Cent.* 251. pl. 42. Imperfect designation of the grantees in a part not material will not vitiate a grant, as where a party was designated as a knight, not being one in truth; *Rex v. Bishop of Chester*, Salk. 560; 1 Lord. Raym. 292.

(y) *The Yarmouth case*, 2 Bro. & G. 209.

(z) *Anon. Salk.* 191. It has been decided that the word *inhabitants* in a charter has no definite legal signification of itself, but is to be explained in each case, sometimes by evidence of usage, sometimes by reference to the context and objects of the charter; *Rex v. Mashiter*, 6 A. & E. 153; *Rex v. Davie*, id. 374; *Bac. Abr. Corporations E.*; 2 Inst. 702, 703. *Citizens and inhabitants*, *Rex v. Amery*, 2 T. R. 536; 8 M. & W. 68. 93; 6 Rep. 60; 3 T. Rep. 199; *Lockwood v. Wood*, 6 Q. B. 31. As to meaning of commonalty in a charter, *Rex v. Osbourn*, 4 East, 327. *Vid. sup.* p. 12.

(a) 1 Rep. Corporation Commissioners, p. 16. 18, 19, 20.

(b) Per Yates, J., in *R. v. Askew*, 4 Burr. 2200; *vid.* 2 Peckw. Elect. Cas. 311: 4 East, 337; 8 M. & W. 36, that inhabitants cannot be obliged to become corporators; and *vid.* *R. v. Bailiffs, &c., of Eye*, that they have no inchoate right in such case, 4 B. & A. 271, per Best, J., 2 B. & C. 597.

(c) *R. v. Mayor, &c. of West Looe*, 3 B. & C. 685.

of the manner in which the thing granted has always been possessed and used.(d)

The construction to be put upon ambiguous words in a charter, may be materially influenced by the sense in which those words are used in earlier charters of the same corporation, and, where the usage upon it has been uniform, by such usage.(e) This distinction however must be borne in mind, that contemporaneous usage is available to explain a doubtful expression in a charter, but not to elucidate the general terms of it.(f)

Subject to this rule, such explanatory usage may be pleaded.(g) Even in the explanation of dubious language in an act of parliament, contemporaneous and continuous usage is much relied on; for it is a general maxim of evidence that *contemporanea expositio fortissima in lege*.(h) And usage is a collection through a great period of time of the regulations by which the grantees have from time to time agreed to put a construction upon the instrument under which their title was derived.(i) Contemporaneous exposition and usage have been resorted to even to extend the words of a grant from the crown beyond their natural import, so as to confer a right to exercise a corporate office within a city and the liberties thereof, though it was granted only to be exercised within the city.(k) And the converse of this doctrine also holds, and usage is available as proof, that words of a charter were intended by the crown to have a more limited meaning than they naturally bear.(l)

[*28] *But if the effect of the usage is to cut down that sense which the words will bear, and to impose upon them a restrictive qualification, clear evidence ought to be produced that the instrument, admitting a larger sense, has been practically acted on in a more limited sense.(m)

Indeed, practically, the only limit that seems assignable to the admission of such evidence to explain particular difficulties arising on dubious or obscure expressions in royal charters, is to be found in the maxim, *quod licet consuetudo est magne auctoritatis nunquam tamen præjudicat*

(d) 2 Phil. Evid. 746; 2 Inst. 282; per Turner, B., 1 Vent. 401; per Parke, B., 9 M. & W. 556.

(e) Rex v. Grout, 1 B. & Ad. 111. It is not to be presumed that there are no repetitions of the same idea in the words of a charter; 6 A. & E. 929.

(f) Per Lawrence, J., 4 East, 333; per Lord Hardwicke, C., 3 Atk. 577; vid. Withnell v. Gartham, 6 T. R. 388; Blankney v. Winstanley, 3 T. R. 279. 286; Davis, app., Waddington, resp., 7 M. & Gra. 42; Governors of Lucton School v. Scarlet, 2 Y. & J. 330; Bailiffs of Tewkesbury v. Bricknell, 2 Taunt. 120; 4 Inst. 306; R. v. Johns, Lofft's R. 77.

(g) Vid. Rex v. Bellringer, 4 T. R. 821; Rex v. Miller, 6 T. R. 268. 281; 2 Inst. 282; vid. 9 B. & C. 431.

(h) Bank of England v. Anderson, 3 Bi. N. C. 666; Rex v. Scott, 3 T. R. 604; Vaugh. 169; Rex v. Aire, &c., Navigation Company, 2 T. R. 664.

(i) Per Lord Eldon, C., in Att.-Gen. v. Newcombe, 14 Ves. 8.

(k) Mayor, &c., of London v. Long, 1 Campb. 21.

(l) Att.-Gen. v. Parker, 3 Atk. 576; vid. Att.-Gen. v. Foster, 10 Ves. 355.

(m) Att.-Gen. v. Newcombe, 14 Ves. 8; Att.-Gen. v. Parker, 3 Atk. 577. The courts will not interfere against a long continued usage upon words of a charter which are at all doubtful; Rex v. Chester, 1 M. & Selw. 101.

veritati. A settled usage will even go a great way to control the words of a charter.(n)

Nevertheless, regard must be had to the length of time the usage has been established. Where a charter bore date 16 Car. 2, it was held, 17 Geo. 2, that a usage which had grown up in that time could not be taken to control the charter.(o) And generally, though contemporaneous usage, proceedings in causes, and parol testimony may be resorted to to explain, they will not be admitted to contradict, a charter.(p)

Nor is it necessary (as has been said) in all cases to show an absolutely contemporaneous usage; for it is a principle that from uninterrupted *modern* usage a jury ought to presume the immemorial existence of the right which the usage goes to support.(q)

And though a usage of forty years' duration could not of itself establish a right, yet it was held to be evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in a grant, served to establish such right.(r)

The powerful effect of long established usage is strikingly exemplified in the doctrine, that on that ground an impost on the subject may be supported, which is of a nature not to originate in a charter, as being beyond the limits of the prerogative, and such as the crown could not legally enforce; thus the right which formerly existed within the jurisdiction of various municipal corporations, of the forfeiture to the use of the corporation of wares foreign bought and foreign sold was held to be good, if proved to rest upon custom, though it could not be *granted [*29] by charter;(s) for fortior et potentior est vulgaris consuetudo quam regalis concessio.

The reason why a thing may be good by custom which would not be good by charter, and the principle upon which the above maxim rests, has been considered to be this, that every custom supposes an act of parliament, or a law made in former times, by an equivalent power, though it were not called a parliament; and therefore it is, that, though the crown cannot grant that land in any particular locality shall be of the nature of gravelkind or borough-English, those peculiar customs are good in certain places.(t)

(n) *Gape v. Handley*, 3 T. R. 288, note; per Buller, J., 3 T. R. 288. Vid. a striking instance, *Rex v. Davie*, 6 A. & E. 374; 2 Phil. Evid. 746; *Butler v. Palmer*, Salk. 191, 1st resol. It will be a ground for presumption against very strong words of a charter, especially if the charter was in restraint of trade; *Mayor, &c. of Berwick v. Johnson, Loft*, 334.

(o) *Rex v. Grosvenor*, 7 Mod. 198; vid. *Rex v. Wynn*, 2 Barnard. 391. In *Rex v. Salway*, 9 B. & C. 424, it was held that a usage in contravention of a charter could not be pleaded in explanation of it; vid. *Rex v. Greet*, 8 B. & C. 363.

(p) *Lucton School v. Scarlett*, 2 Y. & J. 330.

(q) *Jenkins v. Harvey*, 2 C. M. & R. 894; vid. tam. *Brune v. Thompson*, 4 Q. B. 552, where it was said by the court that the doctrine of that case was not altogether satisfactory.

(r) *Chad v. Tilsed*, 5 J. B. Moore, 185. Vid. *Mayor, &c. of Truro v. Reynolds*, 1 M. & Sc. 272.

(s) *Anon. Dyer*, 279 b; *Rex v. Bailiffs of Boston*, W. Jones, 162; case of the city of London, 8 Rep. 125 a; 2 Inst. 47. As to pleading such custom, vid. W. Bendl. 34; *Merew. & St., Hist. Boroughs*, 1150.

(t) Vid. per Vaughan, C. J., in *Harland v. Cooke*, Freem. 320; per Bridgman,

What has been just said respecting customs must be understood to be subject to these limitations:—that the custom have existed from time immemorial, without interruption—in a certain place—and that it is in itself certain and reasonable; such a custom, then, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm.^(u)

It is a general rule in the construction of charters, that of two repugnant clauses the latter is to be rejected.^(x)

Another general rule in the construction of charters is, that such a presumption shall be made, *ut res magis valeat quam pereat*; that is, that the object of the grant shall be attained rather than defeated. It has even been said that nothing is to be inferred from usage to cripple the grant.^(y) And though, as has been observed, in general the grant of the king is to be taken most strongly against the grantee, and most favourably for the king; yet when the grant is of a thing (as land) to which other things are incident, which are not severable, the incidents pass without being expressly named.^(z)

Another rule is, that the king's charter can in no respect alter the existing law of the land;^(a) and therefore all the expressions must, if possible, be so interpreted as to consist with the law.

Another rule is, that the king's charter hath always relation to the time of the date, and therefore it cannot be alleged that a charter was made or delivered on another day than that of the date;^(b) and besides, it must be construed with reference to existing circumstances at its date; thus, a charter of exemption of all lands, &c., of a corporation from forest [*30] law, must be taken only to exempt such lands, &c., as the *corporation was seised of at the time of making the charter,^(c) and not subsequently acquired lands, &c. So a charter of exemption granted to an abbot, that he and his men should be free of toll in every market and all fairs, and in all passage of harbours, ways, and seas, does not extend to goods which they buy to merchandise with.^(d)

We now proceed to consider various points respecting particular parts and particular forms of expression usually found in charters of incorporation. No particular form of words is required by the law to make the creative part of a charter of incorporation good; the words of creation may consist of any terms that suffice clearly to express the intention of

C. J., Mayor, &c., of Colchester v. Goodwin, Carter, 120. Vid. Stra. 462; 17 Vin. Abr. 89, pl. 23. A somewhat different account of the origin and obligation of a custom is given in Tyson v. Smith, 9 A. & E. 406, where the above cases were not cited. But it is not true, that whatever parliament might have enacted is necessarily good by custom; for to intend that, would establish even unreasonable customs; Weekly v. Wildman, 1 Ld. Raym. 407.

(u) Lockwood v. Wood, 6 Q. B. 64, (Exch. Ch.)

(x) Rex v. Amery, 2 Bro. P. C. 368; Cother v. Essex, Hardr. 94.

(y) Per Holroyd, J., Rex v. Cotterill, 1 B. & Ald. 81.

(z) Yearb. 1 Hen. 4, fol. 5, pl. 8.

(a) Lowe's case, 9 Rep. 123.

(b) Ludford v. Gretton, Plowd. C. 149; vid. 1 Leon. 183.

(c) 2 Roll. Abr. Prerogat. 1e Roy. T. pl. 1.

(d) 2 Roll. Abr. id. pl. 2. Vid. inf. "Dean and Chapter;" Lord Middleton v. Lambert, 1 A. & E. 401; infra.

the crown to constitute a corporation.(e) But if the charter omitted to give the body politic a name, and the name intended could not be gathered from the terms of the charter or from the nature of the thing, it would be defective; and so it would probably, if it omitted to give the power of using a common seal, and certainly if it negatived and excluded any of the essentials of a corporation, as perpetual succession, or the right of suing, &c., for then the words of creation would not suffice to express the intention to incorporate.

Habendum sibi et successoribus suis has been held sufficient to make a succession, the subject of grant being a rent to a chantry priest.(f) *Burgenses habeant guildam mercatoriam*, used in a charter of 6 John, have been held sufficient to create a municipal corporation.(g)

¶ (e) *Sutton's Hospital case*, 10 Rep. 28, 5th Resolution; vid. *Styl.* 198; 2 *Rol. Abr.* 197; 10 *B. & C.* 384. A grant of lands by the crown to the men or inhabitants of D., their heirs and successors, rendering rent for any thing respecting such lands, operates, it is said, to constitute the men of D. a corporation for the purpose of supporting the rent, but not for any other purpose; *Bagot's case*, 7 *Edw.* 4, 29; *Vin. Abrid. Corporations*, F. pl. 4; *St. Saviour's case*, Lane, Rep. 21; *Vin. Abrid. Grants*, A. 4, pl. 5; *Aldermen of Chester's case*, Cro. Eliz. 35. The doctrine of a corporation by implication came into use temp. *Edw.* 4, vid. *Year Book*, 21 *Edw.* 4, 56; 8 *Edw.* 4, 28; but the earliest abridgments limited the doctrine that a grant of lands to burgesses, &c., of D. was sufficient to incorporate them, to this that they were considered as a corporation for the purpose of securing the payment of the fee-farm rent to the king, and not otherwise; *Merew. & St., Hist. Boroughs*, 1010. 1020, 1021; vid. tam. 2 *Hen.* 7, 13 *A. B.*; *Merew. & S.* 1068. Also a royal grant to the men of D. that they be discharged of tolls, is a good incorporation for that purpose, but not to enable them to purchase; *Vin. Abr. Corporations*, F. pl. 6; *Case of Inhabitants of Denbigh, Co. Entr.* 537. Accordingly, they may prescribe to discharge themselves from such payment; per *Holt, C. J.*, in *Payne v. Partridge*, 1 *Show.* 255; *Baker v. Brereman*, Cro. Car. 419; *Gravesend case*, 2 *B. & Goulds*, 177; *Hoblyn v. Reg.*, 5 *Bro. P. C.* 512; vid. *Lockwood v. Wood*, 6 *Q. B.* 31; *Merew. & Steph.* 1387. 1537. But without they be incorporate they cannot prescribe to have a profit in alieno solo; *Smith v. Gatewood*, Cro. Jac. 152.

(f) *Sutton's Hospital case*, 10 Rep. 28, 3d Resolution. But a grant of *Athelstan* in these words, *Ego &c. do &c. burgensibus meis et eorum omnibus successoribus Medulfensis burgi quod habebant et teneant semper omnes functiones et liberas consuetudines suas*, &c., did not operate to incorporate the town of Malmesbury; it was not incorporated until 11 *Charles I.* On the other hand, when it was discoverable from the terms of acts of parliament that an aggregate body were intended to hold lands to them and their successors in office, the body was considered to be a corporation by implication; *Tone Conservators v. Ash*, 10 *B. & C.* 349; vid. *id.* 393. So *Edw.* 2, 26 *July*, *A. D.* 1313, granted a charter to the barons (i. e. the freemen) of the cinque ports and their successors; but this grant was never considered to have incorporated them as a body politic; 2 *Peckw. El. Cas.* 401, 402; vid. 2 *Taunt.* 122.

(g) *Bailiffs of Ipswich v. Johnson*, 2 *Barnard*, 121; vid. 2 *Peckw. El. Cas.* 320. 1377; 2 *Luder's El. Cas.* 6, 7. 63. 241. 244; *Mayor, &c., of Winton v. Wilks*, 1 *Salk.* 204. But in pleading, to state that the burgesses of a town have guildam mercatoriam is not equivalent to stating it to be an incorporated town; *Mayor, &c., of Winton v. Wilks*, 1 *Salk.* 204; vid. *Merew. & St., Hist. of Boroughs*, 320. 2049, 2050; 10 Rep. 30. "Burgesses," in ancient charters, usually means inhabitants; *Corb. & Dan. El. Cas.* 41; *R. v. Mayor, &c., of West Looe*, 3 *B. & C.* 677. It appears that being gildated and being incorporated were used as words of the same import, anno 10 *Hen.* 4; vid. the case of *Cokenage v. Large*, where the defendants pleaded the weavers of London were a corporation by prescription, having their guild; *Madox, Firma Burgi*, 197, where the pleadings are given at length. See a curious charter, 51 *Hen.* 3, to *Wallingford*, containing an *inseximus* of the charter of *Hen.* 2, who grants ut *burgenses mei de Wallingford in perpetuum libertates et leges suas omnes et consuetudines, &c., sicut eas habuerunt temp. Edw. Regis, et temp.*

[*31] *The word "inhabitants" in a charter has not of itself any definite legal meaning, but must be explained in each case extrinsically, as by evidence of usage, or by reference to the context and objects of the charter; (*h*) and this latter principle has been carried so far, that in a charter of Edw. 6 the word has been construed, by reference to the usage, to mean "inhabitants paying church and poor-rates," (*i*) although poor-rates were unknown at the date of the charter. Where a charter of Edw. 6 granted to the borough of Monmouth all fairs held within quinque milliaria et circuitu ejusdem villæ, the latter words were construed to include all its liberties, which may be much larger than the area within the walls. (*k*)

Words of grant, whereby an interest purports to pass from the crown, must be precise, and must precisely ascertain and limit the thing granted. (*l*) The same precision is not required with respect to the designation of the grantees, for a charter incorporating the burgesses of A., without more, is good as a grant of incorporation to them and their successors. (*m*) But where there is a grant of a particular *thing [*32] once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, there the

atavi mei Reg. Willielmi, et temp. Henrici Reg. avi mei, scilicet Gildam Mercatorium, &c.: and proceeds—*et concedo in perpetuum consuetudines illas, &c., et alias omnes quas poterunt ostendere antecessores suos habuisse libere et quietè et honorificè sicut cives mei Winton, &c.*, and then confirms to the burgesses and their successors all the foregoing; Brady's Boroughs, App. 12. The first reported cases in which there is any allusion to the doctrine of incorporation as applied to towns in modern times, is in the Year Book, East. T. 3 Hen. 6, fol. 43, A.D. 1424, although it was not until six years after that there is found on record any charter of incorporation, viz. that to Kingston-upon-Hull. In Ireland there appear to be charters of incorporation yet extant of the date of 14 Hen. 3; Att.-Gen. v. Corporation of Cashel, 3 Dru. & War. 294. 299.

(*h*) Rex v. Mashiter, 6 A. & E. 153; vid. 8 M. & W. 68. 75. 93.

(*i*) Rex v. Davie, 6 A. & E. 374; vid. Fearon v. Well, 14 Ves. 13; and per Abbott, C. J., 1 B. & C. 136. (*k*) R. v. Ricards, 1 Keb. 626.

(*l*) Hungerford's case, 1 Leon. 30, 17 Edw. 2, stat. 1; 10 Rep. 64; Anon. Moore, 45; Vin. Ab. Prerogative, O. b, pl. 13; Parmeter v. Att.-Gen., 1 Dow. 316. 323; Alcock v. Cook, 2 M. & P. 625. Every charter of municipal incorporation ought to define the limits of the district, or point out the means by which the crown intends those limits to be ascertained over which the corporation is to have jurisdiction; vid. Rutter v. Chapman, 8 M. & W. 1. A grant in a charter of King John to the borough of Waterford in Ireland, to have murage, *a deo plenè et integrè sicut burgenses villæ de Bristol habebant*, was held bad and void for uncertainty; The Case of Customs, Dav. R. 13; vid. Vin. Abr. Prerogative, O. b, pl. 15; id. Q. b, pl. 6. Definition of Murage, 2 Inst. 222; Darcy v. Allen, Noy, 176. But a grant of a manor, with such privileges and franchises as the Dean and Chapter of St. Paul's formerly enjoyed therein, is certain enough, Lord Darcie's case, Cro. Eliz. 512. Quod volumus held to be good words of grant; Case of Dungannon, 12 Rep. 121.

(*m*) The Yarmouth case, 2 Brownl. & G. 209; vid. 2 Rol. Abr. 197, Prerog. le Roy. H. 1, 2; Tobacco Pipe Makers' Company v. Woodroffe, 7 B. & C. 838. So homines and cives are used indiscriminately in various old charters; vid. 1 H. Bl. 212. It seems that a grant in a charter, *quod nulla prisagia soluta sint de vinis civium et liberorum hominum*, shall enure to the benefit of the individual citizens and freemen and not to the corporation, so that the wines of the latter shall not be exempt; Walter v. Hanger, Moor. 833; S. C. Rol. R. 142. As to meaning of homines sui in a grant to a corporation, *quod ipsi et homines sui sint quieti ab omni theolonio, &c.*, 2 Show. 668; Chamberlain of London v. Russel; et vid. Lord Middleton v. Lambert, 1 A. & E. 401; et vid. 2 Inst. 221; Dyer, 268 b; Cowell's Interpret.

addition of a particular circumstance will operate by way of restriction and modification of such grant.⁽ⁿ⁾

The words "liberties and customs" will not operate to grant tolls.^(o)

A grant of a fair or market, with the usual liberties or customs, privileges or profits, would not enable the grantee to levy tolls.^(p)

A charter of Queen Anne, containing a grant of a market, with the words *cum omnibus tolnetis, et aliis proficuis prædictis, feriis sive nundinis pertinentibus et spectantibus*, was held to carry reasonable tolls, though no amount was specified.^(q)

The words *liberæ consuetudines* in an original grant do not confer a right to take tolls, though they may do so in a charter of confirmation if supported by uniform and immemorial usage.^(r) But when the crown, before the time of legal memory, was entitled to the soil of the town of C., and to toll traverse within it, and afterwards granted to the burgesses "the town with all its appurtenances," these words were held adequate to pass toll traverse.^(s)

The words *omnes piscarias et piscationes* in a charter do not convey royal fishings.^(t)

So a grant of all mines does not pass mines of gold and silver;^(u) nor does a grant of all the king's amerciaments in such a place convey royal amerciaments,^(x) properly so called.

The words *concessimus et confirmavimus* in a royal charter may be taken as conveying a fresh grant, or operating to confirm something *previously enjoyed by the grantees.^(y) Thus where a charter used these words with respect to a court which the grantees had [*33] a prescriptive right to, it was held that they might treat the charter as confirming the right of holding the court to them.^(z) And the word

in *voc. Homines*; *Regist. Brev.* 260 b; *Fitz. N. B.* 228, A.; *Year Book*, 14 Hen. 6, fol. 12.

(n) *Doe d. Vernon v. Vyse*, 5 East, 51. *Vid.* various interpretations of words of grant of market in *re Islington Market Bill*, 3 Cl. & F. 513; *Mayor, &c., of Macclesfield v. Chapman*, 12 M. & W. 18; *Rex v. Cotterill*, 1 B. & Ald. 75. In charters granting a market, there is always this condition implied, that the market be not *ad damnum vicinorum mercatorum*; *Reg. v. Butler*, 3 Lev. 222; *Reg. v. Aires*, 10 Mod. 259; *Rex v. Eyre*, Stra. 43. A grant of tolls may under that term include stallage; *Lockwood v. Wood*, 6 Q. B. 31. A grant of toll, according to common right, may be by general words, but a grant of toll against common right must be certain, and the same of a prescription for toll; *Vin. Abr. Tolls, E.*: The case of *Maidenhead*, Palm. 86; *Quo. Warr. Cas. Att.-Gen. argum. p. 45*. Toll is not incident to a market; and therefore a grant of a market does not confer a right of toll; *Vin. Abr. Tolls, E.*; 2 Inst. 220. So of a grant of a fair; *Earl of Egremont v. Saul*, 6 A. & E. 924. Right of removal incident to a market; *Rex v. Cotterill*, 1 B. & A. 61; *vid.* 4 B. & Ald. 561.

(o) *Heddy v. Wheelhouse*, Cro. Eliz. 558. 591; S. C. Moor, 474.

(p) *Admitted, Mayor, &c., of Stamford v. Pawlett*, 1 C. & J. 60. 73.

(q) *Id.* 71. 73; *vid.* grant of toll void for uncertainty, *Lightfoot v. Lenet*, Cro. Jac. 421.

(r) *Vid.* *Vaugh.* 162; *Earl of Egremont v. Saul*, 6 A. & E. 924; *Duke of Bedford v. Emmett*, 3 B. & Ald. 366. When *consuetudines, customagia* and *theolonia* are found together in a charter, it is not to be presumed, in order to construe them, that there is no repetition of the same ideas in old charters; 6 A. & E. 929.

(s) *Brett v. Beales, M. & Malk.* 428.

(t) *Case of Customs*, Dav. 17.

(u) *Id.* *ibid.*

(x) *Id.* *ibid.*

(y) *Goodson v. Duffield*, Cro. Jac. 313.

(z) *Id.*; *Haddock's case*, T. Raym. 435; *vid.* 13 M. & W. 340.

concessimus is not unfrequently used in ancient charters as well to signify a recognition as an original grant,^(a) at least where the charter grants the identical thing originally prescribed for; and though a charter use none but words of grant and creation with respect to the establishment of the corporation, yet it may be shown by parol testimony that the corporation was a corporation by prescription.^(b)

A charter, in which the king grants, &c., with the assent of the lords and commons in parliament assembled, has the effect of an act of parliament, and can only be repealed by statute.^(c)

The general principle of law with respect to grants being that the crown cannot derogate from its own grant, it follows that when a charter has once been granted and accepted, the king cannot afterwards interfere with the operation of the provisions of it, or with the privileges, rights, and liabilities that are incident to a corporation. Thus, after a corporation has been created by charter or statute, no order or letters-patent from the crown can constitute any one a corporator of that corporation who is not otherwise entitled to be so;^(d) although where a man is entitled to be admitted as a corporator by the terms of the constitution of the corporation, and they refuse to admit him, they will be compelled by *mandamus* to do so. This general principle seems to be further secured, as to certain grants, by statute, which enacts that where grants of felons' goods and other forfeitures have been made to corporations and enrolled as therein pointed out, no process shall be issued by the clerk of the crown against the grantees in respect of such grants.^(e)

Words of disqualification are not to be construed in a new charter to an existing corporation, as if by stating them it were meant to remove all the disqualifications already existing within the corporation, by usage or otherwise; they will, on the contrary, be considered to impose the disqualifications specified, and besides to leave the others in full force.^(f)

Words of exemption in a charter are to be construed strictly;^(g) and [*34] all claims of corporators to exemptions from burdens or offices *thrown by law upon the subject, must be founded on clear and indisputable words in the charter.^(h) The charters of the crown are construed to have relation to the time of the date, and not to the time of the delivery; for matters of record by presumption of law import the truth.⁽ⁱ⁾ Where a charter speaks of years with reference to an office,

(a) *Mayor, &c., of London v. Lynn*, 1 H. Bla. 212, n.; *vid.* 13 M. & W. 336. 342.

(b) *Rex v. Mayor, &c., of Stratford*, 14 East, 348.

(c) Answer of the judges in Dom. Proc. In re the Islington Market Bill, 3 Cl. & F. 531. The very same point had been decided Yearb. 7 Hen. 7, fol. 14, pl. 1, and 9 Hen. 7, fol. 2, pl. 3, where see as to the effect of the words *damus et concedimus*.

(d) *Case of City of London*, 8 Rep. 126.

(e) 4 & 5 Will. & M. c. 22, made perpetual by 7 & 8 Will. 3, c. 36, s. 4.

(f) *Rex v. Abell*, 3 D. & Ryl. 395. But specified disqualifications cannot be extended so as to make analogous circumstances disqualify; *vid.* 5 A. & E. 613. A corporate officer cannot be removed without cause though the charter says generally that he may be removed; Com. Dig. Franchises, F. 32.

(g) *Mayor, &c., of Truro v. Reynolds*, 1 M. & Sc. 286, 287; *Lord Middleton v. Lambert*, 1 A. & E. 401.

(h) *Rex v. Clarke*, 1 T. R. 685.

(i) *Ludford v. Gretton, Plowd. C.* 491. The date of a charter is always of the year of the reign, and not of the year of our Lord.

years of office, and not calendar years, will be understood.^(k) Where a charter gives power to appoint an officer, an appointment for life will be intended unless it appears otherwise either from other parts of the charter or the nature of the office.^(l) Words conveying a monopoly are void;^(m) and it is clear law that the crown cannot at this day grant by charter to a corporation a right of exclusive trading to and from any place,⁽ⁿ⁾ or indeed a monopoly of any kind; and although as late as the reign of Charles 2 the practice was otherwise, and the crown frequently established trading corporations with exclusive powers,^(o) yet the law is now held to be as above. An act of parliament has been considered necessary to convey exclusive rights.^(p) Generally all words in a charter in restraint of trade are looked upon with disfavour, and if doubtful, that meaning will be taken which is least inimical to commerce.^(q) So all charters prohibiting trade are void.^(r) Words of permission in a charter, having the effect of giving power to hold courts of justice, and being therefore for the public benefit, are obligatory and imperative; and the right of determining suits cannot be lost by non user, for it is a duty to the public and to the crown as well as a privilege vested in the corporation.^(s) But a *mere permission or power given to a corporation about any matter of a different nature, is not construed as [*35]

(k) *Rex v. Swyer*, 10 B. & C. 486.

(l) *Dighton's case*, 2 Vent. 82; 14 Vin. Abr. 66.

(m) *Darcie's case*, 11 Rep. 86 b; Definition of Monopoly, 3 Inst. 181; vid. 21 Jac. 1, c. 3, ss. 1. 9; Bac. Abr. Prerogative, F. 4.

(n) Bac. Abr. Monopoly, A.; 3 Inst. 182, 183; 3 Mod. 126. 131, note (e); Com. Dig. Trade, A. 5.

(o) *Vid. Nightingale v. Bridges*, 1 Show. 134.

(p) *Vid.* 6 Geo. 1, c. 18, for constituting two assurance companies with exclusive powers for thirty-one years.

(q) *Mayor, &c., of Berwick v. Johnston*, Lofft, 334; nullus faciat merchandizam construed to mean a prohibition against any stranger making manufactures within the corporation, S. C. per Lord Mansfield, C. J., qu. tam. for from *Mad. Firm. Burg.* p. 276, note (m), it appears that in the earliest times the ordinary meaning of merchandizas was as now, saleable goods. Vic. acc. *Mad. Firm. Burg.* 275, note (l), merchandizas synonymous with bona. Vid. acc. id. p. 273, note (i); id. p. 272, note (g), and a charter of Hen. 3 to the city of Worcester, where *facere merchandizam* evidently means to trade; id. p. 272, note (d).

(r) *Yearb.* 13 Hen. 4, pl. 14; *Taylor of Ipswich v. Sherring*, 1 Rol. R. 4; 9 Hen. 3, c. 1; *Earl of Yarmouth v. Darrell*, 3 Mod. 75; *Merchant Adventurers' Co. v. Rebow*, 3 Mod. 126; *Michelbourne's case*, 2 Brownl. 296; 13 Hen. 4, pl. 14; 11 Rep. 87; 5 Com. Dig. 567; Com. Dig. Trade, D. 1; *East India Co. v. Evans*, 1 Vern. 307.

(s) *Rex v. Mayor, &c., of Hastings*, 5 B. & Ald. 592; note; *Merew. & Ste. Hist. Boroughs*, 1885; vid. *Cro. Jac.* 155. So in a statute *may* means *shall*, when the statute directs the doing of a thing for the sake of justice; 2 *Dwarris Stat.* 712; or for the public benefit; id. *ibid.* The "words 'shall and may' in general acts of parliament, or in private constitutions, are to be construed imperatively;" *Att.-Gen. v. Lock*, 3 Atk. 164; "shall or may;" id. 212. But the grant must ascertain the persons before whom the court is to be held, or it will be void; *Yearb.*, 2 Hen. 7, fol. 13; 6 Vin. Abr. 265, pl. 15. If in prescribing for an ancient court, it be alleged that the court was held first before the bailiffs and then before the mayor, the plea will be bad unless it also states the charter by which the change was made; *Adney v. Vernon*, 3 Lev. 243; Com. Dig. Franchises, F. 9. As to the meaning in a royal charter of *attachiamenta placitorum coronae*, 9 M. & W. 572, 573; 4 Inst. 71. Instances of directory clauses, *Prowse v. Foot*, 2 Bro. P. C. 289; *Pender v. Reg.*, 2 id. 294. Vid. *inf.* note (y).

binding. Thus a mere power of electing for a year given to a corporation, who before might elect for life, does not necessarily import that the power so given must be always exercised to the exclusion of the former,^(t) unless such a power be connected with the indispensable duty of keeping up the continuity, and maintaining the duration of, the body politic; therefore where power is given to choose a mayor, then as the body can do no corporate act without their head, and consequently, if the power were not acted on, the corporate existence must be destroyed, such a power is absolutely imperative.^(u) The corporation will be compelled to hold the court in such a case as that mentioned above, although it has fallen into disuse for 200 years, and there are no funds at the command of the corporation applicable to the expenses of holding it, for non user of a liberty does not determine it.^(x) Perhaps, therefore, it may be concluded generally, that clauses in charters permitting the corporation to do something in which strangers to the corporation are interested, bind the corporation; where, however, the words of permission or direction do not relate to matters extraneous to the corporation, nor to the administration of justice, and if considered as imperative would operate to abridge a power or right inherent in the corporation as being incidental to all corporations, there such words may be neglected or not, according to the convenience of the corporation. Thus where a charter provided that "it shall be lawful" to elect an alderman within eight days of a vacancy, it was held that this clause did not operate to deprive the corporation of the power of election, which is incidental to all corporations for the purpose of keeping up their succession, and that an election made after the lapse of the eight days was good, for the affirmative power did not toll the implied power.^(y)

The words "for the time being," used in a charter, with respect to elections of corporate officers, such words being placed in connection with integral parts of the corporation, as the aldermen "for the time being," do not confine the description to the actually existing state of the corporation; they mean no more than *hodiernè diurnè*, and refer to the bodies [*36] on whom power is conferred by the charter in succession *from one generation to the other.^(z) Where a charter gives a power

(t) *Rex v. Mayor, &c., of Chester*, 1 M. & Selw. 101.

(u) *Vid.* the case put by the Att.-Gen., *Quo. Warr. Cas.*, Att.-Gen. argum., p. 21.

(x) *Rex v. Mayor, &c., of Wells*, 4 Dowl. 562; *vid.* *Rex v. Eastern Counties Railway Co.*, 10 A. & E. 557; *Rex v. Commissioners, &c., of Manchester*, 4 B. & Ad. 333; *Vin. Abr. Prerogative*, Y. c. pl. 14, marg.

(y) *Vin. Abr. Corporations*, G. pl. 5; *Hicks v. Mayor, &c., of Launceston*. The case of *Launceston*, 1 Rol. Abr. 513, *Corporations*, G. pl. 5, cited 8 Mod. 127; 13 East, 373; *vid.* *Rex v. Bird*, 13 East, 390. In *R. v. Blunt, Andr.* 295, the words "shall and may be lawful to elect, &c.," not interfering with any incidental right of the corporation, but only with one that had been conferred by a former charter, were held to be words of grant and binding on the corporation. In *Rex v. Bailiffs of Eye*, 1 B. & C. 86, it is said that "shall and may be lawful" in charters have generally been construed as giving an option to do or not to do the thing respecting which they are used; per *Abbott, C. J.*, *S. P.* in *R. v. Bailiffs, &c., of Eye*, 3 B. & C. 272; *vid. tam.* *Rex v. Mayor, &c., of Chester*, 1 M. & Selw. 101, and *sup. note (s)*.

(z) *Rex v. Morris*, 4 East, 17; *vid.* 9 A. & E. 356. 371, 372.

of distress, a power of sale is never implied; nor does the word imply a power of sale when used in a by-law; but in an act of parliament it always does.(a) Where the charter grants that the corporators or inhabitants of the district over which the corporation has jurisdiction shall be sued in the courts of the corporation and *not elsewhere*, this is an exemption, and advantage of it must be taken by each inhabitant, who is sued in a superior court, by way of plea to the jurisdiction of such superior court.(b) This is the privilege of a defendant alone, and he may waive it if he pleases.(b)

If the grant be that the corporation shall have consuance of all pleas, &c., arising within their jurisdiction, then it has been laid down the privilege must be claimed by the corporation in the court where the action is brought,(c) and not by the defendant; but the truth seems to be that it may either be claimed or pleaded. But the grant is void unless it prescribe before what judge the pleas shall be held, for the grantee cannot make a judge; but if the corporation had a court before the grant, then the grant may be good, without specifying before whom or what court the pleas shall be held.(d) A grant of consuance, where a scholar or privileged person shall be sued, extends not to cases where the college or corporation is sued.(e) Consuance of *pleas* extends not to felonies,(f) but it does extend to all actions in which the court, from its constitution, can do right. It cannot be claimed by custom.(g) It must be claimed in the first instance.(h) A non intromittant clause excludes the jurisdiction of the county justices, but not of the superior courts at Westminster.(i)

Before quitting the subject of the interpretation of the words of charters, it is proper to observe, that, although words of creation only, and not of confirmation, appear in the earliest charter of a local corporation, nevertheless the corporation may be a corporation by prescription, the charter reciting the borough to be an ancient borough, and to have certain immemorial franchises, &c.; and it makes no difference that such earliest charter was granted within the time of legal memory;(k) *and [*37] we have seen that concessimus is sometimes used in ancient

(a) *Arris v. Bradshaw*, 1 Keb. 733.

(b) *Cross v. Smith*, 2 Ld. Raym. 836. A grant *tenere placita* carries all incidents, as officers, process, &c.; Com. Dig. Courts, P. 4; and so of grant of consuance of pleas, id. P. 8. The latter gives *exclusive* rights of trying causes.

(c) Com. Dig. Courts, P. 3, P. 2, qu. tam.; and vid. infra. UNIVERSITIES.

(d) Yearb. 2 Hen. 7, fol. 13; Lib. Ass. 37 Edw. 3, fol. 217; 1 Hen. 7, fol. 16; vid. 9 M. & W. 570. 580, infra, UNIVERSITIES.

(e) Com. Dig. Courts, P. 2, compared with id. P. 3; Dyer, 157, pl. 27; 2 Siderf. 105. 121.

(f) Com. Dig. Courts, P. 3.

(g) Co. Litt. 114 b; *Foster v. Mitton*, 1 Salk. 183; Com. Dig. Courts, P. 3.

(h) *R. v. Agar*, 5 Burr. 2820.

(i) *R. v. Cambridge*, 2 Ld. Raym. 1339; vid. 2 B. & A. 533.

(k) *Rex v. Mayor, &c., of Stratford-upon-Avon*, 14 East, 348; *Vaughan v. Lewis*, Carth. 228; and therefore usages in such corporation may be prescribed for as immemorial usages, &c. But they must not, it seems, be claimed by prescription and grant also; vid. argu. 9 M. & W. 567.

A corporation, it seems, may plead the grant of a charter before time of legal memory, which charter has since been lost, and then a confirmation of it by charter since; *Foster v. Mitton*, Salk. 184; vid. 9 Rep. 29; Vin. Abr. Prerogative, P. c. pl. 7; Bull. N. P. 212.

charters as well to signify a recognition as an original grant;(l) and the words *damus et concedimus* may be taken as a grant, or as a confirmation, at the election of the grantee.(m) *Erigimus* in a royal charter, as well as in the deed of a private founder, is construed to mean founding as well as building, and may mean either exclusively, according to the context.(n)

A power or liberty granted to a corporation, and having relation to strangers, as the power of keeping and holding courts of justice, cannot be lost by non user, as we have seen; but if a vill be incorporated by letters-patent before time of memory, and the franchises have never been used since time of memory, it is said that the franchises are lost.(o) It does not follow, however, that the corporation is dissolved, for franchises are not essential to a corporation, but are only privileges belonging to it.(p)

We have dwelt the longer on this part of the subject, because the privileges of corporators depending upon the words of their respective charters, very nice questions frequently arise out of them. Thus, in a charter to a corporation, words charging all officers of the crown not to press or take for the service of his majesty, &c., any person or persons, being members of the said corporation, was held not to be an exemption granted to the corporation, but merely a direction to the king's officers.(q) A grant of exemptions, expressed in clear words, cannot be objected to on the ground that, by the constitution of the corporation, the number of the members is unlimited who might enjoy such privileges;(r) but grants of exemption from serving common law offices ought to be taken strictly;(s) and must not extend to prevent the particular office from being served at all.(t) Thus, if there be not sufficient jurymen to try causes, besides the persons who are exempted, such charter of exemption is void.(u)

EVIDENCE OF CHARTERS.

With respect to the means of evidence of charters, we must remark, that members of a private corporation cannot have a *mandamus* to inspect

(l) 1 H. Bla. 213; 13 M. & W. 336; Yearb. 21 Edw. 4, fol. 55, pl. 28; sup. 33.

(m) *Hall v. Green*, cited Savil. 133.

(n) *Per Hardwicke, C., Vaughan v. Farrar*, 2 Ves. 182; *vid. Foy v. Foy*, 1 Cox, 164.

(o) *Vin. Abr. Prerogative*, Y. c. pl. 14.

(p) *Rex v. Mayor, &c., of London*, Skin. 311. *Vin. Abr. Prerog. Y. c. pl. 19.* For explanations or illustrations of many unusual terms and words sometimes met with in old charters, the best aids are Cowell's *Interpreter*, Spelman's *Glossary* and Hickeys's *Thesaurus*, Du Fresne's *Glossary*; *vid. Harg. Co. Litt.* 6 a, note 24.

(q) *R. v. Clarke*, 1 T. R. 687.

(r) *R. v. Clarke*, 1 T. R. 679.

(s) *R. v. Clarke*, 1 T. R. 685; Yearb. 2 Hen. 4, fol. 19, pl. 16.

(t) *R. v. Clarke*, 1 T. R. 679; *Cro. Car.* 259, 260.

(u) 2 Inst. 129; 52 Hen. 3, c. 14; *Cro. Car.* 259, 260; 5 & 6 Will. 4, c. 76, s. 123. Exemptions from serving as constable, 1 T. R. 679; *headborough*, *id.*; from toll, 4 T. R. 130.

Information in the nature of *quo warranto* lies to try the right against a person claiming exemption from civic jurisdiction within the corporate limits; *Co. Entr.* 528 a.

the charter, unless they show it to be necessary with reference to some *specific dispute or question then depending in which they are interested, and then the inspection will be granted only to such [*38] an extent as may be necessary for the particular occasion.(x)

With respect to municipal corporations, it does not appear that the Municipal Corporations Act has introduced any alteration in the law as it stood with respect to the right of inspection of charters. A person will have a mandamus to allow him to inspect (but only, as it seems, where the charter cannot be found to be enrolled at the Office of the Rolls)—

1. In an action by the corporation against him where he is a corporator.(y)

II. In such action, where he is a stranger to the corporation, if he be affected by the provisions of the charter.(z)

III. In a dispute between himself and another corporator as such.(a)

But where defendant justified under a corporation for distraining for toll, it was held that the plaintiff had no right to inspect as he was a stranger to the corporation.(b) An inspection will never be granted in case of a corporation, where it would have been refused against a private person.(c) Where the party desires to see the charter only, and not other books or documents, and the corporation refuse him liberty to do so, one course is to apply at the patent roll office, where the enrolment is kept, and may be inspected and copied.

Notwithstanding that a royal charter ought to be enrolled, and so become matter of record, yet where circumstances justify such a step, the courts will presume a charter, although it must have been granted if at all within the time of legal memory.(d) If, however, the original charter has been enrolled but since lost, an exemplification or constat of the roll may be used in evidence, being pleaded with a profert.(e)

(x) *Rex v. Master, &c., of Tailors' Company*, 2 B. & Ad. 115.

(y) *Vid. infra*, EVIDENCE; *Mayor, &c., of Barnstaple v. Lathey*, 3 T. R. 303; *vid. Young v. Lynch*, 1 W. Bla. 27. The same holds true where the application is with a view to dissolve an injunction against him obtained by the corporation; *Reg. v. Mayor, &c., of Beverley*, 8 Dowl. 142.

(z) *Vid. Harrison v. Williams*, 3 B. & C. 162; EVIDENCE, *infra*.

(a) *Phill. Evid.* 812; *vid. infra*, EVIDENCE. A person, who is a corporator, will not be allowed to inspect on behalf of a person who is not; *Rex v. Antrobus*, 2 A. & E. 788.

(b) *Vid.* 3 Wils. 398; 8 T. R. 594. A bill of discovery in prejudice of the king's charter refused in equity; *Brookes v. Bradley*, 2 Chanc. Cas. 95.

(c) *Phill. Evid.* 812.

(d) 2 Bla. Com. 346; *Mayor, &c., of Hull v. Horner*, Cowp. 102. But where it appears in evidence that the charter was enrolled, but the plaintiff does not produce it, the jury are not to presume a charter from the mere evidence of usage; *Brune v. Thompson*, 4 Q. B. 543.

(e) 3 Edw. 6, c. 4; 13 Eliz. c. 6; *Vin. Abr. Franchises*, G. pl. 4; *vid. Page's case*, 5 Rep. 52. That such exemplification or constat is pleadable, *vid.* 5 Rep. 53, 54, since 13 Eliz. c. 6. As to distinction between exemplification and constat, *vid.* 5 Rep. 53, 54. It is the practice to plead a charter or letters-patent with a profert, *qu. tam. Jeffrey v. White*, 2 Dougl. 476. Generally a charter, if enrolled in any court of record, may be pleaded in that court without profert, notwithstanding it were not pleaded before; *Wymark's case*, 5 Rep. 74 b. In other courts it seems that profert ought to be made as well when the party pleading derives an interest

[*39] *With respect to the evidence necessary to prove a royal charter, it is said that a charter may be proved either by the production of the original under the great seal,^(f) or by exemplification under the great seal,^(g) or by examined copies of the record;^(h) this distinction having been taken, that a copy of the charter under the great seal cannot be given in evidence, but a copy of the record thereof may.⁽ⁱ⁾ And every presumption, even of an act parliament, will be made in favour of old grants long enjoyed.^(k)

The subject of evidence of charters may perhaps be fitly closed with this remark:—A new charter granted in consideration of a surrender of a former charter is void if the surrender has not been enrolled, and we may observe, that the reason usually given, namely, that the crown in such case has been deceived in its second grant, is not the only reason, but that the decision is capable of being supported by reference to an important rule of evidence; for if a charter be given in evidence, in which it is recited that a certain office was before granted to J. S., and that J. S. surrendered it to the crown, who accepted the same and granted it to J. D., this is not enough to avoid the title of J. S., but the record of the surrender must be shown or a true copy of it; for the recital of such surrender is not the best evidence the nature of the thing will admit. Now if the surrender has never been enrolled, of course the record cannot be produced.^(l)

The case just stated is obviously in principle immediately applicable to the case of corporate rights, and is an illustration of the coherence and consistency of the great system of English law; for if a surrender were not enrolled, it would be impossible to produce the record of it, and therefore such a charter could not be supported in any case where proof of it was necessary, the effect of which would be practically the same as to declare the charter to be a void or illegal instrument. Thus we arrive at the same conclusion, from considerations arising out of the law of evidence, which has for its object especially the protection of the subject, that we before arrived at from principles derived from the law of prerogative, which was framed for the support of the authority of the crown.

directly from the charter, as when he justifies as servant, &c.; *Leafield v. Hellicar*, Cro. Jac. 317; 1 Chit. Plead. 380, 7th edit. But oyer of a charter enrolled in chancery cannot be claimed, though a profert be made; 1 Wms. Saund. 9, note 1. And to plead a royal charter as being under the great seal, &c., is sufficient, without saying "sealed," for the latter is implied in the word "under;" *Rex v. Mayor, &c., of Canterbury*, 1 Stra. 674. But it ought to be stated what seal the charter is under; Com. Dig. Patent, H.

(f) Tayl. Evid. 1018. When profert is made of the charter under the great seal, the opposite party cannot demand oyer of it; *Rex v. Amery*, 1 T. R. 149; *Jeffery v. White*, 2 Dougl. 476. Nor can he plead nul tiel record; *Eden's case*, 6 Rep. 15 b; *Hynde's case*, 4 Rep. 71. But non concessit is a good plea, S. C.; and an issuable one, *Bedells v. Massey*, 2 D. & L. 322.

(g) Tayl. Evid. 1018.

(h) Id. *ibid.* qu. tam.; *vid. Leyfield's case*, 10 Rep. 92 b; Bull. N. P. 227.

(i) Anon. 12 Mod. 579; *Leyfield's case*, 10 Rep. 92 b.

(k) *Vid. cases cited* 1 B. & Ad. 773.

(l) Bull. N. P. 226, 227; 2 Roll. Abr. 678; Vin. Abr. Prerogative, Q. b. pl. 2; 5 B. & C. 410.

VOIDANCE OF CHARTERS.

With respect to voidance of charters, the effect of a charter being declared void by act of parliament is, that all acts done under it are themselves void.^(m)

*It has been laid down in the old authorities that letters-patent whether rightly granted or not, are in force until repealed by scire [^{*40}] facias.⁽ⁿ⁾ So that if the crown grants the same office to two persons by letters-patent dated on two consecutive days, the latter are merely void, yet the patentee of the first letters-patent must bring sci. fa. in order to avoid them by judgment of the court;^(o) and accordingly it is laid down that the writ of sci. fa. to repeal patents lies in three cases.

I. Where the king grants by several letters-patent the same thing to several persons, the original patentee shall have sci. fa. to repeal the second or other grants (Note 2 Dyer, 998, A.)

II. When the king, having the power to grant that which the letters-patent purport to grant, is moved to do as upon a false suggestion, then it is a prerogative of the Crown to have a sci. fa. to repeal his own grant.

III. When the king grants anything which by law he cannot grant, he may have a sci. fa. to repeal his own letters-patent.^(p)

Nevertheless, it appears that some doubt has been expressed whether letters-patent, which are defective in any of these three respects, are not void at once without the necessity of proceeding by sci. fa.^(q) It seems, at any rate, clear that sci. fa. is not necessary where the letters-patent themselves disclose a defect in the authority to make them; it has been said that they are then void in law without any sci. fa. to repeal them;^(r) although it may nevertheless be advisable to proceed by sci. fa., for the more modern opinion seems to be, that the most proper mode of proceeding to abrogate a charter, of whatever description, is by sci. fa.^(s)

(m) Pippard v. Mayor, &c., of Drogheda, 2 Bro. P. C. 321.

(n) Bro. Abr. Sci. Fa., 58. 63. 173; 3 Lev. 220; vid. 17 Vin. Abr. 100, pl. 1, marg.; id. 117, pl. 14; Keilw. 134; 4 Inst. 88.

(o) Vin. Abr. Prerogative, S. b. pl. 14; U. b. pl. 2. Vid. case of Bishop of Winton, cited Dyer, 269 a; case of Corporation of Wells, cited in Englefield's case, Moore, 327.

(p) 4 Inst. 88; Gledstanes v. Earl of Sandwich, 5 Sc. N. R. 689; vid. Reg. v. Boucher, 3 Q. B. 650. The second grantee cannot have sci. fa. to repeal the prior grant; Basset v. Mayor, &c., of Torrington, Dyer, 276 a.

(q) Vid. dict. per Lord Denman, C. J., 3 Q. B. 650; Twisden, J., in Rex v. Earl of Dorset, T. Raym. 177, says that letters-patent, *although void*, may be repealed by sci. fa., and he cites a dict. per Keble, J., Keilw. 19 a, to that effect.

(r) Vin. Abr. Prerogative, S. b. pl. 2. And that on non concessit the plaintiff must be nonsuit, vid. id.; 2 Wms. S. 72 q; Com. Dig. Patent, F. 1; 2 Rol. Abr. 191 S. pl. 2. It must be observed that that plea puts in issue either that the crown had nothing in the things granted by the charter, *or* that the things which the charter purports to grant did not pass by it, which is a peculiarity belonging to grants from the crown by reason of their being made by matter of record; Cooke v. Blake, 1 Exch. R. 238; Hynde's case, 4 Rep. 71 b; Bedell v. Massey, 2 D. & L. 322.

(s) It was said argu. by Pollock, A. G. (A. D. 1842), in Rex v. Neilson, 1 Webst. Pat. Cas. 672, that he never knew a sci. fa. except in the case of a patent for an invention; but Rex v. Governor, &c., of Copper Miners in England, Lill. Entr. 411; Rex v. Bailiffs of Bewdley, 1 P. Wms. 207; and Mayor, &c., of Liverpool v. Chan-

With respect to the question whether a charter may be repealed *in part* by sci. fa., it must be confessed that considerable obscurity exists; though it has been held, that where one part of a charter is good, and [*41] *the other part voidable, the least may be avoided by sci. fa., and the rest may stand good.(t)

As has been already observed, the effect of an act of parliament declaring a charter void, is to make void all acts done under it.(u)

There are various modes of raising the question of the validity of a charter, and a stranger to the corporation may do so, provided, as it seems, he has a pecuniary interest in proving the nullity of the charter;(x) but what the effect of a judgment declaring void a charter would be on acts done under it does not seem to have been decided, although it has been argued that the effect of judgment of forfeiture in an information in the nature of quo warranto would be to make void every act done under the charter.(y) But though a stranger may dispute the validity of the charter under the above circumstances, yet the court will not allow the legality of the incorporating charter of a borough, granted under 7 Will. 4 & 1 Vict. c. 78, s. 79, to be impugned in an information in the nature of a quo warranto against an officer of the borough; and on such appearing to be the object of the relator, the information will be refused.(z)

The question of the validity of a charter has also been discussed on a special case;(a) so that it would appear judgment against the validity of a charter may be given in four different modes of raising the question, viz. in sci. fa.; information in the nature of a quo warranto; an action

cellor of County Palatine of Lancaster, in B. R. Trin. T. 12 Ann. (vid. 1 Stra. 151), are instances of sci. fa. to repeal charters of incorporation. The case of the proceedings against the corporation of Bewdley is the more important as an authority because they were undertaken in compliance with an address to the crown from the House of Commons, desiring that directions might be given to the Attorney-General to take the proper methods for repealing the charter; vid. 4 Chandler's Debates, 176; 2 Dougl. Elect. Cas. 22.

(t) Per cur. Sackville Coll. case, T. Raym. 177, 178; Reg. v. Bailiffs of Bewdley, 1 P. Wms. 207. A writ of sci. fa. was brought, Dyer, 276 b, pl. 53, to repeal a charter creating a corporation and granting a market, quoad the grant of market. A charter of Edw. 3 to Great Yarmouth was repealed as to part by act of parliament of 50 Edw. 3, come chose fait countre common profit de realme; Hale de Portub. Mar. ap. Harg. Law Tracts, 66.

(u) Vid. sup. p. 39.

(x) Rutter v. Chapman, 8 M. & W. 1; vid. 3 Q. B. 652, per Ld. Denman, C. J.; Rex v. Hanger, 1 Bol. R. 148.

(y) Quo. Warr. Cas. Pollexf. arg. III.

(z) Reg. v. Taylor, 11 A. & E. 949; vid. per Patteson, J., 3 Q. B. 652. It must be observed, that what is said in the text extends to all officers appointed under the charter, and not merely to corporate officers, properly so called; for the decision in the case named was made in respect of a borough coroner appointed under the provisions of the Municipal Corporations Act, and he, it seems, is not a corporate officer; per Coleridge, J., in Reg. v. Grimshaw, 16 Law J. (N. S.) Q. B. 389. The practice in this respect appears to have altered in some degree since the passing of the Municipal Corporations Act, at least if the decision in the case of Reg. v. Taylor may be understood to have the effect of denying a quo warranto information wherever the court can see that in the result the validity of the charter will come in question; for such informations were entertained before that act passed; vid. Holdsworth v. Mayor, &c., of Dartmouth, 11 A. & E. 490. 502.

(a) Vid. Reg. v. Boucher, 3 Q. B. 641.

for money had and received, brought by a stranger against an officer appointed under the charter; and a special case from sessions.

Now some of these proceedings would seem to be equally applicable in most cases to the repeal of part of a charter; it is therefore extremely remarkable, that no trace of any judgment repealing part of a charter should have been discovered in any of the books of entries. Nevertheless it has been stated by the courts, both in former times and lately, that a charter may be repealed in part; for that where part of a charter is bad, as depending on false suggestions of the grantees, there the charter is voidable altogether; but where the vice of the obnoxious *part arises from any other cause, and no false suggestion is mingled [*42] with the consideration for granting the charter, then the charter may be repealed as to that party only. (b) But this position has been qualified with the limitation, that the clauses to be repealed be independent and substantive clauses; if the objectionable clauses influence and affect the whole of the charter, the whole must be repealed, it is said. (c) It has been solemnly decided in the House of Lords, after hearing the judges, that it is the undoubted right of the crown to repeal a charter in which the king is deceived, to the subjects' prejudice; (d) and where the charter operates prejudicially to the subject, a sci. fa. is a writ of right. (e) And it has been lately intimated by the Court of Queen's Bench, that sci. fa. is the proper mode of proceeding where a charter operates "to defeat the law and public policy." (f) And perhaps on this principle the decision in *City of Wells' case*, cited *Moore, Rep. 327*, viz., that when a charter is in part prejudicial to the subject, it shall be repealed altogether, which is said to have passed on conference with all the judges, may be supported. (g)

Scire facias is also one mode of repealing a charter, where there exists under it a legally existing body capable of acting, who have been guilty of an abuse of the power entrusted to them by the charter. (h) The writ

(b) *Vid. Morgan v. Seaward*, 2 M. & W. 561. 563. Thus where the crown granted a manor, and also the sole vending of alum, reserving rent, it was held (with some hesitation, however), that the grant being void in part, viz. as to the sole vending of alum, was bad altogether, the vicious part being of the substance of the grant, and the rent being reserved out of the whole; *Lord Mulgrave v. Mounson*, 2 Freem. 17.

(c) Per Hale, C. B., *Sackville Coll. cas. T. Raym. 177*; *vid. Fitz. N. B. 179*; 22 Ass. pl. 34; *Vin. Abr. Prerogative, G. b. 4, pl. 2*.

(d) *Reg. v. Butler*, 3 Lev. 220; *vid. Reg. v. Boucher*, 3 Q. B. 641; 17 *Vin. Abr.* 100, 101. 115. 117; 4 *Inst. 88*.

(e) *Reg. v. Aires*, 10 Mod. 260. 354; *Butler's case*, 2 Ventr. 344; *Brewster v. Weld*, 6 Mod. 230, *argu. T. Raym. 155*. How to state the prejudice, &c., *Rex v. Arkwright*, 1 Webst. Pat. Cas. 64, note (c); *Rex v. Neilson*, 1 Webst. Pat. Cas. 671. Therefore the crown is bound to allow its name to be used as prosecutor on behalf of the subject injured, 3 Bla. Com. 260, 261; 4 Steph. Com. 48; and the writ does not abate on the demise of the crown, 1 Stra. 43.

(f) *Reg. v. Arnaud*, 16 Law J. (N. S.) Q. B. 55; *Rex v. Bailiffs, &c., of Bewdley*, 1 P. Wms. 207.

(g) *Vid. Ferrers v. Cotton*, Yearb. 7 Hen. 4, 41. 43 b, and this case seems to be accordant with the reasoning of the court; 2 M. & W. 561.

(h) Per Ashhurst, J., in *Rex v. Pasmore*, 3 T. R. 244; *Vanacre's case*, 1 Ld. Raym. 499; *vid. Qu. Warr. Cas. Judgment*, 119; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 385, *acc.* This however is restricted, it is conceived, to corporations originating in the king's charter exclusively, and does not extend to such as

of sci. fa., in case of appeal, may be sued out either in the Petty Bag Office in Chancery, *(i)* or in the Court of Queen's Bench; *(k)* and now [*43] either in term time or vacation. *(l)* The writ may *also be returned either in term time or vacation, and may be directed to the sheriff of any county in England or Wales. *(m)*

What is to govern the discretion of parties in deciding out of which court they will sue the writ, or whether the less expensive and more expeditious course of suing out the Queen's Bench process may always be adopted, seems to have been left undecided. A few remarks are here offered, in the hope of throwing some light upon this question.

The writ of sci. fa. to repeal letters-patent was formerly granted upon petition to the crown, the prayer of which was grantable as of course, the petition being in the nature of a petition of right; now, however, the petition has become obsolete, and the writ issues upon the Attorney-General's fiat, which also appears never to be withheld, though it seems to be necessary even where the writ is grantable ex debito justitiæ. *(n)*

The usual proceedings being brought to issue, when the issues in fact have been tried at nisi prius, or at bar, in the Queen's Bench, or Common Bench, or Exchequer, a transcript of the record and of the verdict is sent back into Chancery, if the writ is to cancel as well as repeal the charter, for the Lord Chancellor to give judgment upon it; for the Queen's Bench has no authority to cancel any of the records of Chancery, much less letters-patent under the great seal, which no judge except the Lord Chancellor has any jurisdiction over. *(o)*

are created by charter from the crown in pursuance of acts of parliament, for it would seem that such charters can only be repealed by act of parliament. This leaves municipal corporations, both those which were in existence at the passing of the Municipal Corporations Act, and those created since, subject to the rule stated in the text. As to the case of a corporation by prescription abusing its power, the proper mode of proceeding against it would be by quo warranto information, which also seems to be a concurrent means of punishment in all cases of the class mentioned in the text; 4 Mod. 55.

(i) 4 Inst. 88; 2 Wms. Saund. 72; vid. form of writ of sci. fa. to repeal charters of a corporation, *Rex v. Governor, &c., of Copper Miners in England*, Lill. Entr. 411. The object there was to repeal and cancel *all* the charters of the corporation.

(k) Yearb. 3 Hen. 4, 6, 29; 4 Inst. 72; vid. 2 Wms. Saund. 72, p. q; 6 Bac. Abr. Sci. Fa. C. 3; Form, Tidd. Forms, 446, 8th ed., 487, 9th ed.

(l) 11 & 12 Vict. c. 94, s. 22.

(m) 11 & 12 Vict. c. 94, ss. 23, 25. Declarations and pleas are to be delivered, not filed, id. ss. 27, 28; and issues may be tried in any of the superior courts; id. s. 29.

(n) Vid. 6 M. & Gra. 260, note; Reg. v. Neilson, 1 Webstr. Pat. Cas. 671, note *(i)*; id. 669, note *(f)*; Hindmarch, Patents, 385; 1 Rol. Abr. 534, G. pl. 1. As to the mode of proceeding to obtain the writ, vid. Hindm. 385, 386; appearance, 393; declaration, 394; venue, *Rex v. Haine*, 2 Cox, 235; time for pleading, Hindm. 395; nol. pros., 396, 397; demurrer, 397; Gude's Crown Pract. Q. B. App. 668; pleading, Hindm. 397, 400, 401; issues, 401; at law, 401, 402; in fact, 402; venire facias, 402—405; trial, 407; nisi prius record, 408; bill of exceptions, 412; venire de novo, 414; new trial, 414; costs on new trial, Reg. v. Bewdley, 1 P. Wms. 224; signing judgment, 415; forms, id. Append. cap. 2; form of Attorney-General's fiat for the writ, 2 Rich. Pract. C. B. 393; form of writ, id.; amendment, *Holland v. Phillips*, 10 A. & E. 149; Gude's Crown Pract. Q. B. App. 668. On the other hand, the Attorney-General is not entitled, as of right, to a trial at nisi prius, and the court may, if they think fit, grant defendant a trial at bar; *Astry's case*, 6 Mod. 123. Vid. as to trial by proviso, and other points of practice, Hindm. 407.

(o) St. Saviour's case, 2d resol. 10 Rep. 67 b; Hind. Pat. 402, 405, 417, 419,

It seems, therefore very doubtful which is the proper course to adopt; the conjecture therefore is here hazarded, that a writ may *issue out of the Queen's Bench when the object is to repeal a part of a [*44] charter; but must issue out of Chancery when the object is to repeal and cancel the charter; the former mode of suing out the writ when practicable is the most desirable, as being most expeditious and less expensive. This would reconcile some degree of conflict that there appears among the authorities, as to whether judgment can be given in the Queen's Bench. In the first case, it is apprehended that it may; in the second, that it cannot, at common law.(p)

Directions as to proceeding generally on this writ may be found in the books of practice, and the proceedings respecting the repeal of charters from the crown are fully detailed in Mr. Hindmarch's valuable Treatise on the Law of Patents; and therefore it is not thought necessary to state them here,(q) especially as late acts of parliament have regulated the proceedings in this form of action.(r)

With respect to the judgment, there is a difference when the charter has comprehended a grant, either of lands or any species of freehold tenement, e. g., franchises, rights, powers, privileges, &c., and when it has been merely a charter of incorporation, e. g. in the case of a trading corporation, where the crown grants nothing beyond the essentials of incorporation. In the case of a municipal or other corporation within the first class, the entry would be, on a writ sued out of Chancery, after reciting the writ and proceedings, &c., "Wherefore it is considered and adjudged by the said Lord Chancellor, and by the said court here, upon the advisement aforesaid, that the aforesaid letters-patent of the aforesaid queen to the aforesaid [names of grantees], as is aforesaid made, that they should have the aforesaid [lands, franchises, &c., corporate rights, &c., as in the charter], to be revoked, vacated, annulled, and to be held vacate, invalid, and taken for wholly null, and also that the inrolment of the same letters-patent be quashed, cancelled and annulled; *and that those lands, &c., [as in the charter] with their appurtenances into the hands of the said lady the queen, be now taken and seized."(s)

The real property included in the judgment must of course be only such as was granted in the charter repealed; the corporation would

420, 421. Vid. the form of judgment in 8 Rep. 31; Tidd's Pract. 1093, 9th ed. Qu. tam. for in *Rex v. Arkwright*, 1 Webst. Pat. Cas. 74, the Court of Queen's Bench gave judgment that the patent be cancelled; and in *Reg. v. Aires*, 10 Mod. 259, that it be repealed; and on a judgment in Chancery on a writ of sci. fa., it seems that error lies into the Queen's Bench; Hale's Jurisd. of the Lords, Harg. edit. 124. That issues in sci. fa. may be tried either at bar or at nisi prius, vid. *Eyres v. Taunton*, Cro. Car. 312; *Reg. v. Bewdley*, 1 P. Wms. 207. But they could not be tried at nisi prius without the consent of the crown, *Fitz. N. B.* 241 a; 2 Inst. 424; *Paddock v. Forester*, 8 Dowl. 834; *R. v. Banks*, Salk. 652. Now, however, that consent is not necessary; vid. 11 & 12 Vict. c. 94, s. 29.

(p) Vid. Hindm. Pat. 432.

(q) Vid. Hindm. Pat.; Holroyd, Pat. 183.

(r) 11 & 13 Vict. c. 94; 12 & 13 Vict. c. 109, ss. 29—41.

(s) 8 Rep. 31; 4 Inst. 88; Com. Dig. Patent, F. 8; Hindm. Pat. 423; entry of judgment for defendant, Hindm. 423, 424. After judgment for the crown, that the charter be cancelled, &c., it seems that *distringas* is the proper mode to compel the corporation to bring in the charter for that purpose; Hindm. 425. Yearb. 17 Edw. 3, 59; Friars Carmelites case, cited 11 Rep. 74 a.

OCTOBER, 1853.—5

retain all other real property provided the charter was not the incorporating charter; if it were so, then the corporation, on the charter being cancelled, would be dissolved, and any lands which it might have acquired aliunde, and whether held to its own use or in trust for charitable purposes, properly so called, would revert to the donors.

The clause following the * is not to be added where a prior grantee, [* 45] *using the king's name, brings sci. fa. in respect of something which, having first been granted to him, is subsequently granted either wholly or in part to another.(t)

But that clause seems to be indispensable in order to revest in the crown some of the rights which a charter has conferred on a municipal or other corporation; for otherwise the subjects of grant in the charter, e. g. port dues, waifs, wrecks, felons' goods, together with liberties, &c., would be left without any one being entitled to the perception of the profits arising from them.(u)

The distinction seems to be in the nature of the franchises; for, as is well known, some franchises upon forfeiture may exist in the crown, and be capable of regrant; e. g. fairs, markets with tolls, port dues, &c., which the crown may hold as a subject may; and such franchises it may be necessary to vest completely in the crown by a writ of seizure founded on the judgment quod capiantur.(x) Others, again, cannot exist in the crown, but only in a grantee from the crown, e. g. waifs, estrays, wreck, &c., which, upon the grant being forfeited, merge in the general prerogative of the crown, becoming actually extinct upon judgment quod capiantur, &c. In such cases no further proceeding is necessary.(y)

SURRENDER OF CHARTERS.

It remains to offer a few remarks on the subject of surrender of a charter, in addition to what has already been incidentally advanced on the subject.

Much dispute and discussion has in former times arisen upon the question whether a municipal corporation could resign or surrender its charter; but it is no longer necessary to enter upon the controversy, because it appears evident from the tone of the Municipal Corporations Act that the legislature intended to impose permanent and indefeasible duties on the bodies to which it applies, and on all that should be hereafter called into existence. It is apprehended, therefore, that those

(t) Dyer, 198 a, *Penwarren v. Thomas*; vid. Dyer, 197 b, pl. 45, *Hunt v. Coffin*. As to the writ of error, *Hindm. Pat.* 427; 6 M. & Gra. 257, note; costs, *Hindm.* 429.

(u) Vid. 8 Rep. 31; *Vin. Abr. Prerogative*, O. b, pl. 10; *Rex v. Toly*, Dyer, 197 b, pl. 46. Form of judgment in *Ferrers v. Cotton*, Yearb. 7 Hen. 4, 41, 43 b, was to repeal the letters-patent, and take into the king's hands the things granted; so *Rex v. Eston*, Dyer, 197 b, pl. 48. So it is said "in the case of liberties, in order to revest them in the crown, there should be judgment of seizure, or ouster at least, against the corporation;" *Mayor, &c., of Colchester v. Brooks*, 7 Q. B. 384.

(x) Per Holt, C. J., *Rex v. Mayor, &c., of London*, 1 Show. 276; 2 T. R. 556; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 384, 385; *Rast. Entr.* 538, pl. 16, 17, 18; 2 Inst. 222; *Heddy v. Wheelhouse*, Cro. Eliz. 592.

(y) Yearb. 15 Edw. 4, pl. 12; vid. 7 Q. B. 384, 385; Cro. Eliz. 592; 3 Inst. 21.

bodies, and such as may be hereafter created by the crown, with the powers given by that act and subsequent statutes, cannot be considered as having power to surrender their charters, and that an act of parliament would furnish the only means of removing the corporate character, at least in case of corporations by prescription; for supposing the surrender *of all the charters in the possession of *such* a corporation [*46] to be made, and accepted and enrolled, it would seem that the corporation, not having derived its existence from any of those charters, would continue, notwithstanding the surrender, and therefore that the purpose of such surrender would fail without the aid of parliament. The same must also be the conclusion, it seems, with respect to all corporate bodies created by charters passed in pursuance of acts of parliament, they cannot surrender.(z) With respect, however, to all other corporations aggregate, created by charter from the crown, there is now no doubt that they may surrender, and the surrender on being accepted by the crown, and enrolled in chancery, is complete, and the corporation, in most instances, would thereupon be dissolved to all intents and purposes.(a) The letters-patent must also be cancelled, and a vacatur of the enrolment of them entered upon the margin of the roll.(b) A charter granted upon a void surrender of a former charter is void also.(c)

A corporation having a capital or joint stock in which each member is individually interested, and which may become productive of individual benefit to each, will be restrained from surrendering their charter for the purpose of getting a new one altering the constitution of the body, on the ground that the charter did not contemplate at all, nor did the common law admit (except by consent of *all* the corporators) of an interest constituted by the charter being destroyed.(d) The distinction will be observed between a surrender of the charter and a surrender of the possessions of a corporation; for in the latter case the corporation may remain, provided the objects of its creation can be fulfilled without the possession of corporate property. Thus it is said that a dean and chapter may surrender all their corporate possessions and still continue a corporation; for their function of advising the bishop may be performed without the possession of real property in right of the corporation.(e) And when a charter has been surrendered, and the corporation reconstructed by the grant and acceptance of a new charter, the old corporation is not destroyed, but all their franchises, liberties, prescriptions,

(z) Qu. to whom must corporations created by the Bishops of Durham and other subjects surrender.

(a) A surrender is void without acceptance and enrolment; R. v. Osborne, 4 East, 327; Plowd. Com. 105; Com. Dig. Patent, E. G.; 7 Vin. Abr. 179; 17 id. 171, pl. 7; 3 T. R. 197; Butler v. Palmer, Salk. 191; in due time, Piper v. Dennis, Holt's R. 170; S. C. 12 Mod. 253; M. & Steph. Hist. B. 1262, 1263.

(b) St. Saviour's case, 10 Rep. 67.

(c) 1 Rep. 50; 4 East, 327.

(d) Ward v. The Society of Attorneys, 1 Collyer, 370.

(e) Case of the Dean and Chapter of Norwich, 3 Rep. 73; S. C. 2 Anders. 120; Hayward v. Fulcher, Palm. 491; Jones, 168; S. C. per Holt, C. J., 12 Mod. 19; Skin. 311, S. C.; Dean of Wells' case, Dyer, 273; Palm. 495; Vin. Abr. Corporations, I. pl. 11, 17, 26; Dyer, 282. So the possessions may be disannexed from a prebend, yet the corporation sole remains; Walrond v. Pollard, Dyer, 273.

rights, liabilities, debts, annuities, &c., remain unimpaired, *(f)* except so far as is specified in the new charter, and this even though the name be changed or altered *(g)* by the new grant. *The surrender of a [*47] charter and acceptance of a new one is said to operate to determine offices held durante bene placito of the corporation. *(h)*

With respect to the operation of acts of parliament on charters, we may observe, an act of parliament containing provisions inconsistent with any privilege or power conveyed by a previous charter always abrogates such privilege or power. Thus where a charter of Edw. 4 granted to the corporation of Norwich consuance of all pleas in attain of false verdict given in the courts of the city, and the stat. 23 Hen. 8, c. 3 enacted that all attainments thereafter to be taken should be taken in the King's Bench or in the Common Pleas, and in none other court, it was held that these words ousted the consuance of the city of Norwich, although the charter had been afterwards confirmed in the entire by Edw. 6, by general words. *(i)*

[*48] *NUMBER OF CORPORATORS.

WITH respect to the number of persons in whom a corporation may be vested, it is to be observed that a corporation may reside in a single person as the king, archbishops, bishops, deans, canons, archdeacons, parsons, who are all said to be corporations sole at common law. *(k)* The chamberlain of London is also a corporation sole for some purposes, and is said to be a corporation by custom; *(l)* that is, the earliest known origin of the rights exercised by that officer is usage. The customs of London however, having been confirmed by act of parliament, 7 Ric. 2, and repeatedly since, this case may be said to rest on statutory authority. *(m)* Two may also form a corporation, and a quasi corporation or body having corporate rights and capacities in a limited and imperfect degree only, and for certain purposes only. This is the case of churchwardens, guardians of the poor, the board of officers of her majesty's ordnance department, and many others. Instances occur of hospitals, schools, and one or two other classes of bodies corporate, made to consist of two persons only. According to the civil law three at least were required to form a corporation; *(n)* and it would appear that fewer than three persons cannot in England exercise *full* corporate rights and powers, inasmuch as a majority cannot be always obtained; whereas all acts of corporations

(f) Hayward v. Fulcher, Palm. 91; S. C. Jones, 166.

(g) Mellor v. Spateman, 1 Saund. 344; Bull. N. P. 213; 4 T. R. 425; 4 Rep. 87.

(h) Howard's case, Hutt. 87; Vin. Abr. Corporations, I. 3, pl. 11.

(i) Clovill's case, Dyer, 202 b; Co. Litt. 294 b; 11 Rep. 64 b.

(k) 10 Rep. 29 b.

(l) 4 Rep. 65 a.

(m) Vid. Bird v. Wilford, Cro. Eliz. 464.

(n) Neratius Priscus tres facere existimat collegium; et hoc magis sequendum est; Dig. Lib. 50, tit. 16; De Verbor. Signif. 85. τρεις συνημα ποιῶσιν; Basilic. tom. I. lib. 2, p. 41; Mad. Firm. Burg. 49; vid. Att.-Gen. v. Day, 2 Atk. 212; Shepherd v. Cotton, 1 Ves. 38.

aggregate must be determined by some majority of the whole body. But this question does not often become of importance, and obviously never could be so with respect to municipal corporations; for the charters of municipal bodies for the most part (as will be seen elsewhere) incorporated all the inhabitants of the boroughs or cities to which they related.^(o) On the other hand, a corporation may consist of any number of persons, though a corporation cannot be limited to a county. A charter cannot be legally made incorporating probos homines of such a county; ^(p) and the reason is, that the designation is too indefinite, not that the numbers are too large. The same body may form at one and the same time two or more different corporations, having different names, objects, and constitutions.^(q)

Again, a corporation may be compounded of several other corporations,^(r) *and whether it is so or not is a question of fact for [*49] the jury.^(s)

Various corporations instituted for other than municipal purposes, have rights of choosing their members at their pleasure; indeed the right is said to be incident to a corporation, if there be nothing in its charter or constitution to make it otherwise. When it is intended to give every one admission to the corporation on certain conditions, that object is generally effected by statute; thus the power of becoming a member of the Russia Company on payment of £5 was given by 18 & 11 Will. 3, c. 6.

*NAME.

[*50]

It has already been stated, that every corporation must have a name, under which it must do all corporate acts, and by which it must sue and be sued (unless, as is sometimes the case, it be empowered by parliament to sue and be sued in the name of its treasurer or other officer;) and which name may either be given directly by the charter of creation, or by a subsequent charter giving a new name in lieu of the old one, or by implication from the terms of the charter;^(t) and the name, when once given, has been said to be an essential element of the corporation, and unchangeable except by act of parliament or by a fresh charter from the crown.^(u) And it seems to follow that there cannot be two

(o) Vid. instances M. & Steph. Hist. of Boroughs, 1302, 1326, 1390, 1391, 1403, 1404, 1405, 1407, 1417, 1418, 1491, 1495, 1501, 1538, 1998, 1999, 1946, 2040; Salk. 434.

(p) Per Popham, C. J., cited in Trinity College case, 2 Brownl. 244.

(q) Vid. supra, p. 5.

(r) Vid. supra, p. 5.

(s) Company of Bricklayers, &c., of Shrewsbury v. Haywood, Dougl. 359.

(t) Pits v. James, Hob. 124; Ayray's case, 11 Rep. 19; Anon. Salk. 191; Com. Dig. Franchises, F. 9; Vin. Abr. Corporations, A. 2, pl. 1, 2; Coll. of Physicians v. Salmon, Holt's Rep. 171.

(u) In re Sheffield, &c., Insurance Co., Q. B., T. T. 1847; Marriott v. Mascall. And. 210; 1 Wms. S. 339 a; 6 Vin. Abr. 261, 262; 10 B. & C. 384; Gilb. Hist. Com. Pleas, 181, 182.

corporations with the same name at the same time. A corporation cannot have two names by grant; but it is held that a corporation may have one name by prescription and another by grant.(x)

It has been said that a corporation may acquire a name by reputation; but this seems only to be true where the difference between the real and the reputed name is merely syllabic or otherwise immaterial.(y) In the case of corporations originating in foundation, the correct name of the founder is, in general an essential part of the name of the corporation, and must not be varied from.(z) But it is settled that trading corporations belonging to foreign countries may sue here under their name of reputation.(a)

Generally the fact of an aggregate body being called by a name is prima facie evidence that they are incorporated, "for the name argues a corporation."(b) But an aggregate voluntary body, though they have a name, are not capable of suing by such name, as if they were a corporation.(c)

Though a corporation must have a name, the restriction does not extend to bind it to one name; for it is said a corporation may have [*51] *several names,(d) and even prescribe by several names;(e) but though they may have two names by prescription, or one by prescription and one by grant, it is said that they cannot have two names by different grants.(f)

Although it has been laid down that generally a corporation ought to purchase by its name of incorporation,(g) yet it has since been held that, as well a corporation by charter as by act of parliament may take under a devise by another name than that in which they were constituted,(h) there being no doubt what corporation was meant. The rules of law in

(x) *Knight v. Mayor, &c., of Wells*, 1 Ld. Raym. 80; S. C. 1 Lutw. 408, 519; vid. *Anon. Dyer*, 279 b; *Vaughan v. Earl of Bedford*, Cro. Eliz. 351.

(y) *Vin. Abr. Corporations*, E. pl. 14; vid. *Ayray's case*, 11 Rep. 19, 20, 22; *Hob.* 122; 3 *Salk.* 103.

(z) *Vin. Abr. Corporations*, E. pl. 12; *Gilb. Hist. Com. Pleas*, 184; vid. 6 *Taunt.* 467.

(a) *The Dutch E. Ind. Co. v. Van Meyers*, Stra. 612, aff. Dom. Proc. But they must show that they are incorporated in the foreign country, and whether they are so is a question for the jury; *Bank of St. Charles v. De Bernales*, 1 Car. & P. 569.

(b) *Norris v. Staps*, *Hob.* 211. But the Courts take judicial notice that "A. B. & Company" is not the name of a corporation; *R. v. Harrison*, 8 T. R. 508.

(c) *Vin. Abr. Corporation*, A. 2, pl. 5.

(d) *Vaughan v. E. of Bedford*, Cro. Eliz. 351; 6 *Vin. Abr.* 272, pl. 16; *Bac. Abr. Corporations*, C. 3; *Reg. v. Bailiffs of Ipswich*, *Salk.* 435. In pleading, if an act of a corporation done by it under one name, and then another act done by it under another name be stated, it must be explained how the change of name took place; 3 *Lev.* 243.

(e) *Per Hale, C. B.*, *Hardr.* 504; 10 *Rep.* 126; *Gilb. Hist. C. P.* 231; *Bac. Abr. Corporations*, C. 3. Vid. *Knight v. Mayor, &c., of Wells*, 1 Ld. Raym. 80. In pleading, ancient corporations, having several names, may be stated to be as well known by one as the other; *Vaughan v. Bedford*, Cro. Eliz. 351; *Lutw. R.* 1498. What evidence of a proscriptive corporation, *Jenkins v. Harvey*, 2 C. M. & R. 393.

(f) *Knight v. Mayor, &c., of Wells*, Ld. Raym. 81; *Mayor, &c., of Shrewsbury v. Hart*, 1 Car. & P. 113.

(g) *Com. Dig. Capacity*, B. 5.

(h) *Chanc. of Oxford's case*, 10 *Rep.* 87 b.; *Att.-Gen. v. Rye*, 7 *Taunt.* 546; *Croydon Hospital v. Farley*, 6 *Taunt.* 467.

this respect are much enlarged, and it would not be allowed that a corporation should attempt to set aside its conveyance or demise because the name was inaccurately inserted in the deed. However, a corporation having had different names given it by different charters, cannot be sued by both names with an alias dictum.⁽ⁱ⁾ A writ of mandamus addressed to a corporation otherwise than by its true name is void.^(k) But in the case of a grant by a subject to a corporation the case is different; for such grant will be good if it can be clearly discovered from the terms of it what corporation is intended, though an omission or mistake of the corporate name may have been made in it; for *nihil facit error nominis cum de corpore constat*.^(l) So of leases and conveyances made to a corporation.^(m) So of devises.⁽ⁿ⁾ But a devise to the abbott of St. Peter, when the foundation is St. Paul, is void,^(o) for the specification of the party is mistaken. And a devise of lands in remainder to a corporation, not in esse at the time of the devisor's death, is bad, although such a corporation is erected before the remainder falls.^(p) But a grant of lands by the crown to a corporation by another name than that which the corporation had before, *passes the lands, and the letters-patent are said to operate as a new incorporation^(q) by the new [*52] name.

Though a corporation be misnamed in an act of parliament, yet if there is enough from which to tell what corporation is meant by the legislature, the statute is not thereby rendered inoperative.^(r)

When a corporation has a new name given to it, whether by charter or act of parliament, it remains in all other respects unchanged, the mere change of name having no effect upon the rights or liabilities of the corporation, which remain precisely as before,^(s) although the territorial limits of the jurisdiction of the body politic may be enlarged or otherwise altered.

The name or style of the municipal corporations in boroughs under the Municipal Corporations Act, is "Mayor, Aldermen, and Burgesses."^(t)

(i) *Knight v. Mayor, &c., of Wells*, Lutw. R. qu. tam. Queen Elizabeth incorporated Liskeard by the name of "Mayor, &c., of the Borough of Liskerett *alias* Liskeard."

(k) *Rex v. Mayor of Ripon*, Salk. 433; *Rex v. Morris*, Ld. Raym. 1238; vid. 1 D. & L. 874; 2 D. & L. 451, as to naming corporations in an affidavit.

(l) *Ayray's case*, 11 Rep. 18 b; *Mayor of Lynn's case*, 10 Rep. 125. And if a deed be made to a corporation by a name differing from their real name, they may sue in the real name, and aver that the deed was made to them by the wrong name; *Abbot of York's case*, cited 10 Rep. 125 b; *Gilb. Hist. of Com. Pleas*, 222. As to evidence in such case, see *Mayor, &c., of Carlisle v. Blamire*, 8 East, 487.

(m) 10 Rep. 124; *Hob.* 124; 6 Taunt. 467.

(n) *Bac. Abr. Corporations*, C. 2; *Att.-Gen. v. Rye*, 7 Taunt. 546; et vid. *Button v. Wrightman*, Poph. 56; *Cro. Eliz.* 816; *Anon.* 3 Leon. 18; 3 Com. Dig. 16.

(o) *Vin. Abr. Corporations*, G. 4, pl. 2; *Counden v. Clarke*, *Hob.* 33.

(p) *Counden v. Clarke*, *Hob.* 33; *Bac. Abr. Corporations*, E.

(q) *Dean, &c., of Christ Church and Parratt's case*, 4 Leon. 190; vid. *Button v. Wrightman*, Poph. 56.

(r) 10 Rep. 57 b; 2 H. Bla. 499.

(s) 3 Lev. 238; *Luttrell's case*, 4 Rep. 87, adm. *Mellor v. Spateman*, 1 Saund. 344; and the corporation, by its new name, may recover a debt due to it before the change; 3 Lev. 238; vid. *Com. Dig. Franchise*, F. 9; 3 B. & Ald. 200.

(t) 5 & 6 Will. 4, c. 76, s. 6.

In cities, however, it has been decided that the proper style is "Mayor, Aldermen, and Citizens."^(u) It seems that the crown has the prerogative of declaring any town to be a city by letters-patent; ^(x) but making a town the see of a bishopric does not make the town a city. Thus Manchester is not a city, nor is Ripon, though each has been made a see; ^(y) and it is capable of the clearest proof that a city and a bishop's see were not originally connected of necessity in any way. The name of a corporation being in all cases an essential part of the metaphysical creation, and that which operates more than any other property of a corporation to give it the appearance of continuous identity, it might seem superfluous, had not the point been litigated, to state that corporations can in no case change their name at their pleasure; such change can only be effected by obtaining a fresh charter of letters-patent from the crown in the case of chartered or prescriptive corporations, or by obtaining an act of parliament in case of statutory corporations.^(z)

Where there is a mistake in the name of the corporation in a writ, in an action by the corporation, the writ may be set aside.^(a)

In a declaration, however, as misnomer is no longer matter for plea in abatement, no other effect, it would appear, ensues from a corporation [^{*53}] ^{*}misnaming itself, than in the case of any other plaintiff, when the proper course is to go before a judge and have the error amended on payment of costs. The name of a corporation must be truly stated in an affidavit, or the motion, in support of which it is used, may fail.^(b)

Where a bill in equity was brought in the individual names of the corporators of a corporation, but stating their corporate character, and a bill of revivor was in their corporate name only, a demurrer for want of privity was set aside, the naming of the individuals in such case being held to be mere surplusage.^(c) But a corporation must prosecute criminally in their full and accurate corporate name,^(d) and the greatest accuracy is required in stating the name of a corporation in all criminal proceedings in which they are concerned. Thus a coroner's inquisition was quashed for describing the engine, moving to the death of the party,

(u) *Att.-Gen. v. Mayor, of Worcester*, *Ld. Chanc. T. T.* 1846, 2 *Phil.* 3; *Corporation of Rochester v. Lee*, 15 *Sim.* 376, *acc.*

(x) *Toml. Law Dict.* in *voc. City*; *Burn. Hist. Reform.*, *App.* 246; *Gibs. Cod.* 1449; 14 *Rym. Fœder.* 754; *Harg. Co. Litt.* 109 b, n. (3).

(y) *Fortesc. Laud. cap.* 24; *vid. Harg. Co. Litt.* 109 b, n. (124); 1 *Wooddes. Lect.* 302; *R. v. Downes*, 3 *T. R.* 563—569; *Mad. Firm. Burg. p.* 2.

(z) *In re Sheffield, &c., Insurance Co.*, 16 *L. J. (N. S.) Q. B.* 407.

(a) *Walker v. Perkins*, 2 *D. & L.* 985. In general, in pleading, the true name of any corporation which it is necessary to refer to ought to be stated; *Turvill v. Aynsworth*, *Stra.* 787; *Rex v. Croke*, *Cowp.* 29. But absolute precision is not required where the statement is matter of inducement merely; *Rutherford v. Evans*, 6 *Bing.* 657; *S. C.* 4 *Moo. & P.* 163; *Warre v. Harbin*, 2 *H. Bla.* 112. As to laying the demise in an ejectment by a corporation, *Doe d. Maldon v. Miller*, 1 *B. & Ald.* 699.

(b) *Reg. v. Gr. West. Railw. Co.* 1 *Dowl. & L.* 874.

(c) *Walker v. Warden, &c., of Manchester College*, 1 *Bli. N. S.* 9.

(d) *Rex v. Patrick*, 2 *East, P. C.* 1059; *Patrick and Pepper's case*, *Leach*, 244; *S. C.* 2 *East, P. C.* 1059; *R. v. Sherrington*, 1 *Leach*, 513. The addition of the corporate name to the christian and surname of all the parties composing it does not satisfy the rule; *R. v. Patrick*, 1 *Leach*, 253; *S. C.* 2 *East, P. C.* 1059.

as the goods and chattels of the Proprietors of the Hull and Selby Railway, that not being the name of the corporation.^(e)

A corporation by implication from the language of acts of parliament, though not established by express words of creation, may sue in their collective name for an injury to their real property.^(f) A name may be given by implication in a charter; thus a charter incorporating the inhabitants of Dale with power to choose a mayor, imposes by implication the name of the "Mayor and Commonalty of Dale."^(g)

Formerly corporations were often allowed to avoid their own leases and conveyances, on the ground of a misnomer of themselves in the instruments; but of late this practice has been discountenanced by the courts, and a more just and rational practice has prevailed;^(h) and where a corporation has had the benefit of the transaction, they will not be allowed to turn round at their pleasure and set it aside on such grounds.⁽ⁱ⁾ A presentation to a living by a corporation by a wrong name will not be vacated on that account.^(j)

If a corporation be named of a place, it was early laid down not to be necessary that geographical truth should be observed in the name.^(k) Thus a body was incorporated by the name of the Prior and Brethren of *the Hospital of St. John of Jerusalem in England; and generally we find that though formerly locality was held to be of the [*54] essence of a corporation,^(l) in times when corporations were almost entirely either municipal, or entrusted with local government in some way, yet of late a different doctrine has prevailed, at least in practice, and it is not now necessary that a corporation unconnected with the administration of justice, and not holding land, should be named of a place.^(m)

*COMMON SEAL.

[*55]

A CORPORATION aggregate expresses its will, wherever strangers are concerned, by its common seal; and in general nothing of importance can be done by a corporation except under its common seal.^(a)

(e) Reg. v. West, 2 Railw. Cas. 613. So in proceedings under a private act of parliament; Rex v. Croke, Cowp. 29.

(f) Tone Conservators v. Ash, 10 B. & C. 349.

(g) Vin. Abr. Corporation, E. pl. 7; per Holt, C. J., 3 Salk. 102.

(h) Lord Audley v. Sidenham, Tothill, 228; vid. Cary, 44; 10 Rep. 122; 4 B. & Ad. 655; Cowp. 29; 1 B. & Ald. 699; Sheph. Touchst. 234.

(i) Croydon Hospital v. Farley, 6 Taunt. 467. (j) Cro. Jac. 248.

(k) Vid. instances cited 10 Rep. 30 a, 32 a, b; Button's case, Poph. 56; Vin. Abr. Corporations, D. pl. 1, 2. The place however ought to be a town or city, not a county alone; thus a corporation could not be erected as the corporation of Trinity College, in the county of Cambridge; it must be "Trinity College, in Cambridge, in the county, &c.;" 6 Vin. Abr. 261.

(l) Vid. Button v. Wrightman, Cro. Eliz. 338.

(m) Vid. Mayor, &c., of Stafford v. Bolton, 1 B. & P. 40; Pilbrow v. Pilbrow's Atmospheric Railw. Co. 4 D. & L. 450.

(n) Com. Dig. Franchise, F. 13; Church v. Imper. Gas Comp. 6 A. & E. 846; Gibson v. E. I. Comp. 7 Scott, 74. If a mayor and commonalty be disseised, and after,

In the courts of equity it is a fundamental principle that a corporation cannot bind itself, except under common seal, in matters concerning its revenues.^(o) Wherever individuals must do a thing under seal, a corporation must do it under their common seal; and therefore they must grant the next avoidance of an advowson under the common seal.^(p) An entry in the books of a corporation of the terms of an agreement (it has been held in equity) entered into by them does not bind them, although it be signed by a majority of the corporators,^(q) not being under the common seal, and not having been acted on so as to alter the situation of any other party. At common law, however, it is held that a trading corporation may be bound by contracts, entered into by a competent board of directors, though not under seal, but semble they cannot enforce such contracts.^(r) In general the rule is, that whatever vests or divests an interest in or out of the corporation, requires the common seal.^(s) And there is not so much difficulty in dispensing with the corporate seal to acts which have not that effect; thus, although in strictness the common seal ought to be affixed to a resolution or order of a corporation to authorise filing a bill on their behalf, yet, if the majority consent to the resolution, and no other course is open to prevent the act being done against which the bill is filed, because the keepers of the seal withhold the use of it, the common seal *will be dispensed with.^(t) Probably the keepers of the seal [*56] in such case might be compelled by mandamus to affix it to such resolution, as was done in the case of the head of a college, who was keeper of the common seal, and who was compelled by mandamus to affix the seal to an answer in Chancery, from which he dissented.^(u) But the writ will not go to a railway company, directing them to take the seal off the register of shareholders, though it was alleged that the seal had been

every one of them release by their proper names, this is not good; but the mayor and commonalty ought to release under their common seal; 6 Vin. Abr. 267.

(o) *Taylor v. Dulwich College*, 1 P. Wms. 656; *Winne v. Bampton*, 3 Atk. 473; *Wilmot v. Mayor, &c., of Coventry*, 1 Y. & C. (Exch.) 524; *Harg. Co. Litt.* 9 b, note (99).

(p) *Cripps v. Abp. of Canterbury*, Owen, 47; *S. C. Cro. Eliz.* 163; *Yelv.* 7.

(q) *Carter v. Dean, &c., of Ely*, 7 Sim. 211; where see the remark of the Vice Chancellor on the case of *Maxwell v. Dulwich College*, 1 Fonbl. Treat. Eq. 306. So resolution to increase the salary of a town clerk is not binding unless under the common seal; *Reg. v. Mayor, &c., of Stamford*, 6 Q. B. 443; *vid.* 4 B. & Ald. 315.

(r) *Ridley v. Plymouth, &c., Comp.* 2 Exch. 711; *vid.* inf. p. 56.

(s) *Vid.* *Carey v. Matthews*, Salk. 191; *Winne v. Bampton*, 3 Atk. 473; *Wilmot v. Coventry*, 1 Y. & C. 518; *Erneley v. Walrond, Dyer*, 102 b. and marg.; *Plowd. Com.* 91 b. Yet it was held by King, C. J., at nisi prius, that a corporation may contract by parol for the letting of a market; 6 Vin. Abr. 292; *Corporations*, K. pl. 41; *vid.* *Yearb.* 12 Hen. 7, 25, 26; 5 M. & Gra. 183, n.; 2 Taunt. 387. In the *Yearb.* 4 Hen. 7, fol. 17 b, it is said a corporation cannot make a feoffment, lease, or any other thing of inheritance, without deed, but as to those things which belong to service they can, as the appointment and employment of ploughmen, servants of husbandry, butlers, cooks, &c. A petition to parliament must be under the common seal; *Chamb. & Pet. Railw. Law*, 137.

(t) *Exeter and Crediton Railw. Co. v. Buller*, Ld. Chanc. T. T. 1847.

(u) *Rex v. Windham*, Cowp. 377; *vid.* *Rex v. Univ. of Cambridge*, 1 W. Bla. 550. A corporation aggregate not being capable of taking an oath, it is usual in chancery, on a bill of discovery, to join the clerk or some of the officers of the corporation, who answers on oath, and is liable for perjury if he forswears himself; *Wych v. Meal*, 3 P. Wms. 311; 3 Bac. Abr. 265; *Anon.* 1 Vern. 47. So on a bill for an account, &c.; *Macintosh v. Great West. Railway Co.* 18 L. J. (N. S.) Chanc. 94.

affixed fraudulently and illegally, &c. ; for the court said, that though the writ went to compel the affixing of a common seal, there was no authority for its going to compel to detach a common seal ; *Ex parte Nash*, Q. B. 14 Jur. 574.

The following acts have been settled to require the common seal : making a feoffment ; (x) a demise ; (y) granting a license ; (z) accepting a demise ; (a) surrendering, by express surrender, a lease for years ; (b) presenting to a benefice ; (c) commanding their bailiff to enter for condition broken, (d) or into lands purchased, (e) or to seize goods forfeited under a custom ; (f) entering into a contract to pay a sum of money for making improvements in the borough, (g) or to borrow money ; (h) retaining or appointing an attorney to appear for the corporation, at least, in case of a municipal corporation. (i) But when an act of parliament empowers the directors of the company to make appointments of officers and enter into contracts, such appointments and contracts need not be under seal ; (k) and if work have been done for a corporation of a character that is connected

(x) *Com. Dig. Franchise*, F. 13 ; 29 Car. 2, c. 3.

(y) *Com. Dig. Franchise*, F. 13 ; *R. v. Chipping Norton*, 5 East, 229. In *Sugden Vend. and Purch. edit. 1846*, it is said to be clear both on principle and authority (citing *Doe v. Hogg*, 1 N. R. 306,) that a corporation affixing their seal is tantamount to a signing and sealing by an individual, p. 971. A lease for years of corporation lands was executed by some of the corporation, but not sealed with the common seal. The lessee entered and paid rent to the bailiffs of the corporation, who were the proper parties to receive it : held that a servant of the corporation might make cognisance as such for taking a distress under a demise by the corporation ; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation ; *Wood v. Tate*, 2 N. R. 247 ; 6 Vin. Abr. 292, pl. 41 ; 11 Q. B. 127 ; *ib.* and *Semb.* a corporation may demise without signature, notwithstanding the Statute of Frauds ; *Cooch v. Goodman*, 2 Q. B. 580 ; *Reg. v. Goddard*, 3 Salk. 171.

(z) 13 M. & W. 838 ; *Com. Dig. Franchise*, F. 13 ; *Horn v. Ivy*, 1 Ventr. 47.

(a) *Pretymen v. Wodry*, Cro. Jac. 109 ; per Parke, B., 8 M. & W. 371. The sealing the counterpart is a sufficient acceptance, without a letter of attorney to deliver it ; *Goodrich v. Cooper*, Owen, 143.

(b) 10 Rep. 68.

(c) *Bac. Abr. Corporations*, E. 3 ; *Gibs. Cod.* 794. But the resolution of a majority of the corporation presenting A. B. to a living, gives him an inchoate right, subject to be divested for want of a formal presentation under seal ; *Reg. v. Kendall*, 1 Q. B. 385.

(d) *Dumper v. Syms*, Cro. Eliz. 815 ; *Com. Dig. Franchise*, F. 12 ; *Edgar v. Sorrell*, Cro. Car. 169 ; *Ernely v. Walrond*, Dyer, 102 b.

(e) *Com. Dig. Franchise*, F. 13.

(f) *Bac. Abr. Corporations*, E. 3.

(g) *Mayor &c.*, of *Ludlow v. Charlton*, 6 M. & W. 817 ; *vid.* *Henley v. Lyme Regis*, 2 C. & F. 331.

(h) *Wilmot v. Coventry*, 1 Y. & C. 518 ; *vid.* *Reg. v. Lichfield*, 4 Q. B. 893 ; *Holdsworth v. Mayor, &c.*, of *Dartmouth*, 11 A. & E. 490.

(i) *Rex v. Chester*, 2 Show. 366 ; *Vin. Abr. Corporations*, U. pl. 5, marg. pl. 6 ; *Arnold v. Mayor, &c.*, of *Poole*, 2 Dowl. N. S. 574. Where an attorney had appeared for a railway corporation, with the knowledge of the directors of it, it is bound by his acts, though he is not authorised under the common seal ; *Flaviell v. East. Cos. Railw. Com.* 17 L. J. (N. S.) Exch. 297.

(k) *Reg. v. Justices of Cumberland*, 17 L. J. (N. S.) Q. B. 102. And where a corporation is incorporated by statute, the court will not assume, on motion for a new trial, that their private act may not empower them to appoint an agent to demise their lands, &c., without seal ; *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 129, 130.

[*57] with the purposes of the *corporation, and have been accepted by them, they cannot, in an action of assumpsit to recover the price object that no order to do the work was given under their common seal.^(l) They must, it seems, accept an assignee of their lessee by deed under their common seal.^(m) A return to a mandamus addressed to them must be under the common seal.⁽ⁿ⁾

Where a corporation had entered into possession and made a railway on land, under a contract of sale made by their agent, the objection that the contract was not made by authority under seal was overruled in equity,^(o) as they had adopted and acted upon the contract.

And although in general an interest can only be divested under the common seal^(p), yet if a resolution had been duly passed by the corporation that they would alien certain property, and upon the faith of that resolution expenditure incurred with reference to the property, equity would probably compel the corporation to make a legal grant of the property in pursuance of such resolution, although it were not under the common seal.^(q)

And if a person enter and occupy premises under a corporation, though without their having demised under the common seal, the absence of such demise does not relieve him from payment of a just equivalent for the use of the property, and he will be liable in debt or assumpsit for use and occupation.^(r)

(l) *Sanders v. Guardians of St. Neots*, 8 Q. B. 810. The contract must be necessarily incident to the purposes of the corporation; *Paine v. Guardians of Strand Union*, 8 Q. B. 326; *vid. per Patteson, J.*, *id.* 929; *Reg. v. Mayor, &c., of Stamford*, 6 Q. B. 443.

(m) 2 Wms. Saund. 305. In pleading such acceptance, it is not necessary to state it to have been by deed; *Dean of Westminster's case*, *Carter*, 16, 17. Nor generally, where it is necessary that a corporation must do an act by deed, need the act be averred to have been done by deed; *Mayor, &c., of Ipswich v. Martin*, *Cro. Jac.* 411.

(n) *R. v. Infield*, 3 Keb. 765.

(o) *London and Birm. Railw. Comp. v. Winter*, 1 Craig. & Ph. 57. The general principle, that a corporation cannot be bound by any thing in the nature of an agreement relating to their real property, except under seal, is fully recognised in the courts of equity; *Carter v. Dean of Ely*, 7 Sim. 211. 227; *S. P.* at common law, 5 Vin. Abr. Condition, B. b. 3, pl. 4.

(p) Vin. Abr. Bailiff, C. pl. 11. In *Rex v. Chipping Norton*, 5 East, 239, a lease for years of tolls by a corporation, but not under seal, was held bad on the above ground. An allegation by a stranger of a corporate act (which ought to be under seal), not saying it was under seal, is good after verdict, the court intending a deed, *vid. Partridge v. Ball*, 1 Ld. Raym. 136; *Yarborough v. Bank of England*, 16 East, 6; *vid. 6 A. & E.* 827. The seal must be the common seal; the seals of all the members of the corporation, or of the managing committee or directors of the corporation, will not answer the requirements of the rule; *Rex v. North Duffield*, 3 M. & Selw. 207. The demise to John Doe, in ejectment, though it be stated to be by deed, in case of a corporation lessor of plaintiff, is proved without proving a deed; *Farley v. Wood*, 1 Esp. 199. And where there is evidence in the nature of admission by the defendant, that the secretary of a corporation who created a tenancy at will, and the successor of such secretary who determined it, had authority from the corporation, though there is no direct evidence that there was any authority to either of them under seal, the jury may infer the existence of any possible valid authority; *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 129. And if the verdict is for the plaintiff, the court will not grant a new trial because the judge at nisi prius did not tell them authority under seal was necessary, *S. C.*

(q) *Marshall v. Queenborough*, 1 Sim. & S. 520; *vid. 1 Y. & Col.* 520.

(r) *Southwark Bridge Company v. Sills*, 2 Car. & P. 371; *Dean, &c., of Roches-*

Where a corporation is called upon to put in an answer in chancery to a bill of discovery, the common seal is not sufficient to authenticate the answer, which the practice of the court requires in all cases to be upon *oath; therefore it is usual to order that the clerk of the corporation, or secretary, or some principal members of it, at the discretion of the plaintiff, should answer on oath; and even a servant, though not a member of the corporation, may for this purpose be made a party to the suit.(s)

Elections may in general be made to corporate offices without the seal; but appointments to offices must in some cases be under the seal, e. g. to a freehold office not being a corporate office.(t)

An officer of the corporation, appointed under the common seal, ought to be discharged by an instrument authenticated in like manner; but if he be appointed by election merely, then an order is sufficient to discharge him without the common seal,(u) unless in the case of a freehold office. But it is said where a corporation have power to remove an officer at their will and pleasure, such will must be signified under the common seal,(x) but the truth seems to be, that this is only necessary where the appointment has been under the seal.

It has been held to be incident to every corporation aggregate to have a common seal,(y) and the absence of a common seal is a material element in deciding on the validity of the claim to be a corporation, by a body who had always been reputed to be incorporated, though it does not appear to be of itself decisive against such claim;(z) on the other hand, it has been left to the jury to say whether, from the fact of the body demising under a common seal on one occasion, they are or are not a corporation;(a) but evidence that there was a time when there was no common seal in a borough, is evidence that it was not then a corporation.(b) There is no doubt that at common law many aggregate bodies, as counties, hundreds, wapentakes, forests, cities and boroughs, though not incorporated, were

ter v. Pierce, 1 Campb. 466; Mayor, &c., of Stafford v. Till. 4 Bingh. 75; vid. 6 A. & E. 838, 839; 11 Q. B. 128, acc.

(s) Anon. Vern. 117, pl. 104; Vin. Abr. Chancery, Y. a; Wych v. Meal, 3 P. Wms. 310; Dummer v. Mayor, &c., of Chippenham, 14 Ves. J. 246. 253; Gibbons v. Waterloo Bridge Company, 5 Price, 491; Mitf. Plead. 153. So on bill for an account, &c.; Macintosh v. Great Western Railway Company, 18 Law J. (N. S.) Chanc. 94.

(t) Provost of King's College, Cambridge, case, Yearb. 13 Hen. 8, fol. 12. As to stamp on such deed of appointment or grant, Roberts v. Elliot, 11 M. & W. 527; Reg. v. Welch, 2 Car. & K. 296.

(u) Rex v. Chalke, 1 Ld. Raym. 225; Rex v. Rippon, id. 563.

(z) Haddock's case, Ventr. 355; Vin. Abr. Corporations, G. 2, pl. 7; Holt v. Medlicott, Freem. 428.

(y) Sutton's Hospital case, 10 Rep. 30 b; Vin. Abr. Corporations, G. pl. 8.

(z) Rex v. Lord Dacres, Dyer, 81 a; S. C. 4 Rep. 107 b.

(a) Stallingers of Sunderland's case, cited 2 Q. B. 593; vid. Rex v. Green, 6 A. & E. 551. The commissioners in lunacy have a common seal, 8 & 9 Vict. c. 100, s. 7, but they are not a corporation. Though the inns of court have common seals respectively they are not corporations, but only voluntary societies; Styl. 457; Skin. 684; 2 Luder's El. Cas. 238.

(b) Bailiffs of Ipswich v. Johnston, 2 Barnard, 121; vid. the case of Cambridge, cited Quo. Warr. case, Att.-Gen., 2d arg. 35. St. Germain's was not a corporation, yet it returned members to parliament, and the indenture was sealed with "the common seal of the borough;" vid. 2 Luder's El. Cas. 199.

treated as though they were bodies politic, and could take in perpetual succession, and have a common seal.(c) So a swain-mote roll was usually sealed with a common seal.(d)

[*59] *Though a corporation seal a deed with any other than their common or corporate seal, it is said to be a good deed.(e) Thus, if an abbot and convent sealed with the seal of a layman, and it is said in the deed *in cujus rei, &c., appensum est nostrum sigillum commune*, it is sufficient, and it shall bind the corporation; for this seal shall be said to be the convent or common seal for the time; for with their common consent they may change their common seal at what time they will.(f) But then in such case the deed ought to purport, on the face of it, to be sealed with the common seal of the corporation.(g) The impression of the seal need not be on wax; an ink stamp, or a wafer, or even an impression made with a stick, and with the intention of executing the instrument is sufficient.(h)

However, notwithstanding these authorities, there seems room to doubt whether a corporation is entitled to use any other than their ordinary common seal. The authentication of corporate documents would be greatly embarrassed by a contrary practice, and the term common seal seems to imply a single seal, and not several seals, changed or altered at the will of the body. This supposition derives some strength from the fact that the legislature has thought it necessary to authorize, by express enactment, joint stock companies incorporated to break, alter and change from time to time their common seals, provided the names of the companies be always inscribed.(i) It is also important that each member of the corporation and the public should at all times know what is the corporate seal, for it is by the corporate seal that the body is bound, and by nothing else, provided such seal be properly affixed to the document in question;(j) except where the rules of corporation law admit of a servant's binding the corporation by acts done in the ordinary course of his employment. Thus, a corporation is liable for the tortious act of their servant, though he be not appointed under seal, if such act be an ordinary service and the corporation have been proved to have adopted this act;(k) but with respect to contracts, the powers of servants to bind the corporation without seal are extremely limited, and will not be extended; thus, it has been decided that a servant to a railway com-

(c) Merew. & Steph. Hist. Boroughs, 443. 691. 1078. 1098. Debt, it was held, would lie against such bodies; id. 893; vid. 4 Inst. 297.

(d) Lovelace's case, W. Jones, 268.

(e) Sheph. Touchst. 57; vid. 6 Vin. Abr. 307; Vin. Abr. Corporations, C. a. pl. 20.

(f) Perk. 123, qu. tam.

(g) Perk. 132; Cooch v. Goodman, 2 Q. B. 530.

(h) Sugd. Vend. 300, 6th edit.; Reg. v. St. Paul's, 7 Q. B. 231; Shep. Touchst. 57; Lightfoot and Butler's case, 2 Leon. 21; Davidson v. Cooper, 11 M. & W. 778; affirmed in error, 13 M. & W. 343.

(i) 7 & 8 Vict. c. 110, s. 25.

(j) Mayor, &c., of Ludlow v. Charlton, 6 M. & W. 823; vid. per Holt, C. J., 12 Mod. 423.

(k) Smith v. Birmingham, &c., Gas Company, 1 A. & E. 526. But a defendant cannot justify in trespass a seizure as servant of a corporation without showing an authority by deed; Horn v. Ivy, 1 Ventr. 47, where the service was not an ordinary one.

pany cannot bind them by a contract with a surgeon for attending a passenger injured on their line, such a power not being incidental to the duties of a servant.^(l)

That a corporation has no *common law* power to change their common seal may also be inferred from the fact, that in some charters the power *to break the common seal and make a new one, and change it [*60] as seems meet, is expressly granted.^(m)

It has been held, however, that where a warrant of attorney to enter an appearance was made under another than the corporate seal, it should not be annulled after having been recorded as the warrant of the corporation.⁽ⁿ⁾

A corporation may submit to arbitration under their common seal,^(o) and where a corporation is patron they must present under the common seal.^(p)

We have above stated the description of contracts which when entered into by corporations aggregate must be made under the common seal in order to be valid; and we proceed to explain the principles of which the above illustrations have been given, premising, however, that the common seal will not make valid a contract into which the corporation are incapable of entering, for instance, it will not make effectual a promissory note given by a municipal corporation and signed by the mayor;^(q) for such corporations, not being trading corporations, have no authority to bind themselves by this kind of contract.

The general rule of law that a corporation acts by and under its common seal, has, from the earliest times, been subject to exceptions, arising out of the extreme convenience, amounting almost to necessity, of dispensing with the strictness of the rule when its application would occasion great trouble or loss of time, or tend to defeat the very object for which the corporation was created. An instance, given in the old authorities is a command to a servant to cut trees in the vacancy of the headship.^(r)

Instances where the rule has been, and usually is, departed from *to save time*, are the retainer of an inferior servant, the authorising a person to drive away cattle damage feasant, to make a distress, &c.^(s) So, for some purposes, the appointment of an officer in a corporate borough by the corporation may be good, though not under the common seal.^(t)

(l) *Cox v. Midland Counties Railway Company*, 3 Exch. 268.

(m) E. g., in the charter of Edw. 6 to the city of Chester, *Rex v. Amery*, 2 Bro. P. C. 339; in the charter of the Cooks' Company, *Rex v. Sellers*, 2 Show. 525.

(n) *Bailiffs of Yarmouth v. Cooper*, Godb. 439; 6 Vin. Abr. 307. 314, pl. 20.

(o) Vid. 9 & 10 Will. 3, c. 15.

(p) 16 Vin. Abr. 199. Elsewhere it seems to be held that writing is sufficient; 17 id. 342. But presentation to the mastership of a hospital by a corporation ought to be under their common seal; *Provost of King's College, Cambridge*, case, Yearb. 13 Hen. 8, fol. 12.

(q) *Reg. v. Mayor, &c., of Lichfield*, 4 Q. B. 908.

(r) Yearb. 12 Edw. 4, fol. 10, pl. 24, per Littleton, J.

(s) Accordingly a bailiff making cognisance on behalf of a corporation, for taking a distress, need not aver his appointment by deed; *Manby v. Long*, 3 Lev. 107.

(t) *Reg. v. Grimshaw*, 16 Law J. (N. S.) Q. B. 385. Semb. an appointment, where no interest passes, may always be without deed; *Saunders v. Owen*, Salk.

such appointment having been repeatedly recognized by the corporation. So the appointment of attorney to a railway company ;(*u*) but the retainer of an attorney to conduct or defend a particular cause must be, it seems, under the common seal, (*x*) in case of a borough.

[*61] *Further instances occur in the accepting bills of exchange, or making promissory notes by corporation constituted for purposes of trade ;(*y*) so an order to insert advertisements in a newspaper on behalf of a trading corporation ;(*z*) so an order to execute a writ. (*a*)

Actions of simple contract by corporation for tolls due to them as lords of markets, fairs, &c., and for port dues, &c., stand upon the ground that it is impossible that contracts under seal can be entered into in such cases.

Where a bond is made to a corporation and an individual, who dies, an action on the bond may be brought by the corporation and the executor of the individual. (*b*)

A servant or officer of a parliamentary corporation, however high or confidential his situation, cannot bind the corporation by entering into a contract on their behalf, but without their authority. (*c*)

In the case of a common person, the presentation of a clerk to a living, or the nomination to a perpetual curacy, might be either by word of mouth, or in writing not under seal, (*d*) though a grant of the right of presentation, &c., to a third party, being an incorporeal hereditament, must of course be under seal ;(*e*) but a corporation must always present or nominate under its common seal, for it speaks and acts by and under that alone, although in such case it cannot be said that an interest passes out of it. (*f*)

With respect to contracts, the rule appears to be somewhat more strictly observed ; for it has been held generally that no municipal corporation is bound by a contract to pay money, although the consideration had been executed, unless such contract be under seal, (*g*) nor can any

147. As to appointment of servants of railway company, *Cox v. Midland Railway Company*, 18 Law J. (N. S.) Exch. 65.

(*u*) *Reg. v. Justices of Cumberland*, 17 Law J. (N. S.) Q. B. 102. That the attorney in the cause was appointed under the common seal will be assumed by the court ; *Thames, &c., Railway Company v. Hall*, 5 M. & Gra. 287.

(*x*) They may constitute a corporator their attorney ; 3 Vin. Abr. 297, K., marg.

(*y*) *Vid.* 6 M. & W. 823 ; 6 A. & E. 361 ; *Murray v. East India Company*, 5 B. & Ald. 204.

(*z*) *Hartwell v. Thames Haven Company*, cited 4 M. & Gra. 883 ; *vid. id.* 876, notes.

(*a*) *Vavisor's case*, Moore, 552 ; *Bac. Abr. Corporations*, E. 3, qu. tam.

(*b*) 2 Vin. Abr. 59, pl. 22.

(*c*) *Cox v. Midland Railway Company*, 18 Law J. (N. S.) Exch. 65. Appointment of agent to a railway company not good without seal, so as to enable him to sue upon it ; *Cope v. Thames Haven, &c., Railway Company*, 18 Law J., (N. S.) Exch. 345.

(*d*) *Co. Litt.* 120 ; *Att.-Gen. v. Brereton*, 2 Ves. 425.

(*e*) *Fitz. N. B.* 76 C. ; *Crisp's case*, *Cro. Eliz.* 164 ; *Grendit v. Baker*, *Yelv.* 7 ; 13 Vin. Abr. 22.

(*f*) 17 Vin. Abr. 342, pl. 7 ; *Rex v. —*, *Cro. Jac.* 247 ; *vid. sup. note (p)*.

(*g*) *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815 ; *vid. tam. Doe d. Pennington v. Tanriere*, 18 Law J. (N. S.) Q. B. 53 ; *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 597. Where a corporation has been receiving money wrongfully, they

corporation either sue or be sued on a simple contract, unless such simple contract be of such a nature that the making of it was essential to carrying into execution the very purposes of the corporation. *(h)* Indeed, for some time it was held that such actions could be maintained on executed contracts only, but it is now settled that the same principle extends to executory contracts. *(i)* Where, however, the defendants had contracted to pay a corporation a sum of money on the happening of a certain event, and the event happened, and the defendants received the full benefit of the contract; held, they could not [*62] object, as an answer to an action on the agreement, that it was not under seal; *(k)* and the same principle has subsequently been applied *against* a corporation. *(l)*

But if such simple contract is not necessarily essential, or at least incident, to the purposes for which the corporation was instituted, they will not be liable upon it, *(m)* unless it be under seal; of this, in ordinary cases, the contract to pay a servant's wages is an instance. *(n)*

Equity will not interfere to compel the performance by a corporation of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party on the faith of the contract. *(o)*

The rule appears to have been restricted in former times by the qualification, that a corporation, to be entitled to perform petty acts and enter upon trifling contracts, &c., without deed must have a head, by whom such acts would be, in fact, performed, the powers of the whole body being considered as vested in him for such purposes, but that where there was no head, such acts although of minor importance and continual concurrence, must be done, if at all, under deed; *(p)* and it seems to have been early considered to be an exception to the former part of the rule, that a covenant might, without deed, order trees to be pruned or cut down, and other necessary acts to be done, in the vacancy of the headship. *(q)*

There is nothing, it is conceived, in any modern case to lead to the are liable in assumpsit for money had and received, although there has been no contract under their common seal; *Hall v. Mayor, &c., of Swansea*, 5 Q. B. 548.

(h) *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 597; *vid. Bowen v. Morris*, 2 Taunt. 387.

(i) *Church v. Imperial Gas Company*, 6 A. & E. 846; *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 597.

(k) *Fishmongers' Company v. Fisher*, 6 Sc. N. R. 56. But until the corporation had performed their part there was, it seems, a want of mutuality, and the defendants might have retracted; *id. ibid.* It seems a person cannot be indicted for intent to defraud a corporation in respect of a contract which he could not have enforced against them for want of the common seal; *Rex v. Gillson*, 1 Taunt. 95.

(l) *Doe d. Pennington v. Taniere*, 18 Law J. (N. S.) Q. B. 53.

(m) *Paine v. Guardians of Strand Union*, 8 Q. B. 326; *Cox v. Midland Counties Railway Company*, 3 Exch. 268; *Lamprell v. Billericay Union*, 3 Exch. 306.

(n) *Vin. Abr. Corporations*, K. 1, pl. 40.

(o) *Wilmot v. Mayor, &c., of Coventry*, 1 Y. & Col. (Exch.) 518; *vid. Broughton v. Manchester Waterworks Company*, 3 B. & A. 1.

(p) *Vin. Abr. Corporations*, K. pl. 39; *Kerwil's case*, Yearb. 12 Edw. 4, fol. 10, pl. 24, per Littleton, J.; *Randle v. Dean*, Lutw. 481.

(q) *Vin. Abr. Corporations*, K. 1, pl. 7; Yearb. 12 Edw. 4, fol. 10, pl. 24; 3 Exch. 270, 276.

conclusion that this distinction no longer exists, and the terms in which it is noticed in the judgments of the courts, in several late cases on this subject, seem to show that it still forms part of the law.^(r) Perhaps, therefore, the most safe mode of entering upon such contracts and acts as are above referred to, not being essential to the objects of the corporation is by deed under seal, in cases where the corporation is without a head, or person specially designated by the constitution of the body for such purposes. After verdict the presumption is, that a contract was under seal, in order to support a count in debt stating that the corporation was indebted, &c.^(s) So, in trover against a corporation, the [*63] *court will presume an authority under seal to do the act complained of, where such an authority was necessary.^(t) But no such specific authority need be shewn where the act was part of the ordinary duty of the servant or agent, and was adopted by the corporation;^(u) and, generally, where a corporation has adopted work done under a contract with them, they cannot object it was not under the common seal.^(x)

There is one class of corporate acts which may be performed so as to bind the corporation without seal, namely, such as are entered of record; as returns to a mandamus;^(y) making an attorney in a court of record; certifying a mayor, or an usage, or custom, in one of the courts at Westminster; and the reason is that the corporation is estopped by the record to say that it is not their deed;^(z) and the same, as it appears, is the case if they sue on a contract, though executory on their part, and not executed, their suing on it would be held to amount to an admission on record that such contract was duly entered into by them, and therefore they would be estopped in a cross action to take objection;^(a) and perhaps it was on this ground it was held that a corporation might assign auditors, in an action of account, without their common seal.^(b)

With respect to deeds, the affixing of the common seal to the deed of a corporation has a singular effect, for though it is a general principle that delivery is essential to a deed, for it is not a deed without delivery, although it be sealed;^(c) yet the common seal being affixed to the deed is tantamount to a delivery,^(d) and suffices to pass an estate in all cases,

(r) *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 821; *vid. Hall v. Mayor, &c., of Swansea*, 5 Q. B. 546; *Cope v. Thames Haven Dock Company*, 18 Law J. (N. S.) Exch. 346; *Cox v. Midland Counties Railway Company*, 3 Exch. 270. 276; *Lamprell v. Billericay Union*, 3 Exch. 306.

(s) *Tilson v. Warwick Gas Company*, 4 B. & C. 962. So in ejectment; *Doe d. Pennington v. Tanriere*, 18 Law J. (N. S.) Q. B. 53.

(t) *Yarborough v. The Bank of England*, 16 East, 6. So in trespass; *Vin. Abr. Corporations*, K. pl. 12. 22.

(u) *Smith v. Birmingham Gas Company*, 1 A. & E. 526.

(x) *Sanders v. St. Neots Union*, 8 Q. B. 810.

(y) *Rex v. Clarke*, 2 Ld. Raym. 848; S. C. 1 Salk. 192.

(z) 1 Salk. 192; 3 Salk. 103; *per Tindal, C. J.*, 4 M. & Gra. 878; *Bac. Abr. Corporations*, E. 3.

(a) 5 M. & Gra. 192.

(b) *Kerwill's case*, Yearb. 12 Edw. 4, fol. 10, *per Littleton, J.*

(c) *Com. Dig. Fait. A. 3.*

(d) *Anon.* 1 Ventr. 257; *Good v. Ash*, 3 Keb. 307; *Case of Dean, &c., of Ferns*, Dav. 44 b; 2 Rol. Abr. 23, l. 50.

unless where the order for affixing the common seal is accompanied by a direction to the clerk to retain the conveyance until a certain event has occurred. In such case the affixing the seal does not operate as a delivery by the corporation until the specified event has occurred.^(e) In all other cases the affixing is said to be a delivery in law, which there may be without an actual delivery to the party.^(f) Thus they may make a lease and seal it, and afterwards make a letter of attorney to enter and deliver the lease;^(g) or, as it seems, there may be a letter of attorney to enter on the lands and to seal the indenture in the name of the corporation, and to deliver it to the party as their deed.^(h)

*But in all cases it must be understood that the common seal is *duly* affixed; the appearance of the common seal at the end of [*64] a deed does not make the instrument the deed of the corporation, unless the seal was affixed by parties duly authorised to do so; therefore, if a person pretending to be mayor of a corporation, and as such to have the custody of the common seal, affix their common seal to a deed without authority from the corporation, that is not the deed of the corporation; and it seems that such person would be personally liable in a civil action on the deed.⁽ⁱ⁾ So corporators concerned in affixing the common seal to an improper return, respecting a matter connected with public government, will not be screened from an information.^(k) But where the seal is regularly and bona fide affixed to a deed within the legal competence of the corporation to execute, then the seal protects all persons concerned in affixing it, or otherwise taking part in the corporate act of ordering it to be affixed, from individual or joint liability; thus where a deed was regularly sealed with the corporate seal, and besides certain members of the corporation signed their names to it, and the corporation was afterwards dissolved, the obligee on bringing debt against the individuals on the deed was nonsuited.^(l) Also though a member of the corporation regularly execute the deed after the corporation seal is fixed, that does not render him personally liable.^(m) We shall meet many instances to prove that individuals procuring the corporate seal to be set to instru-

(e) *Derby Canal Co. v. Wilmot*, 9 East, 360; *Dean, &c., of Fern's case*, Dav. 44 b; *vid. Anon.* 1 Vent. 257; *Good v. Ash*, 3 Keb. 307; *Jermin v. Willis*, Cro. Eliz. 167.

(f) *Shelton's case*, Cro. Eliz. 7; *Com. Dig. Fait. A. 3*; *Rex v. Longnor*, 4 B. & Ad. 647; *Doe d. Garnons v. Knight*, 5 B. & C. 671.

(g) 2 Leon. 97; 1 Vent. 257; *Com. Dig. Franchises, F. 12*; *Willis v. Jermin*, Cro. Eliz. 167; 13 Vin. Ab. 21, pl. 6.

(h) *Carter v. Claycoles*, 1 Leon. 308.

(i) *Sir H. Mackworth's case*, cited 4 Vin. Abr. 346. *Vid. Anon.* 12 Mod. 423; *R. v. Haughley*, 4 B. & Ad. 650; *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 866. But an indictment may be maintained at common law for putting the corporation seal without consent of the corporation to a deed whereby they surrendered their charter, &c., to the crown, and publishing the same as the deed of the corporation, &c.; *Rex v. Tyark, Trem.* P. C. 228.

(k) *Case of the Surgeons' Company*, 1 Salk. 374. In such case the seal may be disproved; per *Holt, C. J.*, *Harston's case*, *Comberb.* 203.

(l) *Edmunds v. Brown*, 1 Lev. 237. It seems that a lease made under the corporate seal becomes, upon the dissolution of the corporation, altogether void; *Pitts v. James*, Hob. 121.

(m) 16 Vin. Abr. 5, pl. 11.

ments which are illegal as being beyond the competence of the corporation, are personally liable for the consequences.

The above powers, it must be observed, are peculiar to the common seal of a *corporation*. A number of persons cannot assume a common seal and attribute to it the force and efficacy of a corporate seal; and therefore, if a number of persons, not being incorporated, enter into a written contract, which they seal with a seal professing to be their corporate seal, such contract cannot be enforced by action, upon its appearing that they have no common seal.⁽ⁿ⁾

And though the court of Queen's Bench in a late case,^(o) in which it appeared upon the record that a demise purporting to be sealed by the common seal of the governors of a hospital, was therefore the [*65] *demise of a corporation, refused, on special demurrer, to take notice judicially that no such corporation existed, yet it seems that the courts do take notice judicially that "A. B. & Company" is not a corporation;^(p) and in one case, Lord Eldon, C., took notice on demurrer, of his own motion, that a lodge of Freemasons, who affected to sue as a corporation, were in reality not incorporated; and he added, "It is an absolute duty of courts of justice not to permit persons not incorporated to affect to treat themselves as a corporation upon the record. . . . I desire my ground to be understood distinctly. I do not think the court ought to permit persons, who can only sue as partners, to sue in a corporate character."^(q)

A corporation aggregate, like an individual, may surrender a term for years by an act in law (e. g. by accepting a second lease reciting the first, &c.), without a deed; but an express surrender must always have been under the corporate seal,^(r) just as in the case of an individual, such surrenders as require to be in writing at all must now be also under seal.^(s)

Also an absolute surrender of a lease may be made to a corporation upon their promise to renew; and though an action at law does not lie against the corporation upon such promise, not being under seal, yet the Court of Chancery, it has been said, will compel them to make a new lease.^(t)

The single bills and bonds of a corporation, even though it be a trading corporation, and the common seal be regularly affixed, are not assignable at common law, but the Bank of England is empowered by 5 W. & M. c. 29, s. 39, to issue such documents with the quality of assignability.

In closing the subject we may remark, that the necessity for the use of the common seal is almost wholly confined to acts done by the corporation affecting strangers; acts relating to the internal affairs of the cor-

(n) *Cooch v. Goodman*, 2 Q. B. 580. Where a corporation is bound by statute to execute deeds, &c., according to certain forms, the proper plea to put in issue the proper execution of a deed is *non est factum*; *Hill v. Manchester, &c., Waterworks Co.*, 2 Nev. & M. 573.

(o) *Cooch v. Goodman*, 2 Q. B. 580.

(p) *R. v. Harrison*, 8 T. R. 508.

(q) *Lloyd v. Loaring*, 8 Ves. 775.

(r) *St. Saviour's case*, 10 Rep. 66 b; *Vin. Abr. Corporations*, K. pl. 33.

(s) *Vid.* 8 & 9 Vict. c. 106, s. 3.

(t) *Frevill v. Ewbank*, 1 Rol. R. 82; 2 Wats. Compl. Incumb. 813.

poration, as affecting members solely, do not in general require the common seal to render them valid; ^(u) thus, though bye-laws intended to operate upon strangers must be passed under the common seal, yet bye-laws only going to regulate matters affecting the corporators themselves need not have the common seal. And many corporate acts may be done without the common seal, although they may, in their results, affect strangers; thus a mayor may be elected, and in many corporations, according to the practice before the Municipal Corporations Act, a town clerk nominated, and in general all elections may be made without the common seal, and such corporate acts are valid. ^(x)

It is said that a gift of personal chattels cannot be made by a corporation *except under seal. ^(y) With respect to proof of a corporation seal attached to any certificate, official or public document, [*66] or document or proceeding of any corporation, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, which by any statute in force in the year 1845, or since come into force, are made receivable as evidence of any particular in any inquiry of a judicial nature, such documents, &c., shall be received in evidence, if they purport to be sealed, &c., as directed by the respective acts, without any proof of the seal, in every case in which the original record could have been received in evidence. ^(z)

The ordinary proof of execution of a deed by a corporation was by showing that the seal on the deed is the seal of the corporation; it was not usual to give evidence of its having been affixed by the corporation, or by their authority; and a mere memorandum on a deed that the seal was affixed, on such a date, by order of the corporation, would not be treated as a distinct attestation, so as to make it necessary to call the person signing such memorandum. ^(a) Whether the general rule that an instrument thirty years old proves itself so as to render proof of its execution unnecessary, applied to the seal of a corporation, was considered doubtful; for the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time, yet the seals of corporations, being of a permanent character, may be proved at any distance of time from the date of the instrument. ^(b)

^(u) *R. v. Chalke*, 1 *Ld. Laym.* 225; *R. v. Mayor, &c., of Ripon*, *id.* 568.

^(x) *Att.-Gen. arg. Quo. Warr.* 35; *vid.* 2 *Barnard.* 121.

^(y) 14 *Vin. Abr.* 123, pl. 4; *vid.* 2 *B. & Ald.* 551.

^(z) 8 & 9 *Vict. c.* 113, s. 1; *vid.* *Stra.* 747. Persons forging a corporate seal to such documents guilty of felony, s. 4. As to forgery of securities of Bank of England, 2 *Russ. Crim. by Greaves*, 424; of other public companies, *id.* 433. "Person" in a statute relative to forgery was held not to be applicable to the aggregate body of a corporation; *Harrison's case*, 1 *Leach*, 180; 2 *East, P. C.* 988; 2 *Russ. Crim.* 385; but since 1 *Will.* 4, c. 66, s. 28, the law is otherwise.

^(a) *Doe d. Bank of England v. Chambers*, 4 *A. & E.* 412; *Phill. Evid.* 651, 652, 8th edit.

^(b) *Rex v. Bathwick*, 2 *B. & Ad.* 639; *vid.* *per Lawrence, J.*, 8 *T. R.* 303. That in general the seal of a corporation must be proved to be genuine by a witness acquainted with it (but that is not necessary since 8 & 9 *Vict. c.* 113, in general), *vid.* 2 *B. & Ad.* 648. What sufficient proof of the seal of a Scotch university, *Colins v. Carnegie*, 1 *A. & E.* 695. The common seal of the city of London had been held to prove itself; *per Ld. Kenyon, C. J.*, *Woodmas v. Mason*, 1 *Esp.* 53. As to

As has been remarked above, an instrument to which the common seal has been attached by an unauthorised person, is not the deed of the corporation, but *primâ facie* the person who has the legal custody is authorised in any given case; hence if one party proves that the common seal of a corporation was affixed to an instrument by the officer who had the legal custody of the seal, that throws upon the other side the burden of clearly proving that the seal was not affixed by the authority of the corporation; (c) and a bond to which such *officer affixes the seal [*67] under a general authority from the corporation, is valid; (d) if, however, a mandamus required the common seal to be affixed, and the majority refused to obey, and the minority affixed it pursuant to the mandamus, the seal would be legally affixed. (e) It might have been supposed, from what has been said, that the common seal was so necessary to the practical working of a corporation, that the absence of a common seal would furnish strong presumption that the body so found to be without it was not a corporation, but only a voluntary society; and so it seems to have been sometimes held, but the decisions are not uniform; (f) and though where a body are constituted by statute without a common seal, it is some ground of presumption that the legislature did not intend to erect them into a corporation, (g) yet the fact of the legislature giving a common seal, does not of itself make the body a corporation. (h)

[*68]

*MAJORITY.

THE principle has been already laid down, that a corporation acts by the majority, or that the will of the majority is the will of the corporation, and binds the minority. Hence, the act of the major part of such corporators as are present at a meeting of the corporators corporately assembled, is in general the act of the whole corporation. (i) The maxim is, *ubi major pars ibi totum*; the absent members being

cases of statutory corporations, where contracts are to be signed by three of the directors, or sealed with the common seal, *Cope v. Thames Haven Dock Co.*, 18 L. J. (N. S.) Exch. 345.

(c) *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 874; *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 324. But where a deed appears with the common seal attached, *omnia ritè acta* is the presumption both as to the legality of the consideration (11 A. & E. 502), and the genuineness of the document.

(d) *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 866.

(e) *Per cur. Veley v. Gosling*, 7 Q. B. 457.

(f) *Vid. R. v. Ld. Dacres, Dyer*, 81 a, acc.; *Company of Carpenters, &c. v. Hayward*, Dougl. 359, cont.

(g) *Smith v. Adkins*, 8 M. & W. 370; *Ex parte Annesley*, 2 Younge, 350.

(h) *Ex gra. The Commissioners in Lunacy*, 8 & 9 Vict. c. 100, s. 7. In Scotland, having a seal is not necessary to constitute a corporation; 9 Cla. & F. 277, argu.

(i) *Com. Dig. Franchises*, F. 11; *Rex v. Varlo, Cowp.* 248; *Hicks v. Launceston*, 6 Vin. Abr. 266; *Cotton v. Davies*, Stra. 53; *Hascard v. Somany*, Freem. 504; *Oldknow v. Wainright*, 2 Burr. 1017; *Att.-Gen. v. Davy*, 2 Atk. 212. The meeting must be in the usual place of meeting; *Musgrave v. Nevinson*, Stra. 584; *et vid. 5 Burr.* 2682.

supposed to side with, and be included in, the greater part.(k) The rule as to the majority binding is the same in corporations having a head, as the master and fellows in a college, as it is in corporations without a head, and the determination of the greater part of the body is the voice of the corporation, except where the concurrence of the head or other integral part, in the corporate acts is expressly required by the charter to statutes of foundation.(l)

The Court of Queen's Bench will compel the officer who has the custody of the corporate seal to affix it to the act of the majority, though the resolution be against the consent and vote of such officer.(m)

The rule of acting by the majority is so firmly established as a principle of corporation law, that it seems to be questionable whether a private founder of a corporation can establish a mode of decision contrary to this common law incident to all corporations,(n) except he have express power given him by act of parliament; and perhaps there is no authority that a founder, as such, can go so far as to give a casting vote to the head. Various questions have arisen in former times as to what is a legal assembly of a corporate body, consisting of several definite parts; but these questions being now of minor importance, it will suffice to refer briefly to the cases in which they have arisen;(o) observing, that the general rule with reference to corporate bodies, consisting of different integral parts of specified amounts of numbers of members is, that where the act is to be done by the body **for the time being, or the major part of them*, the majority of [*69] the whole must meet for the purpose.(p)

Another rule is, that where there is a special body of a definite number appointed to perform corporate acts, there such acts cannot be performed except by a majority of that body.(q) But a charter may empower a less number than the majority of a definite body to proceed to an election, and may make the decision of a majority of such less number binding on the whole corporation.(r)

The question of what is the legal majority in each case frequently involves considerations of great nicety; but majority in all cases means

(k) Reg v. Bailiffs, &c., of Ipswich, Salk. 435.

(l) Re Queen's Coll. Camb. 5 Russ. 64; vid. 1 Q. B. 377; Rex v. Windham, Cowp. 377; Cotton v. Davies, Stra. 53; Bac. Abr. Corporations, E. 7; Withnell v. Gartham, 6 T. R. 388; 2 Burn's Eccles. Law, 117, 8th edit.

(m) Rex v. Windham, Cowp. 377.

(n) Vid. per Cur. in Reg. v. Kendall, 1 Q. B. 383; et vid. preamble of 33 Hen. 8, c. 27, inf. p. 74.

(o) Rex v. Miller, 6 T. R. 268; Rex v. Bower, 1 B. & C. 497; Rex v. Bellringer, 4 T. R. 810.

(p) Rex v. Bellringer, 4 T. R. 810; Rex v. Headley, 7 B. & C. 496; Rex v. Great, 8 B. & C. 363; Rex v. May, 4 B. & Ad. 843. Vid. 5 & 6 Will. 4, c. 76, s. 31. The charter created two bailiffs and twelve assistants, and enacted, in effect, that the two and the twelve for the time being, or the greater part of them, of whom the bailiffs should be two, should do corporate acts: held, that a meeting, at which two bailiffs and six assistants were present, was not a good corporate meeting to do a corporate act; Bailiffs of Godmanchester v. Phillips, 4 A. & E. 550.

(q) Rex v. Varlo, Cowp. 248.

(r) Rex v. Hoyte, 6 T. R. 430.

legal majority, whether it be the numerical majority or not;(s) for if the numerical majority direct their votes where it can have no legal effect, they by so doing voluntarily leave unopposed, that is, they assent to, the voices of the other electors.(t)

Subject then, to the foregoing remarks, and to the further restriction that their will be consonant to, and not in contravention of, the purposes of the incorporation, the will of the majority binds the whole body, such will bring in all cases collected at a corporate assembly duly constituted, and not from the aggregate of the assents of the corporators obtained separately and apart, for that would not be a corporate act.(u)

This important principle of government by the majority extends to various other bodies, to some of whom a character of a corporate nature is given for special purposes, in prosecuting which purposes the will of the majority, under certain restrictions, binds the minority.

Thus where by charter twelve persons were incorporated to elect a chaplain for the church of K., and by a distinct clause three of the twelve were to choose a chaplain for the church of S., within the parish of K., with the consent and approbation of the major part of the inhabitants of S., and on a vacancy two of the three chose a chaplain with the consent of the major part of the inhabitants of S., and the third dissented, Lord Hardwicke, C., held that the three were a corporation for the purpose for which they were appointed, and that the major part of them might do any corporate act,(x) so as to bind the other and all the world.

[*70] *Other instances are, the inhabitants of a township,(y) or parish, or the commoners of a common, the justices at quarter sessions, &c.

Also the majority of the grantees of a charter of incorporation binds the minority on the question of its acceptance;(z) and without the consent of the majority the incorporation is void.(a)

So the statute of Hue and Cry made the inhabitants of the hundred a corporation for the purposes of the statute.(b) So it is laid down that the majority of the part-owners of a ship binds the minority by the law and custom of England.(c) So, where trustees are invested with a trust of a *public* nature, an act done in pursuance of the trust by a majority of the trustees assembled for that purpose is valid.(d)

(s) 7 Q. B. 436.

(t) 7 Q. B. 438.

(u) Vin. Abr. Corporations, G. 3, pl. 6; Rex v. Theodorick, 8 East, 543. A binding majority on a given question is, generally speaking, a majority at a meeting convened to consider the question; Rex v. Theodorick, 8 East, 543.

(x) Att.-Gen. v. Day, 2 Atk. 212. Vid. inf. p. 70; Vin. Abr. Corporations, G. pl. 6.

(y) 5 Rep. 63; Bac. Abr. Bye-Laws; Norris v. Staps, Hob. 212; vid. 7 Q. B. 453.

(z) Rex v. Pasmore, 3 T. R. 343; Gerrish v. Rodman, 3 Wils. 164; vid. Rutter v. Chapman, 8 M. & W. 1.

(a) Anon. 2 Brownl. 100; 6 Vin. Abr. 258.

(b) Russell v. The Men of Devon, 2 T. R. 672; Vin. Abr. Corporations, F. pl. 4.

(c) Knight v. Berry, Carth. 27.

(d) Grindley v. Barker, 1 B. & P. 229; Rex v. Roe, Stra. 117; Wilkinson v. Mallin, 2 C. & J. 636. Vid. inf. Case of New College, Oxford, Dyer, 247 a. In the

And there is no doubt that wherever a power of a public nature is committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority.(e)

And when the law creates a charge upon any precinct or district, there the power of meeting the charge is impliedly conveyed to the inhabitants, and the majority bind the rest; but where it is desired to defray a charge which is not legally binding, there the assent of all is requisite.(f)

Under the Municipal Corporations Act a new principle has been introduced with respect to the majority of the council (which is not a corporation,) namely, that all acts should be decided by a majority of the members present at any meeting, provided the whole number present be not less than one-third part of the whole council, sect. 69.(g)

But in all cases of election, the majority of the elective assembly must act in some specific way in order to bind the minority; thus, if a candidate is proposed for a vacant office, and the minority merely dissent from the proposal without proposing and voting for some one else, they lose their votes, and the person nominated by the minority is legally entitled to the office.(h) And both in elections and on other *occasions of voting, if the majority vote for an incapacitated person, or an illegal or impracticable object, their votes are [*71] thrown away.(i)

The votes of a majority are equally thrown away if they vote for an object beside or beyond the purposes of the meeting;(k) thus, if a meeting is called in obedience to the tenor of a mandamus calling upon the corporation to affix the common seal to a deed (the power to do so being, by the constitution of the corporation, to be exercised by the majority), and the greater number of those present refused to concur, and the minority did in fact affix the seal, the seal would be well affixed, and the corporation would be held to have obeyed the writ; for the purpose of the meeting, and the duty with which it is charged by the law being to affix the seal, all who vote against that purpose, and in contravention of that duty, throw away their votes, or must be taken to acquiesce in the will of the minority.(k) And this, upon consideration, will be found not

case of trustees under private settlements it is different, they must all concur; 3 T. R. 595; Steers v. Butt, Finch. Rep. 78.

(e) Grindley v. Barker, 1 Bos. & P. 229; Cortis v. Kent Waterworks Company, 7 B. & C. 332; Rex v. Whitaker, 9 B. & C. 648. In pleading, it must be shown that a majority concurred in doing the act; Cook v. Loveland, 2 B. & Pul. 35.

(f) Case of Hundred of Blackheath, 1 Salk. 362; Chamberlain of London's case, 5 Rep. 63, remarked on, 7 Q. B. 452.

(g) Vid. s. 31.

(h) Oldknow v. Wainwright, 1 W. Bla. 229; Gosling v. Veley, 7 Q. B. 425, 432; S. C. in err. 19 Law J. (N. S.) Q. B. 111. So an election by the minority of the whole corporation, made by a majority of those present at a properly constituted elective assembly, at the usual place and day, is good, though the majority of the whole corporation be wilfully absent; Case of St. Saviour's, Lane, Rep. 21; the absent majority being considered to delegate to the rest to vote for them. Vid. Merew. & Steph., Hist. Boroughs, 2249; R. v. Knight, 4 T. R. 429, 431; Comberb. 397.

(i) 7 Q. B. 433, 439, 446, 447; S. C. in error, 19 Law J. (N. S.) Q. B. 111.

(k) 7 Q. B. 448, 457; S. C. in error, 19 Law J. (N. S.) Q. B. 111.

at all inconsistent with another fundamental principle of the common law, that the majority must be made up by the votes of the persons present at the corporate meeting; for it is against the common law rule for a member of a corporate body to vote by proxy or substitute; ^(l) and in the case supposed, those who vote for an object, which it is not within their competence to vote for effectually, are in law considered not to be present or taking part in the meeting. Where an election is to be decided by a set number, of whom A. and B. are two, their presence only, not their assent, is necessary to the validity of the acts of the elective assembly. ^(m) So, where the corporation consisted of master and brethren, and an advowson was conveyed to them, to hold to the use of the master and brethren, and their successors, for ever; it was held that the right to nominate a clerk belonged to the majority of the entire body of master and brethren, and that the master's concurrence in the act of the majority was not necessary; ⁽ⁿ⁾ and the master may be compelled by mandamus to put the common seal to the nomination, ^(o) although there may be visitors appointed by the founder, to whom, by the constitution of the corporation, all disputes between the master and brethren are to be referred. But although at common law the acts of the majority bind the minority in all cases within the constitution of the body politic; yet equity will give relief to a corporation where its interests have been fraudulently dealt with by those who, at the time, represented the corporation, although the whole of them assented to the act complained of. Thus, where a number of persons obtained a charter of incorporation, constituting themselves, and all persons who might become subscribers [*72] to the undertaking, a corporation to have a capital *of 20,000*l.*, divided into 400 shares, and then, being the only members of the corporation, bought for themselves all the shares, but only accounted on the books of the corporation for 12,000*l.*, and then sold those shares in the market; a bill was held to lie, at the suit of the corporation against these persons, to compel them to pay the full consideration. ^(p)

It seems also not in violation of any principle to suppose that an action of debt would have lain at the suit of the corporation for the price of the shares unpaid for; for the corporation is a metaphysical being, not identical with the majority, or even the aggregate, of its members at any given time, but consisting of them, their predecessors, and successors, and has rights altogether distinct and separate from those of all or each of such majority or aggregate body; ^(q) and here the thing done was contrary to, and in violation of, the constitution of the corporation; and it has been laid down, that if a transaction be void, and not merely voidable, the corporation cannot confirm it so as to bind the dissenting minority of its members. ^(r) Hence, it would seem to follow, that if, after an illegal act

^(l) Yearb. 11 Hen. 4, fol. 64; Case of Dean of Fernes, Davys's R. 47 b.

^(m) Cotton v. Davies, Stra. 53.

⁽ⁿ⁾ Reg. v. Kendall, 1 Q. B. 366.

^(o) Ibid.; R. v. Windham, Cowp. 377.

^(p) Society of Practical Knowledge v. Abbott, 2 Beav. 567.

^(q) Bligh v. Brent, 2 Y. & C. (Exch.) 295; Society of Practical Knowledge v. Abbott, 2 Beav. 567; Ward v. Society of Attorneys, 1 Colly. 370.

^(r) Preston v. Grand Collier Dock Company, 11 Sim. 327, confirmed, Foss v. Harbottle, 2 Hare, 504.

were done in the name of the corporation by a party having for the time the management of the affairs of the corporation, the custody of the corporate seal, &c., so that an action could not be brought in the name of the corporation without their acquiescence, yet, that if afterwards the then minority were to become the managing body, they might commence an action in the name of the corporation, and recover damages against the guilty parties. Also there may be circumstances in which the Court of Queen's Bench will relieve by mandamus against the improper conduct of the majority contrary to the constitution and objects of the incorporation;(s) and the principle on which the court proceeds in such cases and generally, is this:—Where an inferior court or a body refuses to proceed in some course prescribed by law, the mandamus goes; but the court does not interfere in consequence of any misapprehension or error in the course of the party, provided it has been entered upon.(t)

This relief in equity is not confined to cases of trading corporations; but where a corporation, not being a trading corporation, had a capital or joint stock, in which the several members of the society had individual rights of property productive to them of pecuniary benefit, and a majority of the whole body (1291 to 22) had determined on surrendering the charter, in order to remodel the constitution of the society, so that the members should not possess any individual right of property in its capital: held, that the charter having limited the powers of those who had *the affixing of the common seal, by conditions which were incon- [*73] sistent with the notion of applying the common seal for the purpose of procuring the annihilation of the society, and the common law containing no principle allowing the interest constituted in the funds of the corporation to be taken away, without the consent of the whole body, an injunction must issue to restrain from affixing the common seal until the hearing.(u) The relief given by equity does not extend to protect the minority from the operation of measures legally resolved on by the majority, however the former may conceive themselves to be injured by such measures, as though, for instance, it were a resolution adopting a project for vesting all the property of the corporation in trustees with the view of liquidating the affairs of the corporation;(x) and it is a general rule, that the courts of chancery will not interfere by injunction in the private internal affairs of trading corporations, any more than the court of Queen's Bench will interfere by mandamus: it is also a rule in equity, that a suit by an individual shareholder of an incorporated company, complaining of an injury to the corporation, cannot be maintained if it appears that the plaintiff has the means of procuring a suit to be instituted in the name of the corporation itself; and this rule applies equally, whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of the majority of shareholders, or an

(s) *Reg v. Eastern Counties Railway Company*, 10 A. & E. 549.

(t) *Ibid.*; *Rex v. Severn, &c., Railway Company*, 2 B. & Ald. 646.

(u) *Ward v. Society of Attorneys*, 1 Colly. 370.

(x) *Lord v. Copper Miners Company*, 18 L. J. (N. S.) Chanc. 65; S. C. 2 Phill.

act or transaction absolutely illegal and incapable of being confirmed by a majority.(y)

If, however, the act complained of (though the act of the directors only,) be such an act as a general meeting of the shareholders might legally sanction, then a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give complete validity to the act of which the bill complains.(z)

The result of the above authorities therefore is, that, acting within the scope and in obedience to the provisions of the constitution of the corporation, the will of the majority, duly expressed at a legally constituted assembly, must govern; but beyond the limits of their constitution neither the will of the majority nor unanimity can make any act valid; as, for instance, if the constitution enables the corporation to raise money, whether by subscription for shares, or by imposing tolls or rates, and specifies the objects to which such funds are to be applied, no vote of the corporation can divert those funds from such objects.(a)

The rule of the majority binding the whole has been already stated to relate equally to corporations having a head as to corporations without [*74] one; but it may be expedient here to investigate the state of *the law as to this, with respect to some corporate communities, a little more closely.

As respects deans and chapters, hospitals, colleges, or other corporations (*i. e.* other corporations (as it seems) originating by foundation), the stat. 33 Hen. 8, c. 27, intituled, "The Bill for Leases of Hospitals, Colleges, and other Corporations," after recognizing the common law rule, that leases, &c., of such corporations are good with the assent and consent of the major part, provides that in such corporations none shall have a negative voice, notwithstanding such may have been the will of the founder.(b)

(y) *Mozley v. Alston*, 1 Phill. 790.

(z) *Foss v. Harbottle*, 2 Hare, 461, was explained in *Bagshaw v. Eastern Counties Railway Company*, 7 Hare, 129, 130.

(a) *Bagshaw v. Eastern Counties Railway Company*, 7 Hare, 114.

(b) 33 Hen. 8, c. 27. Albeit, that by the common laws of this realm of England, all assents, elections, grants and leases had, made and granted by the dean, warden, provost, master, president, or other governor of any cathedral, church, hospital, college, or other corporation, by whatsoever name they be incorporate or founded, with the assent and consent of the more or greater part of their chapter, fellows, or brethren of such corporation having voices of assent, had thereunto consented and agreed; yet the said common laws notwithstanding, divers founders of such deaneries, hospitals, colleges and corporations within the said realm, have, upon the foundation and establishment of the same deaneries, hospitals, colleges and other corporations established and made amongst other their peculiar acts, local statutes and ordinances, that if any one of such corporation, having power or authority to assent or dissent, should and would deny any such grant or grants, that then no such lease, election or grant should be had, granted or leased; and, for the performance of the same, every person having power of assent to the same have been and be daily thereunto sworn, and so the residue may not proceed to the perfection of such elections, grants and leases, according to the course of the common laws of this realm, unless they should incur the danger of perjury; for the avoiding whereof, and for the due execution of the common law universally within this realm and every place in one conformity of reason to be used: be it ordained, established and enacted by the authority of this present parliament, that all and

The manifest intention of the statute has been considered to be to establish the rule of the common law, that a majority of the body corporate should bind the rest.^(c) But this statute has been held not to extend to enable the major part of a certain body of the corporators (such body not being a corporation) to bind the rest in respect of their assent, in the performance of a duty imposed on them by the statutes of the corporation; therefore, where, by the statutes of a college, a body of corporators, consisting of the warden, three bursars, five deans, and five senior fellows, were empowered to dispense with the absence of a fellow, a dispensation by the major part is not good; for the statute *does not extend to any particular number of a corporation,^(d) and the act [^{*75}] was not a corporate act.

Also neither the mayor, nor any other head officer of the corporation, has, at common law, a casting vote in case of equality of votes; there must be an express power given by the constitution of the corporation to confer the right,^(e) otherwise no bye-law or ordinance of the corporation can give it.^(f)

every peculiar act, order, rule and statute heretofore made, or hereafter to be made, by any founder or founders of any hospital, college, deanery or other corporation, at or upon the foundation of any such hospital, college, deanery, or corporation, whereby the grant, lease, gift, or election of the governor or ruler of such hospital, college, deanery or other corporation, with the assent of the more part of each of the same hospital, college, deanery or corporation, as have or shall have voice of assent to the same at the time of such grant, lease, gift, or election hereafter to be made, should be in anywise hindered or let by any one or more, being the lesser number of such corporation, contrary to the form, order and course of the common law of this realm of England, shall be from henceforth clearly frustrate, void and of none effect; and that all oaths heretofore taken by any person or persons of such college, hospital, deanery and other corporation, shall be for and concerning the observance of any such order, statute or rule, deemed void and of none effect; and that from henceforth no manner of person and persons of any such hospital, college, deanery, or other corporation, shall be in any wise compelled to take any oath for the observing of any such order, statute, or rule, upon the pain of every person so giving such oath to forfeit, for every time so offending, five pounds, the one moiety thereof to be to the use of our sovereign lord the king, and the other moiety thereof to any of the king's subjects, which will sue for the same in any of the king's courts of record by action of debt, bill, plaint, or information or otherwise, wherein the defendant shall not be admitted to wage his law, nor any protection nor essoign, or any other dilatory plea admitted or allowed.

(c) 2 Burn, Eccles. L. 117.

(d) The case of New College, Oxford, Dyer, 247 a. Another ground on which this decision may be supported is, that the act, being a judicial act, could only be done by the concurrence of the whole of the persons designated, or that the authority granted was not strictly pursued by a dispensation made by a part of the parties entrusted with it.

(e) Reg. v. Chapman, 6 Mod. 152; Anon. 7 Mod. 12; Anon. 12 Mod. 232. Where the statutes of Clare Hall, Cambridge, provided that the person should be elected for whom the master and the major part of the fellows should vote, it was decided that this only gave the master a single negative voice; Rex v. Blythe, 5 Mod. 404.

(f) Rex v. Dean of Chichester, 1 Heyw. El. Cas. 391; Rex v. Ginever, 6 T. R. 732.

[*76]

*BYE-LAWS.

WHERE it is necessary for the accomplishment of the objects of their incorporation, a body politic has, as an incident to it, the power of making bye-laws,^(g) and of enforcing them by penalties; and such bye-laws, in the case of municipal corporations and of other corporations entrusted with local, popular, or territorial government, will bind both members and strangers, and not members of the corporation only.

A bye-law is a rule obligatory on a body of persons or over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character, which a corporation is empowered to make, either by the common or statute law, is a bye-law.^(h) It is a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide.⁽ⁱ⁾ A bye-law cannot impose an oath; unless there be a custom to do so; for that is contrary to the common law.

The principle has sometimes been laid down in more general terms, asserting the power to make bye-laws to be incident to every corporation aggregate; but there does not appear to be good authority for a more extensive rule than the one above stated;^(k) nor indeed is the question likely to arise, except in cases where some powers of government, either over localities or bodies of persons, are lodged in the corporation. The affairs of other corporations are often carried on without its becoming necessary to frame any bye-laws.

The bye-laws of a corporation are always obligatory on all the members,
[*77] *and each member is bound to take notice of them;^(l) for every one within the scope of the bye-laws is considered as having given

(g) *Company of Feltmongers v. Davis*, 1 B. & Pul. 100; *City of London v. Vaneacre*, Carth. 482. In the report of the same case, 1 Salk. 142, the court is made to say only that where a franchise is granted for the benefit of a body politic, the body politic has power incidentally to regulate that franchise for the public benefit. Vid. 6 Vin. Abr. 258, pl. 4.

(h) Per Parke, B., 19 L. J. (N. S.) Q. B. 135; 8 Rep. 63 a; *Hopkins v. Logan*, 4 M. & W. 630. A new oath can only be imposed by authority of parliament, and no oath can be required, unless it be established by statute or common law; Com. Dig. Serement. A.; vid. Merew. & Ste. Hist. Boroughs, 2039; vid. dict. Godb. 254; *Rex v. Dean, &c.*, of Dublin, 1 Stra. 539. Therefore a bye-law imposing an oath is bad, unless authorised by statute or immemorial usage, though allowed by charter as it seems; 1 Rol. 5; 2 Mod. 27; *R. v. Jay*, 3 Keb. 714. Vid. inf. p. 78.

(i) Per cur. Gosling v. Veley, 7 Q. B. 451; vid. 1 Keb. 733; per Parke, B., 19 L. J. (N. S.) Q. B. 135. A bye-law is never pleaded as such; "rule, order and ordinance" is the phrase under which bye-laws are spoken of in pleading. In pleading a bye-law, it must be stated when and by what body or court it was made; *Rex v. Dean of Dublin*, Stra. 539; vid. 1 B. & Pul. 100; 4 M. & W. 633.

(k) To make ordinances is declared not to be of the essence of the corporation; *Sutton's Hospital case*, 10 Rep. 31; vid. per Abbott, C. J., in *Rex v. Westwood*, 57; cont. per Holt, C. J., 1 Show. 281. It belongs also by custom to other than corporate bodies; e. g. the parishioners of a parish; a leet, 2 Rol. Rep. 391; the inhabitants of a township; the commoners of a common, Merew. & Ste. Hist. Boroughs, 1078; 5 Rep. 63; Bac. Abr. Bye-Laws; the tenants or perhaps the homage of a manor, Dyer, 322 a; Vin. Abr. Bye-Laws, B.; vid. Hob. 212.

(l) *Vintners' Company v. Passey*, 1 Burr. 239. 250.

his consent to them.^(m) But besides the members, all the inhabitants of a district, over which a corporation is invested with jurisdiction, are bound by the bye-laws of the corporation enforcing that jurisdiction, and must take notice of them at their peril.⁽ⁿ⁾ So all the members of a trade, over which the corporation has jurisdiction, are bound by its bye-laws for the regulation of such trade, whether or not they are members of the corporation;^(o) and every stranger, though merely coming within the limits of a corporation invested with local jurisdiction and powers of government, is bound at his peril to take notice of all its bye-laws,^(p) provided, it is said, the object of the bye-laws be to suppress a general inconvenience or defeat fraud.^(q)

In all corporations, to which the power of making bye-laws is incident, it is to be exercised by the entire body of corporators as distinguished from select bodies, unless the constitution of the corporation have vested the whole power of making bye-laws in some particular part or body of the corporation;^(r) but a power, given by the charter to a select body, to make bye laws touching certain objects therein specified does not deprive the body at large of their incidental power to make bye-laws as to matters not so specified in the charter;^(s) and where a particular authority to make bye-laws is given by the charter, every bye-law purporting to be made under it must fall within the scope of that authority.^(t) The general rule is, that no bye-law will be held good in a court of law or equity, which is repugnant to, or inconsistent with, the laws of the land in any one instance,^(u) or which imposes a farther restraint than a statute imposes,^(x) though this last point is not quite free from dispute.^(x)

That all corporations have not incident to the incorporation the power *of making bye-laws, will appear from some cases of eleemosynary [*78] corporations to be treated of hereafter.

If by a public general statute applicable to every subject of the realm of England, a penalty of 5s. is imposed for a certain description of

(m) *T. Jones*, 145; *vid. R. v. Trevethan*, 2 B. & A. 339.

(n) *Vanacre's case*, Salk. 142; *Butchers' Company v. Morey*, 1 H. Bla. 370; *vid. Company of Horners v. Barlow*, 3 Mod. 258; and in such case it is therefore not necessary, in declaring for the penalty under the bye-law, to allege notice of it; *James v. Tutney*, Cro. Car. 498; *Butchers' Company v. Bullock*, 3 B. & Pul. 434.

(o) *Butchers' Company v. Morey*, 1 H. Bl. 370; *Kirk v. Nowill*, 1 T. R. 118. 266.

(p) *Prigge v. Adams*, Skin. 350; *Pierce v. Bartram*, Cowp. 269; *Kirk v. Nowill*, 1 T. R. 118. Beyond such limits they do not bind; 3 Mod. 158; *T. Jones*, 144; *vid. tam. 2 Brownl.* 177; *Hob.* 211; *Hutt.* 6; 11 Rep. 53; *Godb.* 252.

(q) *Bosworth v. Heane*, Stra. 1085; *S. C. Andr.* 91; *Cas. Temp. Hardw.* 405; *Franklin v. Green*, 1 Bulstr. 11; *per Heath, J.*, 1 H. Bla. 375.

(r) *R. v. Westwood*, 2 Dow. & C. 21.

(s) *Id. ibid.*; *per Parke, B.*, 16 M. & W. 228.

(t) *Calder, &c., Navigation Company v. Pilling*, 14 M. & W. 81. 87; *vid. per Wilmot, J.*, 3 Burr. 1838; *R. v. Phillips*, cited 3 Burr. 1325.

(u) *Norris v. Staps*, Hob. 211; *vid. 3 Salk.* 77, pl. 8. Therefore the power to make such bye-laws must always be shown in pleading, that the court may see the power has been strictly pursued; *R. v. Lyme Regis*, Dougl. 158, 159; *vid. 1 B. & Pul.* 100.

(x) *Tailors of Ipswich case*, 11 Rep. 53; *vid. Green v. Mayor, &c., of Durham*, 1 Burr. 131; *per Lord Kenyon, C. J.*, 7 T. R. 548; *Calder, &c., Navigation Company v. Pilling*, 14 M. & W. 90; *vid. tam. Butchers' Company v. Morey*, 1 H. Bla. 374; *Butchers' Company v. Bullock*, 3 B. & P. 434; *Pierce v. Bartram*, Cowp. 270.

offences, and a corporation, having rights and powers of territorial government, pass a bye-law affixing the penalty of 5*l.* to the commission of every such offence within their boundaries, such bye-law is said to be bad.(y)

Where a statute provided that only 2*s.* 6*d.* should be taken for the enrolment of indentures of apprenticeship, and a bye-law ordered 10*l.* to be taken, it was held bad on that account;(z) and generally if a statute either incorporating a company *de novo*, or extending the powers, &c., of a chartered corporation, prescribes certain regulations with regard to its dealings with the public on certain specified occasions and for certain purposes, it is very doubtful whether the corporation can enforce against the public any further regulations, with regard to those occasions and purposes, by making bye-laws cumulative to the regulations imposed by parliament.(a)

So where a bye-law ordered 11*s.* 6*d.*, instead of 2*s.* 6*d.*, to be taken(b) for enrolment of apprenticeship indentures.

Where a bye-law made a sum payable four times a year quarterly by the members of the corporation, a declaration on it need not specify the days on which it was payable.(c)

It is not competent to a person, who has voluntarily become a member of a corporate body, to set up the objection to a bye-law, which he is called upon to obey, that the corporation had no power to make such a bye-law.(d)

As it seems, a bye-law, which infringes the general obligation of conformity with the laws of the realm, and operates to curtail the common law rights of the subject within the jurisdiction of the corporation, may be good, if it be supported by an immemorial custom.(e) Thus there being an immemorial custom in the city of York for a select body of the corporation to make rules and regulations as to the practice of the court of record there, held that a bye-law limiting the number of attorneys of the court to four was good.(f) So a bye-law may levy a toll or talliage [*79] on the members of the corporation towards *the necessary expenses of the corporation;(g) though clearly a bye-law, to levy money of the subjects generally, would be bad, especially if there appeared to be any circumstances of oppression connected with the bye-law.(h)

(y) *Calder Navigation Company v. Pilling*, 14 M. & W. 90; per Lord Kenyon, C. J., 7 T. R. 548; *vid. tam.* *Butchers' Company v. Morey*, 1 H. Bla. 370; *Butchers' Company v. Bullock*, 3 B. & Pul. 434; *Pierce v. Bartram*, Cowp. 270; which are cases of bye-laws sinning against the above principle, and yet held to be valid.

(z) Per Lord Kenyon, C. J., 7 T. R. 548.

(a) *Eagleton v. East India Company*, 3 B. & Pul. 55.

(b) *Nevesley v. Webster*, 1 Kenyon's Cas. 243; S. C. Sayer, 251. But these cases appear to have been cases of bye-laws passed in violation of the express provisions of the statutes 22 Hen. 8, c. 4, and 28 Hen. 8, c. 5, relating to apprentices.

(c) *The Innholders' case*, 1 Wilks. 281.

(d) *King v. Clerk*, Salk. 349; *Piper v. Chappell*, 14 M. & W. 640.

(e) *Vid. R. v. Coopers' Company of Newcastle*, 7 T. R. 503; *Rex v. Tappenden*, 3 East, 186.

(f) *Rex v. Sheriffs of York*, 3 B. & Ad. 770.

(g) *Case of Winchelsea*, T. Raym. 448; *Mayor of Ripon's case*, Siderf. 282. Several charters of municipal corporations expressly empower the corporations to tax the inhabitants for municipal purposes; 1 Rep. Munic. Corporation Commissioners, p. 22.

(h) *Qu. War. Cas. Att.-Gen.'s arg.* 42. But a bye-law assessing on the mem-

But such custom must be strictly pursued and adhered to in the terms of the bye-law; therefore a bye-law altering the *qualification* of persons to be taken as apprentices by members of the corporation, was held not to be supported by a custom claimed to make bye-laws regulating the *number* of persons so to be taken. *(i)*

Where a bye-law is founded on a custom, it was held that a return to a writ of *hab. corp. cum causâ* must set out the custom directly, and not by way of recital. *(k)*

A custom to make bye-laws for the government, &c., of the cordwainers of the city of Exeter, does not support a bye-law extending to the cordwainers of the county of the city; *(l)* though it has been said that the city and the county of a city are the same thing.

Upon a similar principle, where a power is given by the constitution of the corporation to make bye-laws according to a certain form and in a particular manner, the power must be strictly pursued, and no bye-law made otherwise, than according to the power, will be binding; *(m)* so if the incorporating statute points out the mode by which bye-laws are to be enforced, (as by fine or amercement,) no other mode of enforcing them can be resorted to; *(n)* and the same is true of powers given by a royal charter; for the king's grant shall not enure to any other intent than that which is precisely expressed in it. *(o)* Therefore where the power of making bye-laws was vested by the charter in the mayor and aldermen, and power of election in the mayor, alderman and commonalty, it was held that a bye-law giving the power of election to the mayor and aldermen was bad, although purporting to be made with the assent of the commonalty. *(p)* However, there is no objection to a bye-law properly passed, which regulates the manner of electing officers of the corporation, provided the constitution of the corporation *be not infringed; *(q)* but where a charter directed the election of an [*80] officer to be made by a majority of a select body, a bye-law giving a casting voice to the presiding officer, in case of an equality of votes, is bad. *(r)*

bers of the corporation a burden cast by law on the body politic is valid; *Jeffrey's case*, 5 Rep. 66 a.

(i) *Rex v. Tappenden*, 2 East, 186; *vid. Mayor, &c., of Colchester v. Goodwin, Carter*, 68; *Wood v. Searl, J. Bridgm.* 140.

(k) *Chamberlain of London v. Compton*, 7 D. & Ry. 597.

(l) *Wood v. Searl, J. Bridgm.* 140. But the city of London has been held entitled of common right to make a bye-law regulating the enjoyment of a franchise, which was to be exercised without the limits of the corporate jurisdiction, viz., the shrievalty of Middlesex; *City of London v. Vanacker*, 1 Lord Raym. 498. So a bye-law may be good that obliges a commoner to exercise his right of common at certain times only; but a bye-law to exclude from the common altogether would be void; *Chamberlain of London's case*, 3 Leon. 264.

(m) *Dunston v. Imperial Gas, &c., Comp.*, 3 B. & Ad. 125; *vid. 4 M. & W.* 630.

(n) *Per Buller, J.*, 1 T. R. 125; for, where the right and the remedy are both created by the legislature, the corporation are bound to pursue the remedy provided by it; *Dundalk Western Railway Company v. Tapster*, 1 Q. B. 670.

(o) *Finch. L.* 101; *Sheph. Touch.* 83.

(p) *Rex v. Head*, 4 Burr. 2515; so *per Aston, J.*, 3 Burr. 1840.

(q) *Newling v. Francis*, 3 T. R. 198; *vid. per Holroyd, J.*, 4 B. & C. 823, 824.

(r) *Rex v. Ginever*, 6 T. R. 732.

OCTOBER, 1853.—7

Where a bye-law is duly made in accordance with the provisions of the charter, in a matter within the competence of the corporation to regulate, the bye-law, to some purposes, may be considered as forming a part of the charter in pursuance of which it has been made; thus where a defendant to a *quo warranto* information insisted in his plea on the charter, but in his rejoinder rested his defence upon a bye-law, it was held, by the House of Lords, on the unanimous opinion of six of the judges who were desired to assist the house, that there was no departure.^(s)

Again, it is a general rule that every bye-law must be reasonable and properly adapted to execute the objects marked out in the institution of the corporation;^(t) therefore any bye-law infringing upon, altering, or limiting, the powers and privileges or duties conferred or imposed by the constitution of the corporation, is bad.^(u)

A bye-law erecting a new office unknown to the constitution of the corporation is bad.^(x)

A bye-law imposing a penalty on *any person* refusing to take upon him an office in the corporation was held bad, because in the circumstances of the corporation in question, it might include persons over whom they had no jurisdiction.^(y) A bye-law avoiding all bonds, covenants, &c., make in contravention of it, is bad;^(z) for that is assuming the powers of a court of law.

So a bye-law of the University of Oxford, prohibiting all persons, townsmen as well as gowmsmen, from being abroad in the streets after nine o'clock at night, is bad;^(a) for such regulation is in excess of the powers of the university; but a bye-law that the offender against it shall be disfranchised is good.^(b)

A bye-law involving an expenditure of the funds of the corporation, without an adequate advantage accruing to the corporation, is bad, as being unreasonable;^(c) and therefore a bye-law to compel the giving of [*81] a dinner must show that it is for a beneficial purpose, or that *an interest of the corporation is in some way promoted by it,^(d) or it will be invalid. But a bye-law of the Surgeons' Company, that no member shall take an apprentice who does not understand the Latin tongue, is good,^(e) for that regulation is within the competence of the corporation to impose, and strictly ancillary to its purposes as well as advantageous to the public.

(s) *Tucker v. Reg.* 2 Bro. P. C. 311.

(t) *Rex v. Cutbush*, 4 Burr. 2204; *Hoblyn v. Reg.* (in err.), 2 Bro. P. C. 329; *Tucker v. Reg.* (in err.), 2 Bro. P. C. 304; *Rex v. Ginever*, 6 T. R. 732; *Rex v. Breton*, 4 Burr. 2260; per *Yates, J.*, 3 Burr. 1839; *Mayor, &c., of Oxford v. Wildgoose*, 3 Lev. 293; *Rex v. Phillips*, cited 3 Burr. 1325.

(u) *Rex v. Breton*, 4 Burr. 2267.

(x) *Rex v. Ginever*, 6 T. R. 735.

(y) *Mayor, &c., of Oxford v. Wildgoose*, 3 Lev. 293. So where the words in the bye-law were "any inhabitant;" *Mayor, &c., of Guildford v. Clerke*, 2 Ventr. 247.

(z) *Doggerell v. Pokes, Moore*, 411; *S. C. Owen*, 69.

(a) *Dodwell v. University of Oxon*, 2 Ventr. 33.

(b) *Com. Dig. Bye-Law, D. 2*; *Bab v. Clerke, Moore*, 411.

(c) *Master, &c., of Scriveners' Company v. Brooking*, 3 Q. B. 95; *Company of Framework Knitters v. Green*, 1 Lord Raym. 113; *Carter v. Sanderson*, 5 Bing. 79; *Gee v. Wilden, Lutw.* 420.

(d) *Master, &c., of Scriveners v. Brooking*, 3 Q. B. 95.

(e) *R. v. Surgeons' Company*, 2 Burr. 892.

A bye-law, if unreasonable, will be held bad, although it have been duly passed, and published and notified to the proper authorities, and not disallowed by them.(f)

Where a certain discretion is vested by the charter or constitution of the corporation in the body, a bye-law limiting the discretion so given is bad.(g) Still a bye-law may regulate the enjoyment of a right, if the restraint which it imposes upon the exercise of the right be upon the whole for the general benefit of the corporation;(h) but to impose an additional qualification on those who have an inchoate right to the freedom of the corporation was considered an infraction of the rule, and therefore a bye-law with that object was held to be invalid;(i) and, besides, such a restraint would be unreasonable and inconsistent with the objects of the corporate constitution.(j) However, a bye-law providing a method of previously examining the right of claimants to the freedom has been held good.(k) A bye-law therefore may in the above manner regulate the admissibility to office, but a bye-law cannot enlarge the number of those who by the constitution are eligible to office,(l) nor of the eligible to be corporators,(m) nor of the electors.(n) But when the mode of electing to an office is not specified and prescribed by statute, charter or custom, the corporation may from time to time pass bye-laws regulating such elections;(o) and these bye-laws, subject to the above restrictions, will be binding. Again, a bye-law may, it is said, narrow the number of electors, provided to do so does not violate the intention of the constitution, and the restriction be reasonable,(p) and the limitation does not exclude any integral part of the body, or introduce any stranger into the corporation;(q) but the corporation can *neither narrow the num berof the eligible,(r) for that would be to give themselves a [*82] new constitution,(s) nor can they vary the description of the eligible.(t)

A bye-law imposing a penalty on refusal by a corporator duly elected to serve a corporate office is good;(u) and it is no objection to such bye-

(f) *Elwood v. Bullock*, 6 Q. B. 383. So a bye-law confirmed by the justices, &c., under 19 Henry 7, c. 7, s. 1, remains liable to be disaffirmed in a court of law, *vid. infra*, p. 92; *Graves v. Colby*, 9 A. & E. 360; *Elwood v. Bullock*, 6 Q. B. 383.

(g) *Reg. v. Governors of Darlington School*, 6 Q. B. 682; *R. v. Askew*, 4 Burr. 2199; *R. v. College of Physicians*, 7 T. R. 287.

(h) *James v. Tutney*, Cro. Car. 497; *Pierse v. Bartrum*, Cowp. 269; *Anon. Goldsb.* 79; *vid. Com. Dig. Bye-Laws*, C. 4; *Wannell v. Chamberlain of London*, Stra. 675; *Green v. Mayor, &c., of Durham*, 1 Burr. 131.

(i) *R. v. Spencer*, 3 Burr. 1833; *R. v. Tappenden*, 3 East, 131.

(k) *Green v. Mayor, &c., of Durham*, 1 Burr. 131; *vid. R. v. Marshall*, 2 T. R. 2; *R. v. Bailiffs of Eye*, 1 B. & C. 85.

(l) *Mayor, &c., of Guildford v. Clarke*, 2 Ventr. 247; *R. v. Mayor, &c., Weymouth*, 4 Bro. P. C. 461; *Powell v. Reg.* 3 Bro. P. C. 436.

(m) *Powell v. Reg.* 3 Bro. P. C. 436. (n) *R. v. Bird*, 13 East, 384.

(o) *Newling v. Francis*, 3 T. R. 189; and a bye-law may regulate the time for taking an election in the circumstances stated in the text, 2 Lord Raym. 1355.

(p) *R. v. Attwood*, 4 B. & Ad. 502; *R. v. Spencer*, 3 Burr. 1827.

(q) *R. v. Ashwell*, 12 East, 22; *R. v. Westwood*, 7 Bing. 1; *vid. tam. per Lord Kenyon*, C. J., 6 T. R. 735; *R. v. Holland*, 2 East, 74.

(r) *R. v. Attwood*, 4 B. & Ad. 502; *R. v. Tunwell*, 3 Dougl. 207.

(s) *Per Lord Mansfield*, C. J., in *R. v. Tunwell*, 3 Dougl. 207.

(t) *Lee v. Wallis*, Ld. Keny. Cas. 292.

(u) *Taverner's case*, Sir T. Raym. 446; *Mayor, &c., of Wokingham v. Johnson*,

law that the party may be indicted for refusing to serve the office, (x) as he may be in all cases of municipal offices, at least if they be necessary for the administration of justice or the proper conducting of the government of the borough; and so a bye-law affixing a penalty on the voluntary resignation of a corporate office is good. (y)

Almost any bye-law, if founded on an immemorial custom, may be supported, although it be in itself idle or unreasonable. (z) However, it may be doubtful if the spirit of the decision, of which the above is the effect, would be adhered to at present; for the tendency of the courts has been of late to declare void all customs which are not in themselves reasonable, without regard to the question whether they might once have been reasonable, although the older authorities held that customs could not be deemed to be void for unreasonableness, unless it could be shown that they could never have been reasonable. (a) The question of reasonableness, we may observe, must be discussed with reference to the locality over which the custom is claimed to extend; for what may be a good custom in a borough (b) may not be so in an upland town; (c) the reason apparently being that an arrangement derogatory to common right and affecting a large body of persons, it can hardly be supposed they would have allowed to grow up, unless it had originated in a legal manner and on good grounds; the agreement, which is the basis of custom, could hardly have been evinced by such repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our times, as to have become the law of the particular place (d) [*83] under such circumstances, unless it had *had a substantial and legal origin; whereas, in the case of a small community, the alleged custom may be reasonably referred to usurpation on the one hand, and submission to force or fraud or covin on the other.

Cas. Temp. Hardw. 284; Mayor, &c., of London v. Vanacker, Salk. 142. In declaring on such bye-law, if the office is not judicially recognised as a corporate office, there must be an averment of the right of the corporation to have it; Sayer, R. 275.

(x) Mayor, &c., of London v. Vanacker, Salk. 142; S. C. Carth. 480; R. v. Bower, 1 B. & C. 585. The penalty of the bye-law is incurred by refusing to qualify for the office, *Starre v. Mayor, &c., of Exeter*, 3 Lev. 116; S. C. 2 Show. 159; for refusing the oath, &c., is refusing the office, per *Bramston, C. J., Langham's case*, March, 190; vid. *R. v. Larwood*, Carth. 306; *Reg. v. Humphery*, 10 A. & E. 368.

(y) Mayor, &c., of Cambridge v. Herring, 1 Lutw. 402.

(z) Wallis's case, Cro. Jac. 555; per Wightman, J., 3 Q. B. 105.

(a) 2 Inst. 664; *Hix v. Gardiner*, 2 Bulst. 195, 196, per Coke, C. J.: vid. *Rogers v. Brenton*, 10 Q. B. 26; *Cudden v. Estwick*, 6 Mod. 124. "The rule of law is, that wherever there is an immemorial usage the court must presume every thing possible which could give it a legal origin;" per Lord Mansfield, C. J., *Cocksedge v. Fanshaw*, Dougl. 127.

(b) Lib. Assis. 40 Edw. 3, fol. 250, A. pl. 41; 45 Edw. 3, fol. 229, A. pl. 8.

(c) Co. Litt. 110 b; et vid. Yearb. 21 Edw. 4, fol. 28, B. pl. 23; *Beresford v. Bacon*, 2 Lutw. 1317, 1319; Litt. s. 165; *Jones v. Robin*, 10 Q. B. 635.

(d) *Tyson v. Smith*, 9 A. & E. 425, 426. Vid. the custom of Lynn to take ballast for ships, Mayor, &c., of Lynn v. Taylor, 3 Lev. 160. Custom for resident freemen of Newcastle to claim exclusive right in the town moor against the members of the corporation at large; *Anon.*, cited in *Cocksedge v. Fanshaw*, Dougl. 121.

On the other hand, a bye-law cannot operate to annul a custom.^(e) This has been decided by the highest authority, and the reader will have been prepared to acquiesce in the decision by what has been said above respecting the nature of a custom; for if an immemorial usage be in existence, proved by repeated acts of assent on both sides, so as to have become, according to the principles of our jurisprudence, the established rule, obligatory on all who come within its sphere, it cannot be tolerated that any majority of the persons locally subject to this law, who at any time may conceive objections to the custom, should be empowered to set it aside for ever by an arrangement among themselves; and the decision, so far as it goes, is strictly in accordance with the rigour of the old law with respect to customs; according to which, a custom once established could only be abrogated by act of parliament, however injurious or inconvenient its operation, in the lapse of time, and change of circumstances, might have become.^(f)

A bye-law in restraint of trade must not only be reasonable but beneficial to the public,^(g) and the old cases laid down, that a custom to make bye-laws in restraint of trade, will not be favoured.^(h) But a prescription or custom to restrain from using a particular trade in a particular place was allowed;⁽ⁱ⁾ and customs to exclude foreigners from territorial jurisdictions under corporate government have been held good;^(k) corporations have even been held entitled to sue for the breach of such customs without having first passed bye-laws ascertaining the penalties to be taken from the offenders.^(l) But now all these customs in boroughs, and all bye-laws founded upon them, are wholly abrogated (except in the city of London) by the Municipal Corporations Amendment Act, which has abolished all exclusive rights of trading and working at trades in corporate towns and cities,^(l) and all customs, usages, &c., inconsistent with the provisions of the act.

(e) *Rex v. Johnson*, 6 Cl. & F. 41.

(f) 2 Inst. 664.

(g) *Gunmakers' Company v. Fell*, Willes, 389; *Bosworth v. Herne*, Cas. Temp. Hardw. 409; *Dodwell v. Oxford*, 2 Vent. 33, 34; *vid. Wood v. Searl*, J. Bridgm. 141; *Player v. Jenkins*, Siderf. 28; *Fremantle v. Throwsters' Company*, Lev. 229; *vid. 3 Smith's Wealth of Nations*, 111. 144, 145.

(h) *Mayor, &c., of Winton v. Wilks*, Salk. 203; *per Littledale, J.*, 7 Dowl. & H. 602.

(i) *Harris v. Wakeman*, Sawyer, 255; *Shaw v. Poynter*, 2 A. & E. 324; *Brown v. Jollyfe*, Cro. Jac. 597.

(k) *Ellington v. Cheney*, cited 1 Wils. 235; *Mayor, &c. of Colchester v. Sympton*, cited 1 Wils. 237; *Weavers' Company v. Brown*, Cro. Eliz. 803.

(l) Sect. 14.—And whereas in divers cities, towns and boroughs a certain custom hath prevailed, and certain bye-laws have been made, that no person not being free of a city, town or borough, or of certain guilds, mysteries or trading companies within the same, or some or one of them, shall keep any shop or place for putting to show or sale any or certain wares or merchandize by way of retail or otherwise, or use any or certain trades, occupations, mysteries, or handicrafts for hire, gain, or sale within the same: Be it enacted, that notwithstanding any such custom or bye-law, every person in any borough may keep any shop for the sale of all lawful wares and merchandizes by wholesale or retail, and use every lawful trade, occupation, mystery and handicraft for hire, gain, sale or otherwise within any borough; *vid. Elwood v. Bullock*, 6 Q. B. 383; *Pierce v. Bartrum*, Cowp. 269. This is returning to the old law that every one might sell any commodity, &c., in any city or borough, &c.; 9 Edw. 3, cc. 1 and 2; 25 Edw. 3, c. 2; 27 Edw. 3, c. 11.

[*84] *Bye-laws nevertheless may be passed for the *regulation* of trade, and will still be valid, provided they conform to the general requisites of good bye-laws: in fact corporations have always exercised, without question, the power of making bye-laws for the regulation of trade within their limits; and this is no more than it has been held a court leet has authority to do.^(m)

With respect to the mode of enforcing bye-laws of corporations, it has already been observed, that the power of enforcing by penalties is part of the power of making bye-laws, which is incidental to all corporations, to the development of the objects of whose constitution such power is necessary; and in general the rule is, that a bye-law without an express act of parliament can *only* be enforced by a pecuniary penalty, which must be certain;⁽ⁿ⁾ the exception to the generality of the rule being the cases where bye-laws have been allowed as being authorized by a custom, ex. gra. in the city of London, although they purported to give power of imprisonment by way of enforcing them.

But a bye-law fixing the maximum, as 5*l.*, and giving a power of mitigation not below another sum, as 2*l.*, is good;^(o) for there is nothing unreasonable in such a regulation, and it is sufficiently certain. It may be observed that this mode of fixing the limits of penalties has been varied by the legislature in the Railway Companies Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 109), by which the companies are required to fix the penalties for infringing their bye-laws, though a range is given by the statute between 0*l.* and 5*l.*: and a similar requirement is contained in the Municipal Corporations Act with respect to bye-laws enforcing the serving of certain of the municipal offices specified in the enactment.

Also a bye-law fixing one penalty for a first offence, a larger for the second, and a still larger for the third and every time after, does not appear to be bad for uncertainty;^(p) but where a certain penalty is fixed by bye-law it cannot be altered as long as the bye-law remains unrepealed.^(q)

Offences against the bye-laws of municipal corporations are not as such punishable by indictment,^(r) and *a fortiori* they are not so in case of other corporations.

A bye-law affixing forfeiture of goods, as the penalty for disobeying it is bad, although the charter expressly authorize the corporation to establish such bye-laws; for that no forfeiture can grow by letters-

[*85] *patent(s) is an old maxim of the law, and *fortior et potentior est vulgaris consuetudo quam legalis concessio*, and by *Magna Charta*

(m) 2 Rol. Rep. 391; Hardr. 56; Merew. & Steph. Hist. Boroughs, 1687; Exeter v. Smith, 3 Keb. 367.

(n) Bosworth v. Burgen, 7 Mod. 459, S. C. Lutw. 1324; Leathy v. Webster, Sayer, 252.

(o) Piper v. Chappell, 14 M. & W. 649; vid. Butchers' Company v. Bullock, 3 B. & Pul. 434.

(p) Butchers' Company v. Bullock, 3 B. & Pul. 434.

(q) Scarning v. Conyer, 3 Leon. 7; S. C. Moore, 75; Bendl. 159; Davis v. Lowden, Cartr. 29.

(r) Rex v. Sharples, 4 T. R. 777.

(s) 8 Rep. 125 a.; Kirk v. Nowill, 1 T. R. 118; Vin. Abr. Bye-Laws, A. 2, pl. 17; Com. Dig. Bye-Law, E. 2; 2 Inst. 47. 54; Bac. Abr. Bye-Laws, E.; Clarke v.

no man is to be dispossessed of his property but *per legale judicium parium suorum*; thus where a charter of Hen. 6 granted to the corporation of dyers of London power to search, and that all cloth that they should find dyed with logwood, &c., should be forfeited, it was held that the grant was bad.^(t) And as a bye-law is bad which attempts to inflict a forfeiture directly, so a provision which is in the nature of an imposition of a forfeiture will be bad; thus a bye-law cannot enforce payment of the penalty by declaring the offender shall be excluded from participation in the profits of the corporation until he pays the penalty; for such a confiscation is in the nature of a forfeiture, and therefore inadmissible in a bye-law.^(u) So if the forfeiture is to be levied by distress *and sale* of goods, the bye-law, without a custom or act of parliament to support it is bad.^(x)

Still it seems that a bye-law, in pursuance of an immemorial custom, enforced by a forfeiture, would have been held before the Municipal Corporations Act to be good; for such custom was good, as in the case of the custom of foreign bought and foreign sold, where the goods were forfeited.^(y) This custom has been held good in the cases of the cities of York and Lincoln;^(z) but now it is possible that all such customs are abrogated in municipal corporations by the Municipal Corporations Act, sect. 2, for they are, it would seem, inconsistent with that act. This however does not rest on any decided case, and may be open to some doubt. And a bye-law imposing a forfeiture, where the corporation is expressly authorized by act of parliament to take forfeitures, is undoubtedly good.^(a)

A bye-law cannot, it has been distinctly laid down, impose imprisonment as the penalty for infringing its provisions, although the corporation were expressly authorized to do so by their charter;^(b) for it i

Tuckett, 2 Ventr. 183; Horne v. Joy, 1 Ventr. 47; Nighingale v. Bridges, 1 Show. 135.

(t) 8 Rep. 125 a; Dyer, 279 b, marg.; 2 Inst. 47.

(u) Adley v. Reeves, 2 M. & Selw. 60; Gunmakers' Company v. Fell, Willes, 390.

(x) Clarke v. Tuckett, 2 Ventr. 183; 3 Lev. 281; 3 Salk. 76; Com. Dig. Bye-Laws, E. 2; Lee v. Wallis, Sayer, 263; S. C. Keny. Rep. 295. Levying by distress under a bye-law never implied a sale of the goods, Arris v. Bradshaw, 1 Keb. 733; for at common law every distress is replevisable, Sayer, 263.

(y) Clearywalk v. Constable, Cro. Eliz. 110; Sams v. Foster, Cro. Eliz. 352; Dyer, 279 b; 8 Rep. 126. 128. It seems that in declaring on a bye-law founded on a custom, the custom ought to be fully set out; Chamberlain of London v. Godman, 1 Burr. 12; for the Courts cannot take judicial notice of custom; Har-top v. Hoare, Stra. 1187; Hodges v. Steward, Salk. 125. So if a bye-law refer to former bye laws, they ought all to be set out in pleading; Gerrish v. Rodman, 3 Wils. 171. But if the bye-law is founded on a private statute the declaration need only state the substance of the act; Hopkins v. Mayor, &c., of Swansea, 4 M. & W. 638.

(z) Kirk v. Nowill, 1 T. R. 118.

(a) Dyer, 279, pl. 10; 2 Rol. Abr. 202.

(b) Clark's case, 5 Rep. 64; 2 Inst. 54; 8 Rep. 125; Ladyham's case, March, 186; Com. Dig. Bye-Law, E. 1; Vin. Abr. Bye-Laws, A. 2, pl. 1; Hardcastle's case, 4 Vin. Abr. 303; vid. Chilton v. London, &c., Railway Company, 16 M. & W. 212; vid. 2 Burr. 846. Many of the old charters, and some charters granted by Charles 2, gave the power of enforcing bye-laws by imprisonment, but such powers had fallen into disuse before the Municipal Corporations Act; 1st Rep. Munic. Corp. Comm. p. 22.

[*86] *contrary to Magna Charta that any one be imprisoned except per legale iudicium parium suorum. Nevertheless an immemorial custom, confirmed by statutes establishing the customs of the corporation,^(c) or an act of parliament expressly empowering the corporation to do so, will be good grounds for a bye-law imposing imprisonment.^(d)

It may be observed as being worthy of notice, that although the law has been broadly laid down by Sir Edward Coke and other judges, that a bye-law cannot imprison, yet the crown at all periods of our history up to the era of the Revolution was in the habit of granting the power in its charters not only to municipal^(e) but to trades corporations.^(f)

Although the general rule is as stated above, that the most proper mode of enforcing a bye-law, at common law, is by a penalty of a pecuniary nature, yet, as we have seen, disfranchisement of the offender may be limited in the bye-law as the punishment for breach of it;^(g) and where the bye-law relates to an office it is not unusual that amotion from the office should be limited as the consequence of violating it.

With respect to the form of a bye-law, it has been settled that it is not necessary that the preamble should state the reasons for making it.^(h) It ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those on whom it is to operate. Except in the two Universities and the College of Physicians, a bye-law being in Latin would be bad for that reason. The penalty of the bye-law must not be reserved to a stranger to the corporation. In the cases of the chamberlains of London, Bristol,⁽ⁱ⁾ and some other cities and towns, however, where it is the practice for penalties to be reserved to these officers, the courts have said that they will take notice of the relation there is between the chamberlain and the corporation, and that he is no stranger, but, *as it were*, part of the corporation, and that *camerarius, ex vi termini*, signifies thesaurarius of the corporation.⁽ⁱ⁾ Accordingly, when, in a corporation incorporated

(c) *Wood v. Mayor, &c., of London*, Salk. 397; S. C. 12 Mod. 686; *Rex v. Clerk*, Com. 24; S. C. Salk. 349. The Merchant Tailors' Company of London have power to imprison one of their body who refuses to take upon himself the place of liveryman upon being duly elected; *Rex v. Merchant Tailors' Company*, 2 Lev. 200.

(d) Power of imprisonment granted by 14 & 15 Hen. 8, c. 5, to the College of Physicians; *R. v. Bowerbank*, Skin. 676; *vid.* 2 Bulstr. 259. Many of the city companies have a power of imprisonment granted in their charters: the same is the case in many charters of municipal corporations; *vid.* 1 Munic. Corp. Comm. Rep. p. 22—"Many corporations have the power of enforcing their bye-laws by fine and imprisonment, but these powers are very little exercised."

(e) *Vid.* Chancery's case, 12 Rep. 83; *Torle's case*, Cro. Car. 582, that the power of imprisonment cannot be given by letters-patent.

(f) *Vid.* instance in a charter of James I to the Plumbers' Company, *Piper v. Chappell*, 14 M. & W. 626; and another in his charter to the Turners' Company, *Graves v. Colby*, 9 A. & E. 358. Another instance occurs in the charter of Charles 2, to the borough of Doncaster.

(g) *Rex v. Rippon*, 2 Keb. 25, *qu. tam.* (h) *Rex v. Harrison*, 3 Burr. 1328.

(i) *Totterdell v. Glazby*, 2 Wils. 266; *Bodwin v. Fennell*, 1 Wils. 233; *Anon. Gouldsb.* 79; *Graves v. Colby*, 9 A. & E. 366. *Exeter*, *Pierce v. Bartrum*, Cowp. 269. *Bedford, Mayor, &c., of Bedford v. Fox*, 1 Lutw. 562. In such case, the officer suing need not set out his election or appointment to the office. *Harris v. Wake-man*, Sayer, 255. But it seems that the bye-law may go on to say, that the penalty when recovered may be given to the informer, the poor of certain parishes, &c. *Vide Cas. T. Hardw.* 406.

by the name of the "Masters, Wardens *and Commonalty of the Mystery or Art of the Turners of London," a bye-law was duly [*87] made, imposing a penalty of 15*l.* for refusal to accept the office of steward, but reserving it to the masters and wardens for "the time being," for the use, &c., of the company, it was held that an action of debt for the penalty would not lie at the suit of the persons who were master and wardens at the time of the refusal (not being so at the commencement of the suit, but for anything that appeared, being strangers to the corporation at the time of the commencement of the action); and it would seem, that, in order to enable the master and wardens or other officers of the corporation, to whom, in their official character, the penalty might be reserved on the bye-law, to sue on it as officers of the corporation, such officers must have a perpetual succession in the nature of a corporation. It seems also that the corporation in such case are precluded from suing in their own name on such a bye-law.^(k) This question, with respect to the officers of corporations suing in virtue of their offices, will be found more fully discussed hereafter.

A bye-law limiting the mode of recovery of the penalty to an action in the courts of the corporation is bad (except by the custom of London);^(l) for the corporation are interested in the result of such action, and non potest esse iudex et pars.^(m) This, however, seems only to be true in practice where the defendant is a stranger to the corporation; for it has been laid down by Lord Mansfield, C. J., that the objection does not apply where both parties are interested. So in London (it seems to have been laid down that) they may try in the corporation courts actions on bye-laws affecting only members of the corporation, when it does not appear on the record that the same party is plaintiff and judge,⁽ⁿ⁾ and each side is equally interested. The action in such case ought to be, and in practice mostly is, brought by the chamberlain.^(o) It is otherwise, where the suit is their own suit against a stranger to the corporation;^(p) for there it may not be brought in the courts of the corporation.

The penalty in a bye-law is never recoverable by distress, (unless there is an immemorial custom under which distress is the established mode of levying penalties in the corporation,) where it is not so limited

(k) *Graves v. Colby*, 9 A. & E. 374. But where the bye-law declared that the offender should forfeit and pay so much to the master and wardens of a similar company, to the use of the company, it was held that *the same* master and wardens might recover; *Piper v. Chappell*, 14 M. & W. 624.

(l) *Ballard v. Bennett*, 2 Burr. 778, 779; *Chamberlain of London v. Barnardiston*, 2 Siderf. 178; *Harris v. Wakeman*, Sayer, 254; *Wood v. Mayor, &c., of London*, 1 Salk. 397; 19 Hen. 7, c. 7, s. 2. It has ever been held to be a good objection to a judge, that a corporation, of which he is a member, is interested in the cause, Sayer, 255; but not to a juror, *id.*

(m) *Co. Litt.* 141 a.; *Vin. Abr. Judges*, A. pl. 8. 14. 29; *Com. Dig. Justices*, I. 3; *Charte v. Kennington*, 2 Stra. 1173; *Vin. Abr. Himself*, A. pl. 2.

(n) *Wood v. Mayor, &c., of London*, Salk. 397; *Reg. v. Rogers*, 2 Lord Raym. 778; *Egerton v. Earl of Derby*, 12 Rep. 114; *Brookes v. Earl Rivers*, Hardr. 503.

(o) 2 *Ld. Raym.* 778; 2 A. & E. 312.

(p) *Hesketh v. Braddock*, 3 Burr, 1847.

in the bye-law itself.(q) In municipal corporations it is now otherwise ; [*88] *for the Municipal Corporations Act, giving a power of distress and sale in specified circumstances, a bye-law made under it, taking no notice of distress, &c., would be good. On the other hand, the bye-law may limit the penalty to be recovered by action of debt, but if it does not, debt lies.(r) Or the corporation may maintain assumpsit, but not indebitatus assumpsit, to recover the sum forfeited under the bye-law.(s)

With respect to the construction of bye-laws, it is a rule that the words shall receive a reasonable construction, and that a condition shall be construed so as to be consistent with the subject-matter of the bye-law.(t)

Another rule, which may be stated as now being fully settled, is, that a bye-law that is void in part is void wholly ; e. g., if the penalty be unreasonable, the rest of the bye-law is vitiated thereby, and becomes wholly inoperative and null.(u)

A bye-law giving power to distrain for the penalty, upon *due proof* before the master and wardens of the corporation that the penalty had been incurred, was construed to be satisfied only by proof by a verdict.(x)

All bye-laws authorizing any payment, matter, or thing forbidden by the act for preventing the application of corporation property to the purposes of election of members to serve in parliament (2 & 3 Will. 4, c. 69,) or for the purpose of evading the provisions of that act, are made utterly void by its 4th section.

The words "using a trade" contained in a bye-law will be taken to

(q) Vid. *Clark's Case*, 5 Rep. 64, ad. fin. ; *Lambert v. Thornton*, Ld. Raym. 91 ; 3 Lev. 281 ; Com. Dig. Bye-Law, D. 2.

(r) Com. Dig. Bye-Law, D. 1.

(s) *Barber Surgeons' Comp. v. Pelson*, 2 Lev. 252 ; *City of London v. Goree*, 1 Ventr. 298 ; S. C. 2 Lev. 174 ; *Feltmakers' Co. v. Davis*, 1 B. & Pul. 98. Both in debt and in assumpsit it is necessary to set out the bye-law in the declaration ; *Feltmakers' Comp. v. Davis*, 1 B. & Pul. 98 ; 1 Wms. Saund. 312, n. 3. But it is not necessary to state or prove that any demand of the penalty was made on the offender ; *Butcher's Comp. v. Bullock*, 3 B. & P. 434. In justifying, however, under a bye-law empowering to distrain, it seems necessary to state and prove a demand and refusal ; *Davis v. Morgan*, 1 C. & J. 587. In declaring on a bye-law for the penalty for not taking up the livery of a company, it has been held necessary to aver that the company had a livery ; *Innholders' Co. v. Gledville*, 1 Sayer, 274 ; vid. *Poulterers' Co. v. Phillips*, 6 Bi. N. C. 322. And in making cognizance under a bye-law referring to other bye-laws, they must be set out ; *Gerrish v. Rodman*, 3 Wils. 171. Precedents of declarations on bye-laws, 14 M. & W. 624 ; 3 Q. B. 95 ; 2 A. & E. 312 ; 4 M. & W. 621 ; 1 Wils. 281 ; 1 H. Bla. 370 ; 3 Burr. 1847 ; 3 B. & P. 434. It seems that the venue is local ; *Isaac v. Luffe*, 2 Show. 238, Butt's ed.

(t) *Poulterers' Comp. v. Phillips*, 6 Bing. N. C. 323 ; *Tobacco Pipe Makers' Comp. v. Woodroffe*, 7 B. & C. 838.

(u) Com. Dig. Bye-Law, C. 7 ; per *Bridgeman, C. J., Mayor, &c., of Colchester v. Godwin, Carter*, 121 ; *Elwood v. Bullock*, 6 Q. B. 383 ; *Clarke v. Tuckett*, 2 Ventr. 182 ; *Rex v. Atwood*, 4 B. & Ad. 481. The authorities on the other side, viz. that a bye-law may be good in part and bad in part, at least where the parts are divisible, are per *Lord Kenyon, C. J., Rex v. Fishermen of Faversham*, 8 T. R. 356 ; *Lee v. Wallis*, 1 Keny. Cas. 295 ; per *Parker, C. J.*, 1 Stra. 469 ; *Player v. Vere*, Sir T. Raym. 288. 294. 328 ; *Harris v. Wakeman*, Sayer, 256 ; per *Bayley, J.*, 1 B. & Ad. 95 ; per *Lawrence, J.*, 7 T. R. 549.

(z) *Wood v. Searl, J., Bridgm.*, 142 ; vid. *Crookhay v. Woodward*, Hob. 217 ; *Gold v. Death*, Hob. 93 ; 21 Vin. Abr. 75, 76.

signify following it as a master, not as a journeyman or apprentice.(y) The words "it shall and may be lawful" in a bye-law are not obligatory on the corporation.(z) In charters these words have sometimes, though not generally, been construed as giving an option.

Where a bye-law appointed certain sums, arising out of rents belonging to a municipal corporation, to be distributed annually among certain specified officers of the corporation, it was held that any [*89] one and each of these officers could sue the corporation, upon this bye-law, for his portion of the annual payment upon its being withheld, if not at common law, at least, since the Municipal Corporations Act, which (sect. 2) gave rights to the parties enforceable by an action of debt.(a) The principle on which the decision of the court of error in the case proceeded was this, that wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law, by the same statute.(b)

A bye-law barely delegating to a select body the examining and approval of candidates for admission as members of the corporation, will not be construed as necessarily conferring the right of admission upon such approval;(c) for the object of the examination is merely to ascertain the qualification, and a qualification is not a title or right to an office,(d) it is only a basis of eligibility, on which an actual appointment or election to the office may, or may not be founded, according to the general considerations which predominate in the minds of the electors, who, having the discretion reposed in them, may exercise it as they think fit, provided they do not maliciously exclude.

The validity of a bye-law may be questioned in various modes; it may either be tested in an action of debt, or assumpsit, brought for the recovery of the penalty;(e) or if the penalty have been actually levied, the party may bring an action of trespass against the corporation,(f) or against their officer;(f) or the validity of a bye-law may be questioned on a return to a mandamus, where the party to whom the writ is directed, justifies his refusal to comply with it under the bye-law,(g) or where the penalty is limited by the bye-law itself to be recovered in the courts of the corporation. The validity of the bye-law may be questioned, in every case but that of the city of London, in a writ of error in the Queen's Bench.(h) But the validity of a bye-law cannot be questioned in a summary manner on motion, on the return of a writ

(y) Clerk v. Denton, 1 B. & Ad. 97; 5 Eliz. c. 4, s. 31; vid. 2 A. & E. 320. 324.

(z) Rex v. Bailiffs of Eye, 1 B. & C. 87.

(a) Mayor, &c., of Swansea v. Hopkins, 8 M. & W. 901, in error.

(b) Anon. 6 Mod. 26; S. C. Salk. 415; vid. per Parke, B., 5 M. & W. 324; Webb v. Jiggs, 4 M. & Selw. 113. 119; Com. Dig. Debt, A. 9; 4 Burr. 2381; 4 M. & W. 640. The plaintiff must show title to the penalty; Mayor, &c., of Exeter v. Starre, 2 Show. 159; and also that the defendant stands within the mischief of the bye-law, Colchester v. Goodwin, Carter, 119; Gunmakers' Co. v. Tilt, Willes, 390; Ex parte Eden, 2 M. & Selw. 229.

(c) Rex v. Askew, 4 Burr. 2190. 2200; Rex v. Bailiffs of Eye, 1 B. & C. 85.

(d) 3 B. & C. 685; 4 Burr. 2200. (e) Moir v. Munday, Sayer, 181. 185.

(f) Ibid. (g) R. v. Harrison, 3 Burr. 1322.

(h) Vid. Harris v. Wakeman, Sayer, 254.

of habeas corpus eum causâ from any other corporation but that of the city of London.(i)

The result and effect of exacting money, under a bye-law which the corporation had no right or authority to make, may be fatal to corporations in certain cases; for the doing so has been held to be extortion, [*90] *punishable by forfeiture of the corporation.(k) But whether this doctrine would still apply to the corporations under the Municipal Corporations Act, and whether those corporations can be deprived of their corporate existence without another act of parliament, that statute not erecting new corporations, but only remodelling the old ones, and there being nothing of an incorporating character in its provisions, and whether those corporations, not owing their origin to parliament, but to the crown, the rules of the common law in this respect operate on them, notwithstanding that act, is a question; so of corporations created by the crown since that statute.

With respect to what is evidence of the existence of a bye-law, it has been held that the books of a corporation in which their bye-laws are registered, are evidence of such bye laws, even against strangers to the corporation.(l)

As to producing in evidence certified copies of bye-laws, the law now is, that whenever, by any act now in force, or hereafter to be in force, any certified copy of any bye-law shall be receivable in evidence of any particular in any court of justice or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall be admitted in evidence, provided it purport to be sealed or impressed with a stamp, or sealed and signed as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, when a seal or stamp is necessary, or of the signature or official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.(m)

Evidence of a practice in contravention of a bye-law is said not to be receivable to invalidate the bye-law;(n) and the reason apparently is derivable from the nature of a bye-law, which is an ordinance passed by the corporation for the purpose of regulating the objects to which it extends to all future time; it is as enduring as the corporation itself, if not repealed by competent authority in the meantime; and it has even been held that a bye-law, which a corporation is duly authorized in all respects to make, when once made, can only be repealed by act of parliament, or by the corporation themselves.(o)

Long continuance of a bye-law is fair evidence to show that it has no intrinsic inconvenience.(p)

(i) Ballard v. Bennett, 2 Burr. 777.

(k) Adjudged in the Cas. of Quo. Warr.; vid. Merew. & Steph. Hist. Boroughs, 1788. 1991.

(l) Case of Thetford, 12 Vin. Abr. 90.

(m) 8 & 9 Vict. c. 113, s. 1; and by s. 4, persons forging such seals, stamp or signature of a corporation, are made guilty of forgery, &c.

(n) Sells v. Browne, 9 C. & P. 601. (o) Vid. 20 Car. 2, c. 6; et vid. inf. p. 91.

(p) Rex v. Ashwell, 12 East, 28.

It has been surmised that the declarations of deceased corporators were evidence of reputation of a custom to exclude foreigners;(*q*) but now such customs are abolished in municipal corporations; and such *evidence by itself would not be admissible to prove the existence of a bye-law, even if the corporation books in which it was contained were lost; for the corporation ought to replace the bye-law so lost by a new one to the same effect. But it would be different if there were an uninterrupted usage for a sufficient length of time in accordance with the alleged bye-law: for there the corporation may be excused from making a new bye-law. For where there do not remain any traces of a bye-law on the corporation books, and although there cannot be any proof given of the loss of it, yet upon evidence of constant usage a jury may be directed to presume its existence,(*r*) provided it might have been legally made. Even sixty years' usage has been considered evidence of a bye-law.(*s*) But within seventy years of the grant of the charter it was held there could be no sufficient usage to raise the presumption of a lost bye-law vesting a right of election in a representative body.(*t*) Still it seems the correct mode of acting would be for the corporation to replace bye-laws, the authentic originals of which may have been lost by the destruction of the corporation records from time or accident, as by this means all questions of usage, or the lapse of sufficient time to enable a jury to presume that the bye-law had once existed, would be avoided.

As regards the repeal of bye-laws, it appears that the only mode of abrogating a bye-law which is within the scope and object of the constitution of the corporation which passes it, and which is not unreasonable or contrary to law, is by act of parliament, if the corporation refuse to repeal it:(*u*) a bye-law is never obsolete.

Every bye-law may be repealed by the same power that made it,(*x*) that is, the corporation itself; but it can only be repealed prospectively, and not so as to disturb rights already vested under it.

The bye-laws or statutes granted by a founder of an ecclesiastical or eleemosynary corporation for its government cannot be repealed or altered even by the founder himself or his heirs, unless he has reserved power to do so in the statutes.(*y*)

Having thus stated the leading rules and general principles applicable to the bye-laws of corporations generally, we shall proceed to point out such regulations, respecting particular classes of corporations, as may appear to be most deserving of notice, and as serve best to illustrate the principles of corporation law.

(*q*) *Davis v. Morgan*, 1 C. & J. 587.

(*r*) *Rex v. Head*, 4 Burr. 2515; *Rex v. Ashwell*, 12 East, 22; *Rex v. Bird*, 13 East, 367; Bull. N. P. 211; Cowp. 110; Phil. Evid. 478, 8th ed. A bye-law may be set forth in pleading with an averment that it is no longer extant, but in such case a continuous usage ought to be shown; *R. v. Westwood*, 4 B. & C. 786.

(*s*) *Perkin v. Masters, &c., of Cutlers' Co.*, 21 MSS. Serjt. Hill, 65.

(*t*) *Rex v. Grosvenor*, 7 Mod. 198.

(*u*) Vid. 12 Hen. 7, c. 6; Rol. Abr. 363; and vid. sup. p. 90.

(*x*) *Rex v. Ashwell*, 12 East, 22; per Ashhurst, J., 3 T. R. 198.

(*y*) *Philips v. Burg, Skin.* 513; 6 Vin. Abr. 278.

Fellowship of crafts or mysteries, guilds and fraternities, are restrained from making and executing bye-laws in disinheritance or diminution of the [*92] *prerogative of the crown or against the public advantage, unless such bye-laws be examined and approved by the chancellor, treasurers of England, or chief justices of either benches, or three of them, or both the judges of assize on circuit in the county, upon pain of forfeiture of 40*l.*(*z*)

Such corporations are also prohibited making any bye-laws to restrain any one from suing in any of the king's courts, under a penalty of 40*l.*(*a*)

This enactment does not extend to cities or boroughs incorporated, nor to railway companies incorporated by acts of parliament, nor to joint stock companies registered and incorporated.

The customs of London having been repeatedly recognized and expressly confirmed by parliament, all bye-laws duly framed upon and according to such customs will be held good. Thus a bye-law to oblige all joiners to be free of the Joiners' Company is good, there being a custom to that effect; (*b*) so a bye-law that no one, not being free of the city, shall keep any shop or use any trade within it; (*c*) so that brewers' drays should not be in the streets after eleven o'clock, A. M. in summer, and one in winter, there being a custom for the corporation to have the regulations of carts; (*d*) so a bye-law limiting the number of carts; (*e*) so that no broad cloth should be sold but what was brought to Blackwell Hall to be examined; (*f*) so that none but free porters should intermeddle in importing and exporting any corn, roots, &c., within certain bounds; (*g*) so that no one shall exercise the trade of a painter unless he be free of the Painters' Company; (*h*) so that no artificers, handicraftsmen, or other shopkeepers or traders by retail, being free of the city, should be permitted to employ, &c., in any such handicraft or manual occupation within the city, &c., any person, not being free of the city or apprentice to a freeman; (*i*) so that none but a freeman of the city using the trade of a butcher shall be made free of the Butcher's Company; (*k*) so a

(*z*) 19 Hen. 7, c. 7, s. 1. But this statute does not confirm any bye-law which has been so allowed as it prescribes, but every one must stand or fall upon question in a court of law upon its own merits, irrespective of the fact of its having been allowed, which only saves the corporation from the 40*l.* penalty each time they enforce such bye-law; Tailors of Ipswich case, 11 Rep. 54 b; per Att.-Gen. Quo Warr. Cas. p. 44; vid. *Graves v. Colby*, 9 A. & E.; Vin. Abr. Bye-Laws, B. pl. 7.

(*a*) 19 Hen. 7, c. 7, s. 2.

(*b*) *Wannell v. Chamberlain of London*, Stra. 675; et vid. 1 Burr. 14.

(*c*) *Wagoner's case*, 8 Rep. 129; *Arris v. Bradshaw*, 1 Keb. 733.

(*d*) *Bosworth v. Hearne*, Stra. 1085; S. C. Cas. Temp. Hardw. 402; Andr. 91.

(*e*) *Player v. Jones*, 1 Vent. 21; S. C. Siderf. 284; *Shaw v. Pope*, 2 B. & Ad. 465.

(*f*) *Chamberlain of London's case*, 5 Rep. 62.

(*g*) *Fazakerley v. Wiltshire*, Stra. 462; per Lord Abinger, C. B., 4 M. & W. 330; vid. *Collyer v. Stennett*, 4 M. & Gra. 676; *Rex v. Chamberlain of London*, 8 Mod. 267. But in declaring for the penalty for interfering, &c., it would have been necessary to allege that there were one or more free porters present who might have been employed instead of defendant; 1 Str. 468.

(*h*) *Clerk v. Le Cren*, 9 B. & C. 52; *Harrison v. Godman*, 1 Burr. 123.

(*i*) *Shaw v. Poynter*, 2 A. & E. 312; and vid. S. C. as to form of declaration.

(*k*) *Rex v. Chamberlain of London*, 3 Burr. 1322.

bye-law extending over a foreign franchise, and purporting to bind strangers there, was held good.^(l)

*All companies incorporated for carrying on public undertakings, are empowered by the Companies Clauses Consolidation [^{*93}] Act^(m) to make, from time to time, such bye-laws as they shall think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such bye-laws and make others, provided such bye-laws be not repugnant to the laws of that part of the united kingdom where the same are to have effect, or to the provisions of this or the special act, and such bye-laws shall be reduced to writing, and shall have affixed thereto the common seal of the company, and a copy of such bye-laws shall be given to every officer and servant of the company affected thereby; and they may by such bye-law impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such bye-laws, as the company shall think fit, not exceeding five pounds for each offence; all the bye-laws to be made by the company shall be so framed as to allow the justice before whom any penalty imposed thereby may be sought to be recovered, to order a part only of such penalty to be paid, if such justice shall think fit. The production of a written or printed copy of the bye-laws of the company, having the common seal of the company affixed thereto, shall be sufficient evidence of such bye-laws in all cases of prosecution under the same.

Joint stock companies, when registered and incorporated, are empowered⁽ⁿ⁾ to make bye-laws, from time to time, at some general meeting of shareholders specially summoned for the purpose; such bye-laws to enure for the regulation of the shareholders, members, directors, and officers of the company; provided that such bye-laws be not repugnant to or inconsistent with the provisions of the Joint Stock Companies Registration Act, or of the deed of settlement of the company; and all such bye-laws must be reduced into writing, and have affixed thereto the common seal of the company, and be registered at the office for registering joint stock companies, and until they be so registered they shall not be of any force, and be printed and circulated for the use of the shareholders, and a copy given to every officer of the company, and to every shareholder who shall require the same;^(o) and in all actions, suits, and other legal proceedings for the enforcement of such bye-laws, or other penalties for the breach thereof, the production of a written or printed copy of the bye-laws of the company, having the seal of office of the registrar of joint stock companies affixed thereto, shall be sufficient evidence of such bye-laws.^(p)

Railway companies incorporated by act of parliament have frequently granted to them, by their special acts, power to make bye-laws, and to enforce them, by the imposition of penalties, upon persons other than the servants of such companies; and it having appeared to parliament

(l) *Fazakerly v. Wiltshire*, Stra. 462.

(m) 8 Vict. c. 16, ss. 124—127.

(o) 7 & 8 Vict. c. 110, s. 47.

(n) 7 & 8 Vict. 110, s. 25, pl. 11.

(p) *Ib.* s. 48.

[*94] *expedient that this power should not be left wholly without control, the law now is, that no such bye-laws are valid until two calendar months after a certified copy thereof has been laid before the Commissioners of railways, unless before that time approved of by the Commissioners of railways.(g) The Commissioners of railways may disallow any such bye-law; and if at the time of such disallowance it is already in force, may further prescribe the time at which it shall cease to operate, and become null and void.(r) All provisions of railway acts requiring the concurrence of courts of quarter sessions, &c., to give validity to bye-laws, are repealed.(s) Subject to these provisions, the Railway Clauses Consolidation Act empowers incorporated railway companies to make bye-laws for regulating the use of the railways, provided every such bye-law is passed under the common seal, and contains a fixed penalty not exceeding 5*l*.(t) provided that certain regulations for the due publication of the bye-laws be observed;(u) all which being duly observed, such bye-laws are declared to be binding on *all parties*.(x)

(g) 3 & 4 Vict. c. 97, s. 8. And be it enacted, that no such bye-law, order, rule, or regulation made under any such power, and which shall not be in force at the time of the passing of this act, and no order, rule, or regulation annulling any such existing bye-law, rule, order, or regulation which shall be made after the passing of this act, shall have any force or effect until two calendar months after a true copy of such bye-law, order, rule, or regulation certified as aforesaid, shall have been laid before the lords of the said committee, unless the lords of the said committee shall before such period, signify their approbation thereof. Then the 9 & 10 Vict. c. 105, s. 2, transferred all the powers, rights, and authority then vested in the said lords of the said committee, by any means whatsoever, to the commissioners of railways.

(r) 3 & 4 Vict. c. 97, s. 9. And be it enacted, that it shall be lawful for the lords of the said committee, at any time, either before or after any bye-law, order, rule, or regulation which shall have been laid before them shall have come into operation, to notify to the company who shall have made the same, their disallowance thereof; and in case the same shall be in force at the time of such disallowance, the time at which the same shall cease to be in force; and no bye-law, order, rule, or regulation which shall be so disallowed shall have any force or effect whatsoever; or if it shall be in force at the time of such disallowance, it shall cease to have any force or effect at the time limited in the notice of such disallowance, saving in so far as any penalty may have been then already incurred under the same. Then the 9 & 10 Vict. c. 105, s. 2, transferred all the powers, &c., of the board of trade to the commissioners of railways.

(s) 3 & 4 Vict. c. 97, s. 10.

(t) 8 & 9 Vict. c. 20, s. 109. It shall be lawful for the company subject to the provisions (as above) to make bye-laws, and from time to time repeal or alter such bye-laws, and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and such bye-law shall be reduced to writing, and shall have affixed thereto the common seal of the company; and any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding five pounds, to be imposed by the company in such bye-laws as a penalty for any such offence; and if the infraction or non-observance of any such bye-law or other such regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, annoyance, or hindrance, and that without prejudice to any penalty incurred by the infraction of any such bye-law.

(u) 8 & 9 Vict. c. 20, s. 110. The substance of such last-mentioned bye-law, when confirmed or allowed, &c., under any act in force regulating the allowance or confirmation of the same, is to be painted on boards, or printed on paper and

(x) See next page for note (x).

*The subject of bye-laws would not be complete without stating the law, as it at present stands, with respect to the bye-laws ['95] of municipal corporations. We therefore proceed with this branch of the subject, although in doing so it will be necessary to anticipate, on some points, information which the reader will not find fully developed until a subsequent part of the work.

The Municipal Corporation Act enacts, that it shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force throughout such borough, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences; provided that no fine so to be appointed shall exceed the sum of 5*l.*, and that no such bye-law shall be made unless at least two-thirds of the whole number of the council shall be present; provided that no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof, shall have been sent, sealed with the seal of the said borough, to one of his majesty's principal secretaries of state, and shall have been affixed on the outer door of the town hall, or in some other public place within such borough; and if at any time within the said period of forty days, his majesty, with the advice of his privy council, shall disallow the same by law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation; provided also, that it shall be lawful for his majesty, if he shall think fit, at any time within the said period of forty days, to enlarge the time within which such bye-law, if disallowed, shall not come into force; and no such bye-law shall in that case come into force until after the expiration of such enlarged time.(y)

On this enactment it may be remarked, that, although the expressions

pasted on boards, and hung up and affixed, and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the bye-laws thereon, or any part thereof, shall be obliterated or destroyed, and no penalty imposed by any such bye-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid.

(z) 8 & 9 Vict. c. 20, s. 111. Such bye-laws when so confirmed, published, and affixed, shall be binding upon, and be observed by, all parties, and shall be sufficient to justify all persons acting under the same; and for proof of publication of any such bye-laws, it shall be sufficient to prove that a printed paper or painted board containing a copy of such bye-laws was affixed and continued in manner by this act directed; and in case of its being afterwards displaced or damaged, then that each paper or board was replaced as soon as conveniently might be. *Vid. Chilton v. London and Croydon Railway Co.*, 16 M. & W. 212.

(y) 5 & 6 Will. 4, c. 76, s. 90. The charters generally empower the municipal corporations throughout England and Wales, "to make bye-laws for the good rule and government of the town, and in some instances to tax the inhabitants for municipal purposes; but in a great number of corporations the power is disused, and no bye-laws are made. Many corporations have the power of enforcing their bye-laws by fine and imprisonment, but these powers are very little exercised;" 1 Rep. Municipal Corporation Com., p. 22.

OCTOBER, 1853.—8

are not perfectly free from ambiguity, the probable meaning of the legislature was to give the power of making bye-laws with fixed pains for the breach of them, in all cases mentioned in this section, and not merely in [*96] cases of nuisances. This, however, is far from being free *from doubt, in the absence of judicial interpretation. It will be observed that this section of the act requires the presence of at least *two-thirds* of the council for the making of bye-laws, while s. 69 declares that all acts whatsoever authorized or required by virtue of this act to be done by the council of the borough, and all questions of adjournment and others that may come before such council, may be done and decided by the majority of the members of the council who shall be present at any meeting held in pursuance of this act; the whole number present at such meeting not being less than *one-third* part of the number of the whole council. This discrepancy may very probably hereafter lead to litigation. Thus it may perhaps hereafter become a question whether the repeal of one of these bye-laws must not be made by the same proportion of the council that it required to pass it; the general rule being that a bye-law is to be repealed by the same body that has power to make it.

It seems that not only the description of bye-laws mentioned in s. 90, but also bye-laws imposing fines for non-acceptance of office in the corporation, (s. 51), are to be made as directed, s. 90. If the corporation have need to pass any other bye-laws, than such as may be necessary for the above purposes, they perhaps ought to be passed by the whole body and not by the council; for the giving to a select body a power of making bye-laws touching certain matters specified, does not deprive the body at large of their incidental power to make bye-laws touching all other matters within the scope of their constitution; (z) unless it should be held that this is one of the acts which the corporation is to perform vicariously, as it were, through the medium of the council, a doctrine which has been stated, as we shall see hereafter, to express the meaning of the legislature.

This further provision is added, that all the provisions hereinafter contained relative to offences against this act, punishable upon summary conviction, shall be taken to apply to all offences committed in breach of any bye-law or regulation made by virtue of the act. (a)

The act, therefore, points out how the bye-laws made by virtue of it are to be enforced, namely, by the imposition of fines or penalties, which are to be levied by distress and sale, or for want of sufficient distress, the offender to be imprisoned, &c. (s. 129), and the corporation are precluded from inflicting any other punishment (b), and, it would seem,

(z) *Rex v. Westwood*, 2 D. & Cla. 21; S. C. 4 B. & C. 781. Hence (semb.) a corporation newly created under the powers given by the Municipal Corporations Act, must pass all such bye-laws as fall within the class last above mentioned, by an assembly of the whole body. On the other hand a bye-law made by the body at large, when by the constitution of the corporation it ought to be made by a select body, is void; *Parry v. Berry*, Com. R. 269.

(a) 5 & 6 Will. 4, c. 76, s. 91. This section applies all the provisions of sections 127 to 133, inclusive, to breaches of any bye-law made by virtue of the act.

(b) *Vid. dict. per Buller, J.*, 1 T. R. 125; for s. 129, *vid. infra*.

*from pursuing any other remedy ;(c) and therefore an action of debt or assumpsit to recover the penalties *on such bye-laws* does [*97] not seem to be open to them. If these bye-laws had been left to be made under the common law power of the corporations to make bye-laws the case would have been different, for then the statute would have been construed only to have given a remedy cumulative upon the common law remedy by action.(d)

The mode of levying the fine to be imposed by bye-law for the refusal to accept office is pointed out in s. 51.

On the other hand, the summary remedies given by this act are only applicable for the enforcement of bye-laws passed by virtue of this act, and consequently every municipal corporation is left to such remedies as it had before the passing of this act for the recovery of penalties under bye-laws passed previously. These will be found stated above.

All persons, who were possessed of any corporate benefits before the passing of the act, under any usage, custom or bye-law, or otherwise, are confirmed in their enjoyment of them by s. 2,(e) (provided such usage, custom or bye-law, be not inconsistent with any of the provisions of the act ; s. 1.)

*PROPERTY.

[*98]

WE proceed to state some remaining characteristics, or, as they have usually been called, incidents of corporations in general ; and, first, with respect to property. It has been laid down generally that a corporation aggregate has an incident power to purchase lands and goods.(f)

At present every corporation aggregate, not being restricted by its constitution, may acquire and take in succession personal property to any amount, and goods and chattels granted to them go in succession, without express words in the grant(g) indicating the intention that they should do so.

But with respect to lands and tenements, the legislature began early to impose restrictions upon the right of corporations aggregate to acquire and transmit them in succession, by various statutes called the Statutes of Mortmain. These restraints were first considered to be necessary in consequence of the extent to which landed property was accumulating in the hands of the great religious or ecclesiastical corporations, and the earliest of them is contained in Magna Charta.(h) The imposition of the necessity that a corporation aggregate must in general have a license

(c) Vid. per cur. Dundalk Western Railw. Co. v. Tapster, 1 Q. B. 670.

(d) Chapman v. Pickersgill, 2 Wils. 146 ; vid. 2 M. & Cra. 628.

(e) Exemptions from tolls, enjoyed by corporators, are not within the meaning of these words, where the tolls are levied within the corporate jurisdiction, and the exemption was in virtue of the corporate character solely ; vid. infra, MARKETS.

(f) Com. Dig. Franchises, F. 15 ; 10 Rep. 30 ; 1 Bla. Com. 478.

(g) Fulwood's case, 4 Rep. 64 b.

(h) 9 Hen. 3, c. 36.

from the crown to enable it to hold lands and tenement in mortmain is a relic of the feudal restraints on alienation.⁽ⁱ⁾

However, the necessity still remains, and it is subject to it, that every corporation aggregate is said to have a capacity to take and hold lands and tenements in succession or perpetuity. It is not correct therefore to say that every corporation aggregate, as such, has power to acquire lands as an incident to its incorporation; the proper mode of stating the law seems to be that, subject to the discretion of the crown or parliament as to the grant of a license in mortmain, a corporation has a capacity to take and hold in perpetuity.^(j)

This license was usually conveyed in the royal charter erecting the corporation, and the right of the crown to grant such license was fully established by the statute 7 & 8 Will. 3, c. 37, which provided that the crown for the future, at its own discretion, might grant licences to aliene or take in mortmain, of whomsoever the tenements in question might be holden.

The Statutes of Mortmain,^(k) which bear upon the interests of corporations at the present day, are principally the following:

[*99] *The statutes 7 Edw. 1, st. 2, c. 1 (*De Religiosis*), and stat. Westminster 2nd, enacted in substance that no person, religious or other whatsoever, (i. e. body politic, ecclesiastical or lay, sole or aggregate), shall buy or sell any lands or tenements, or under the colour of gift or lease, or by reason of any other title, receive the same, or by any other craft or engine shall presume to appropriate them to himself, whereby such lands may in anywise come into mortmain, under pain of forfeiture of the same, and within a year after the alienation, the next lord of the fee may enter; and if he do not, then the next immediate lord is from time to time to have half a year to enter in; and for default of all the mesne lords, the king shall have the lands so alienated for ever, and shall enfeoff others by certain services.^(l)

15 Ric. 2, c. 5, extended the statute *De Religiosis* to all lands and tenements, fees, advowsons, and other possessions, purchased or to be purchased to the use of guilds or fraternities; "and, moreover, it is assented, because mayors, bailiffs and commons of cities, boroughs and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion; that from henceforth they shall not purchase to them, and to their commons or office,

(i) 2 Bla. Com. 268. Various statutes have relaxed the rule in favour of particular classes of corporations, as hospitals; 39 Eliz. c. 5; 13 & 14 Car. 2, c. 12; parsons, 17 Car. 2, c. 3; 29 Car. 2, c. 8.

(j) Vid. Sugd. Vend. & Purch. 884, edit. 1846; Co. Litt. 99 a.

(k) The mortmain acts are: Magn. Ch. 9 Hen. 3, c. 36; 7 Edw. 1, st. 2; 13 Edw. 1, c. 32; 13 Edw. 1, c. 41; 18 Edw. 1, st. 1, c. 3; 27 Edw. 1, st. 2; 34 Edw. 1, st. 3; 18 Edw. 3, st. 3, c. 3; 15 Ric. 2, c. 5; 21 Hen. 8, c. 6, s. 5; 23 Hen. 8, c. 10; 1 & 2 Ph. & M. c. 8, s. 51; 35 Eliz. c. 4; 21 Jac. c. 1; 13 & 14 Car. 2, c. 12; 17 Car. 2, c. 3, s. 7; 22 Car. 2, c. 6, s. 10; 29 Car. 2, c. 8; 7 & 8 Will. 3, c. 37; 9 Geo. 2, c. 36, as far as it relates to conveyances to corporations to charitable uses; 43 Geo. 3, c. 108, s. 1; 9 Geo. 4, c. 85; and 2 & 3 Will. 4, c. 115, as to Catholic donations, &c., vid. 2 M. & K. 221.

(l) 7 Edw. 1, st. 2, c. 1; vid. Bac. Abr. Mortmain (A.), edit. Dodd. See also stat. Westm. 2d (13 Edw. 1, st. 1, c. 32). This enactment extends to rent and commons, though they are not lands or tenements, 19 Vin. Abr. 515, pl. 39.

upon pain contained in the said statute *De Religiosis*; and whereas others be possessed, or hereafter shall purchase to their use, and they thereof shall take the profits, it shall be done in like manner as is afore-said of people of religion."

It does not appear to be necessary for our purpose at present to refer particularly in this place to the other Statutes of Mortmain, but we will consider a little the effect of these statutes on corporations.

With respect to real property, it has been said, that to grant and purchase are incident to a body incorporate; ^(m) and that if any sole corporation, or aggregate of many, either ecclesiastical or temporal, purchase lands or tenements in fee, they have capacity to take, but not to retain, unless they have a sufficient license in that behalf; for within one year after alienation, the next lord of the fee may enter; *and if he do not, then the next over lord, and so on, each mesne lord [^{*100}] having half a year to enter in; and in default of all the intermediate lords, the crown may take possession of the lands as escheating. ⁽ⁿ⁾ To take, first, the case of purchasing. The meaning of the doctrines above laid down, which at first sight appear to involve some degree of contradiction, is this, that a corporation, aggregate or sole, when once created, may, without a license to hold in mortmain, take lands and tenements granted to them or him in mortmain, for they have at common law a capacity so to do; and that, without license, they may hold such lands, and sue, &c., in respect of them, provided neither the lord or lords, of whom they were holden, nor the crown, assert their rights and enter upon such lands; in other words, a grant or gift in mortmain is not void, but only voidable by the lord or the crown entering for the escheat.

Alienation in mortmain gives no right to an action at law to the mesne lords, or to the crown; for the thing which passes to the lords or the crown by the alienation is a title merely, without any such right as supplies a cause of action. ^(o) That title can only be legally asserted by means of some act to be done by the lord; the forfeiture does not vest the estate in the lord without some act on his part; ^(p) and hence in case of an alienation in mortmain of an advowson, as the only mode of entry

^(m) 10 Rep. 30. As regards granting, this is a mere dictum of the reporter; the case he cites from Fitz. Abr. Grants, 30, and which is there cited as 22 Edw. 4, is in fact 21 Edw. 4, fol. 55, pl. 28. Coke therefore had not looked beyond the abridgment; but neither there nor in the last mentioned case is there a syllable to show that a corporation may grant, as an incident to its incorporation. In fact, the doctrine seems to have originated with this loose note of Sir Edward Coke, and to have thence found its way into the books; but in the absence of any case deciding the question, the observation of the Court of Exchequer Chamber, upon an extrajudicial statement of the full Court of King's Bench, seems applicable. "These various repetitions, derived from the same source, cannot raise the authority of the proposition itself higher than that which it originally possessed;" *Veley v. Burder*, 12 A. & E. 307.

⁽ⁿ⁾ Co. Litt. 2 b.

^(o) Co. Litt. 345 b; 19 Vin. Abr. 231, pl. 7. The statute 3 & 4 Will. 4, c. 27, contains provisions respecting rights of entry, &c., but semble, that statute does not apply to the crown at all, 19 Vin. Abr. 533; 11 Rep. 74 b, nor to subjects with respect to titles of entry of this kind; nor semble, does 7 Will. 4 and 1 Vict. c. 26, s. 3, which permits rights of entry to be devised; et vid. *Culley v. Doe d. Tayler-son*, 11 A. & E. 1008, 1019.

^(p) *Doe d. Evans v. Evans*, 5 B. & C. 584, 587, note.

is by presentation,(q) therefore if the lord presents at any time within his year, though the living has been full for six months, it will be good to give him the title, which must be perfected by *quare impedit*, to be brought within the year.(r)

It seems that nothing but entry on lands aliened in mortmain is requisite on the lord's part. In case of the king however, it is said that there cannot be entry made on the lands until office found.(s) At any rate, of things not lying in tenure, as rents, commons, and the like, it is certain that the king is not entitled to them until office found, and until then they remain in the corporation.(t)

The entry of the immediate lord for forfeiture for alienation in mortmain must be made within a year, computed from the day next after the alienation.(u)

Where lands are conveyed to the use of A. for life, with remainder [*101] *to an unlicensed corporation, the forfeiture does not accrue until the death of the tenant for life;(x) and so where a remainder-man aliens to an unlicensed corporation, the lord cannot enter until the determination of the particular estate.(y)

The meaning of the term unlicensed corporation is this. As was observed above, the conveyance of lands to a corporation was not made void to all intents and purposes by the Statutes of Mortmain, but only voidable at the option of the lords and the crown; consequently if the mesne lords and the crown all consented to waive the escheat, each in their respective rights, the corporation to whom the land was granted enjoyed the property unmolested. In process of time the rights of the lords becoming difficult to trace, a license from the crown was generally considered sufficient to ascertain the right of property to the corporation; and this license it became usual for corporations to obtain from the crown, enabling them to take lands to such a value, notwithstanding the Statutes of Mortmain. In strictness, however, the license to hold in mortmain was only a waiver of the right of the crown to enter on the lands alienated; for as no royal charter can per se take away the property, or prejudice the interest of the subject, such license did not abrogate the right of the mesne lords to enter, and therefore with respect to them the corporation was not secure until the lapse of the periods respectively limited for the assertion of their rights.(z) In fact the king's license had only

(q) Vid. 17 Vin. Abr. 422, pl. 11; id. 423, pl. 4, marg.; id. 427, 483. The lord is said to have a title to enter, but no right; 18 Vin. Abr. 443; in case of the crown, vid. 17 Vin. Abr. 482.

(r) 17 Vin. Abr. 338, pl. 23; id. 392, pl. 3; Dyer, 25 b. pl. 163, marg.

(s) Doe d. Hayne v. Redfern, 12 East, 96; Doe d. Evans v. Evans, 5 B. & C. 587, note. And the crown shall have the issues of the lands from the time of the inquisition taken, and not before; Vin. Abr. Alienations, D. pl. 5. Even in treason, until the stat. 33 Hen. 8, c. 20, the lands did not vest in the crown until office found; 4 Vin. Abr. 271, pl. 10, marg.

(t) Shelf, Mortm. 8.

(u) Plowd. C. 202; Vin. Abr. Mortmain, C. 3, pl. 5.

(x) Vin. Abr. Mortmain, B. pl. 19, C. pl. 6.

(y) Vin. Abr. Mortmain, C. 3, pl. 4.

(z) 2 Hawk. Pl. Cor. 390, cap. 37, s. 29. A license in mortmain is not of the essence of the corporation, which is perfect without it; Case of Sutton's Hospital, 10 Rep. 31 a, 26 b.

the effect of waiving the crown's right to the escheat, but if there were any mesne lord, he might have taken advantage of the Statutes of Mortmain, notwithstanding the royal license, and have entered for the forfeiture;(a) and if he did not, and the crown, on office found, entered, and granted the lands, the gaantee held the land of the chief lords as before, and not of the crown.(b)

Formerly, previous to the grant of a royal license to hold in mortmain, a writ of *ad quod damnum* must have been sued out, directed to the escheator, to inquire what damage it would be to the king or to other persons, if the king do grant such license,(c) and whether the intended donor would by the gift or grant be disabled, for want of sufficient lands, to pass upon assizes and juries *ita quod patria magis solito non oneretur seu gravetur*;(d) but, notwithstanding, the language of the writ implies that it was desirable to provide, that others as well as the mesne lords and the crown, were not injured by the projected alienation. It was the law, as stated above, in effect, that the mesne lords might grant licenses of alienation in mortmain, so far as they were *respectively concerned, and the ground is stated to be the *maxim quilibet potest* [*102] *renunciare juri pro se introducto*.(e) But this writ of *ad quod damnum* has been long disused,(f) and, instead of it, the license may contain a clause dispensing with the necessity of that writ or any other writs, inquisitions or mandates.(g) Also in modern acts of parliament, enabling corporations to hold lands, there is usually a clause dispensing with that writ as well as with the Statutes of Mortmain;(h) so that the writ, though disused, is by no means obsolete.(i) But in such license to hold in mortmain it is now always implied that the lands be granted in the manner prescribed by the statute 9 Geo. 2, c. 36, which we shall presently have occasion to refer to more fully.(k) The license, like other licenses and authorities, must be strictly pursued.(l) Thus, if the king licenses a man to alien his manor of Dale, the alienation of the manor, except twelve acres, is not good, not being in pursuance of the authority;(m) for a man cannot do less than he has an authority to do;(n) and so if the license be to make a feoffment by deed, a feoffment made without deed will not be valid. So if the license to a man be to alien a third part of his lands, and he aliens all his lands, this is invalid.(o)

Such license is not assignable over. But it may be countermanded or

(a) Harg. Co. Litt. 99 a, note 108; Vin. Abr. Mortmain, C. 2, pl. 1. 4; id. D. pl. 3. The settled rule is that the king cannot prejudice the interest of the party; 2 Hawk. P. C. 390; Anon. 12 Rep. 29, 30; Freem. R. 138.

(b) Vin. Abr. Tenure, F. pl. 9. (c) Fitz. N. B. 222 a, where see form of writ.

(d) Fitz. N. B. 222 b. (e) Co. Litt. 99 a.

(f) Shelf. Mortm. 33; Harg. Co. Litt. 99 a, note (108). (g) Fitz. N. B. 226 h.

(h) Shelf. Mortm. 40. (i) Vid. 3 & 4 Vict. c. 60, s. 2; 6 & 7 Vict. c. 87, s. 22.

(k) Mogg v. Hodges, 2 Ves. sen. 53.

(l) 15 Vin. Abr. 93; J. Bridgm. 114; Vin. Abr. Alienations, B. pl. 3, 4; Anon. Bulst. 105; Butler v. Baker's case, 3 Rep. 33; Pexall's case, 8 Rep. 85.

(m) J. Bridgm. 114. So if the license is to alien two parts of the manor, and he aliens the whole; Pexall's case, 8 Rep. 85.

(n) Co. Litt. 52 b; Vin. Abr. Authority, B. pl. 23; Jenk. Cent. 215.

(o) Rex v. Allen, J. Bridgm. 114.

revoked at any time before execution.(p) However, the demise of the crown between granting such a license and its execution is not a revocation.(q)

With respect to the form of the license, it has been decided that a license to purchase in mortmain lands and tenements empowers to purchase advowsons,(r) and the same would be the case if the word hereditaments(s) were used.

The license is usually granted by writ of privy seal or letters-patent (the latter seems to be the more regular course), empowering the licensee to hold lands to such an annual amount in value, and frequently also empowering all the subjects, whether incorporated or unincorporated, to alien in mortmain to the licensee up to such amount.(t)

In the cases of trading or other private corporations, the acts of parliament or charters constituting them usually express in each case [*103] *the extent to which the corporation may hold lands; if no amount is mentioned in the license, or charter, or statute, they may hold to any extent.

The crown grants this license at present under the authority of an act of parliament, which was passed to get rid of what seems a merely imaginary objection to the legality of such licenses on the old practice; because it was said the king thereby took upon him to dispense with the Statutes of Mortmain.(u) The legislature therefore enacted that the crown at its discretion should and might lawfully "grant to any person or persons, bodies politic or corporate, their heirs and successors, license to alien in mortmain, and also to purchase, acquire, take and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents or hereditaments whatsoever, of whomsoever the same shall be holden;"(x) and they declared "that lands, tenements, rents or hereditaments so aliened, or acquired and licensed shall not be subject to any forfeiture for or by reason of such alienation or acquisition.(y) The question whether, on the interpretation of this statute, a person, not having a license to alien in mortmain, can alien to a corporation having only a license for themselves to hold in mortmain, (without the clause enabling all persons to alien to them), so as to prevent the entry of the immediate lord of the crown for the escheat, seems never to have been settled, and perhaps is more curious than practically important.(z)

A question of more difficulty is as to the position of corporations, who have taken, and continue to hold, lands beyond the annual value which their license to hold in mortmain authorizes. It would seem that with respect to such surplus lands, the corporation is liable to entry by the crown on default of the mesne lords at any time; for although it is true

(p) Anón. Dyer, 92 a; Palm. 74; 2 Rol. R. 152.

(q) Co. Litt. 52 b; Fitz. N. B. 223; Plowd. C. 457.

(r) 2 Vin. Abr. 279, pl. 2; London v. Colleg. Church of Southwell, Hob. 303, 304.

(s) Anon. Dyer, 323; Anon. Dyer, 350 b; 10 Rep. 65 b.

(t) See form of such license to a college, Shelf. Mortm. Append. 891; and see a great number of licenses granted under 7 & 8 Will. 3, c. 37, in 22 Commons Journ. 708. 710.

(u) Co. Litt. 99 a, Harg. note (108).

(x) 7 & 8 Will. 3, c. 37, s. 1.

(y) Id. *ibid.*, s. 2.

(z) Harg. Co. Litt. 99 a, note (108).

that their title would be good after the lapse of sixty years, and adverse possession from the time at which the title to the land accrued to the crown,^(a) on default of the mesne lords (such adverse possession being established by acts of ownership done in the assertion of a right), yet it would seem that the title to the land does not fully and in its completeness accrue to the crown until office found under the alienation; and as at common law, before the statute of Geo. 3,^(b) there was no limitation to the crown's entry on the land, the only restriction being that the crown should have the issues of the land only from the time of inquisition taken, and as the *title* of entry is not perfected and matured into an absolute right to the land until office found and actual entry, the sixty years does not begin to run until that event, and therefore the crown may enter at any time, provided office has first been found.

*The question is of the more importance, as there is no doubt that many corporations have greatly exceeded the limits of their [*104] license, and hold such surplus lands without any right derived from it for their doing so. It is clear, however, that if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is, that they may take, though, unless they can obtain an extension by the crown of their license, they cannot hold the lands,^(c) unless the mesne lords and the crown choose to sleep upon their respective titles.

A condition in a grant or devise that the grantee or devisee should alien in mortmain is void, and the grantee or devisee takes an absolute estate.^(d) Though it seems that a condition in a feoffment that the feoffee should *not* alien in mortmain to such a religious house, or to any corporation, was perfectly valid; although the devise in this form created a fee simple conditional, which it has been formerly said could only be done by act of law not of a party;^(e) but several instances may be shown, in which the creation by devise of fee simples forfeitable, if alienated in specified modes, has been allowed.

It must be understood that everything, which has been said with respect to the necessity of license, applies to all corporations, whether sole or aggregate. Thus alienation to a parson and his successors, or to a vicar and his successors, is mortmain;^(f) and a license is necessary to enable them to hold, for alienations to them are within the statute *De Religiosis*.

However, many statutes have enacted general dispensations to bodies corporate to hold in mortmain in given circumstances, and for specified

(a) 9 Geo. 3, c. 16; Doe d. Will. 4, v. Roberts, 13 M. & W. 520; Boom's Max. 47.

(b) 9 Geo. 3, c. 16. The stat. 3 & 4 Will. 4, c. 27, not mentioning the crown expressly, cannot, it is conceived, be construed to include the crown in the words "body politic," and if so, has no bearing on the question.

(c) Att-Gen. v. Bowyer, 3 Ves. jun. 728; vid. Shelf. Mortm. 10, note, instance of a commission to inquire where a corporation had had conveyed to them by way of mortgage land over and above their license. This was A. D. 1833.

(d) Doe v. Aldridge, 4 T. R. 264; Doe v. Wright, 2 B. & A. 710; vid. Doe v. Harris, 16 M. & W. 517; 9 Geo. 2, c. 36; infra, Grieves v. Case, 4 Bro. Ch. Cas. 67; S. C. 2 Cox, 301.

(e) Vid. Anon. Dalison, 58, approved in Crockett v. Crockett, 2 Phill. 557.

(f) Vin. Abr. Mortmain, B. pl. 6.

purposes. Some of the most important of these will be mentioned here; others will occur for notice in other parts of the work.

The stat. 43 Geo. 3, c. 108, empowers all persons having in their own right any estate or interest in possession, reversion or contingency, of or in any lands or tenements, or of any property in goods or chattels, by deed enrolled under 27 Hen. 8, c. 16, or by will (either of them being executed at least three months before the decease of such person), to give to any body politic or corporate and their successors, ^(g) lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting, rebuilding, repairing, purchasing or providing any [*105] church where the Liturgy, &c., shall be used, or any *mansion for the residence of any minister officiating in such church, or of any outbuildings, offices, churchyard or glebe for the same to be applied (the consent of the ordinary being first obtained), according to the intentions of the donor; and "such bodies politic and corporate shall have capacity to purchase, receive and hold, as well as from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or alien to them lands, &c., without any license or writ of *ad quod damnum*, the Statute of Mortmain, &c., notwithstanding." ^(h)

By 51 Geo. 3, c. 115, s. 2, any person seised of, or entitled to, the fee simple of any manor, may grant to the minister of any parochial church or chapel any parcel of the waste, not exceeding five acres, discharged from all right of common, within the parish or within any extra-parochial district wherein such church or chapel shall be, or be intended to be, erected for the purpose of erecting thereon or enlarging any such church or chapel, or for a glebe for the minister, or to erect a mansion house or other buildings thereon, or to make other conveniences for the residence of the minister.

Various other statutes ⁽ⁱ⁾ have enlarged in some respects and modified in others, these powers, until some limit has been imposed on them by a late act, the Church Building Acts Amendment Act, ^(k) for it is enacted, ^(l) that in cases of endowment, grant or conveyance of houses, lands, tithes, advowsons, rent-charges, tenements, or other hereditaments, or money to be laid out in lands or other hereditaments for the site of a church, &c., under the Church Building Acts (enumerating them from 58 Geo. 3, c.

^(g) In favour of a conveyance to a corporation sole *to uses* by his natural as well as his corporate name, it has been held that it was made to him in his proper capacity, and not in his corporate character; *Fulmerston v. Steward*, Plowd. c. 102, 103. 55 Geo. 3, c. 147, s. 12, empowers all owners of land to convey to the parson and his successors any messuage or land in exchange for any parsonage house and glebe lands, &c., not to exceed twenty acres; *vid.* 7 Geo. 4, c. 66, s. 1.

^(h) 43 Geo. 3, c. 108, s. 1. Some further restrictions are contained in ss. 2, 3. By s. 4, plots of land not exceeding one acre holden in mortmain may be granted either by exchange or benefaction for the purposes of the act; see further 51 Geo. 3, c. 115; *Dixon v. Butler*, 3 Y. & Coll. Exch. 677. If a bequest be given for building a church, which the corporation will not take for that purpose, it is gone altogether; *Att.-Gen. v. Bishop of Oxford*, 1 Bro. Ch. Cas. 444, n.

⁽ⁱ⁾ 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 7 Will. 4 & 1 Vict. c. 75; 1 & 2 Vict. c. 107; 2 & 3 Vict. c. 49.

^(k) 3 & 4 Vict. c. 60.

^(l) *Id.* s. 2.

45, to 2 & 3 Vict. c. 49, inclusive), no license in mortmain shall be necessary, whether such endowment be made before or after the passing of the act; "Provided nevertheless, and be it enacted, that nothing herein contained shall authorize an exemption from the provisions of the Mortmain Acts, where, in the case of an endowment as aforesaid, for the use or benefit of any church or chapel, or of the incumbent or minister thereof, such endowment, whether made at one period or at different periods, shall in any one case exceed in the whole the clear annual value of 300*l*."

It is further enacted, that additional endowments may be made where churches or chapels have been built or endowed under the acts before mentioned; "Provided always, that nothing herein contained shall be construed to extend to the authorizing any such additional endowment, without the same being subject to the provisions of the Mortmain Acts, *which shall amount, together with the former endowment or [*106] of 300*l*."(*m*)

By the Church Endowment Act, any person or body corporate having, in their own right, any estate or interest in possession, reversion or contingency, of or in any lands, tithes, tenements or other hereditaments, or any property of or in any goods and chattels, is empowered by deed enrolled under 27 Hen. 8, c. 16 (except in case of goods and chattels), or by will, to give, &c., to the "Ecclesiastical Commissioners for England" and their successors, for and towards the endowment or augmentation of income of such ministers or perpetual curates as in the act mentioned, or for or towards providing any church or chapel for the purposes of the act; and the commissioners are empowered to take, both from such persons as give and such as sell, &c., without license in mortmain, &c.(*n*)

By 4 & 5 Vict. c. 38, s. 7, grants of lands or buildings, or any interest therein, may be made to corporations sole or aggregate, or to several corporations sole, for the purposes of the education of poor persons, to be held by such corporations for the purposes aforesaid, to the extent and within the restrictions mentioned in the act.

Another instance of the same kind of enactment, dispensing with the Statutes of Mortmain, is found in the 39 Eliz. c. 5, which enabled all hospitals, maisons de Dieu, abiding places or houses of correction, for the finding sustentation and relief, and setting to work, of poor, needy, &c., persons, to take lands, being incorporated, without license, so as the same should not exceed the yearly value of 200*l*. above all charges, &c.(*o*)

To this conclusion, then, we at length arrive, viz., that except in the cases above examined, every corporation, whether aggregate or sole, must have a license in mortmain to enable it to hold land against the crown or the mesne lords, but that unless the crown or the mesne lords interfere, the corporation may hold lands without such license.(*p*)

(*m*) 3 & 4 Vict. c. 60, s. 17.

(*n*) 6 & 7 Vict. c. 37, s. 22. See form of grant by a corporation, 7 & 8 Vict. c. 94, schedule.

(*o*) 39 Eliz. c. 5, s. 27; vid. also 13 & 14 Car. 2, c. 12, establishing corporations for the relief of the poor, and empowering them to take lands without license in mortmain.

(*p*) By 7 & 8 Vict. c. 110; 10 & 11 Vict. c. 78, s. 1; joint stock companies incor-

We are next to consider in what circumstances a corporation duly empowered by a license to hold in mortmain may make use of it for the acquirement and possession of real property. This depends on the manner in which, and the purposes for which, the grant, gift or other conveyance to the corporation of the real estate, or money to be laid out in real estate, is made, and the subject naturally resolves itself into three parts :

1. What estates a corporation with a license may take by way of purchase.
- [*107] *2. What estates with license they may take by way of devise.
3. What estates they may take by way of lease or demise.

I. WHAT ESTATES CORPORATIONS MAY TAKE BY WAY OF PURCHASE.

As regards buying lands and real property, all corporations were empowered, by 22 Car. 2, c. 6, s. 10, to buy one species of real property, viz., fee farm rents, and other rents belonging to the crown, or parcel of the duchies of Cornwall and Lancaster, and which were conveyed by grants from Car. 2 previous to the 24th June, 1672, whether under the great seal, the seal of the duchy of Lancaster, or the seal of the county palatine of Lancaster, which letters-patent were ordered (by sect. 4) to be expounded most beneficially for the grantees.(g)

However, 19 Geo. 3, c. 45, s. 1, repeals so much of this statute as relates to such rents, &c., as were then remaining unsold in the duchy of Lancaster; and 26 Geo. 3, c. 87, s. 10, repeals it as to rents within the survey of the Exchequer, and not then sold or disposed of.

All corporations, therefore, who have purchased such rents, &c., pursuant to the statute of Car. 2, are entitled to hold them, whether licensed or unlicensed, and if the former, they are entitled to hold them, over and above the annual value limited in their license.

By 42 Geo. 3, c. 116, s. 50, any bodies corporate may give any sums of money for the purpose of applying the same in the redemption of the land-tax charged on any manors, messuages, lands, tenements or hereditaments settled to any charitable use, which sums may be applied accordingly, any statute of mortmain or other statute or law to the contrary notwithstanding.

With respect to the mode in which corporations take lands generally, it is to be observed, that a corporation may take by way of bargain and sale,(r) or by feoffment.(s)

porated are empowered to hold and dispose of lands, tenements and hereditaments under a license, and not from the crown, but from the board of trade.

(g) Vid. 22 & 23 Car. 2, c. 24; *Vigers v. Dean, &c. of St. Paul's*, 18 Law J. (N. S.) Q. B. 97. The mode in which the corporation takes, in cases under the statute, is expressly prescribed to be by indenture of bargain and sale enrolled, vid. per *Wightman, J.*, 18 Law J. (N. S.) Q. B. 100.

(r) *Sutton's Hospital case*, 10 Rep. 34; *Watk. Convey.* 530, 8th edit.; *Holland v. Bonis*, 1 Leon. 183; 2 Leon. 121; 3 Leon. 175; vid. 13 Hen. 7. 9, pl. 5. The bargain and sale must have been by indenture enrolled, if under 22 Car. 2, c. 6.

(s) *Bailiffs, &c., of Ipswich v. Martin*, Cro. Jac. 411; vid. *Butl. Co. Litt.* 207 a, note (102).

Where lands held by homage and fealty were conveyed to a corporation aggregate, they were considered to be held by homage and fealty, although the corporation could not do homage or fealty;^(t) and perhaps it was out of consideration of the ancient law of tenures that the distinction arose between a grant by the king to the men of Islington of lands *rendering rent*, which they could take, and which, without more, made them a corporation, for the purpose of paying the rent; and a grant by the king to the men of Islington, without more, which it was held was void; and one reason seems to be, that in the latter case the lands would have been held of no one, there being no *reservation of any kind in the grant; in the former, the reservation of rent implied that the lands were held by fealty, the [*108] tenure being socage tenure.^(u)

With respect to municipal corporations, they are allowed to purchase and hold in perpetuity lands to the extent of five acres to the whole, either within or beyond the limits of the borough, and to build thereon a town hall, a council house, police office, gaol or house of correction for the borough; but this enactment leaves untouched any powers that such corporations may have, of taking and holding^(x) in mortmain, by royal license in their charters or otherwise.

Municipal corporations appear, however, to be restricted from acquiring by any application of the borough fund in the way of bargain and sale, any more land than the five acres mentioned above, as it has been decided, that, from the passing of the Municipal Corporations Act, the property of all municipal corporations within the act became trust property, being held in trust for the benefit of the inhabitants in each case.^(y) They cannot take by grant or devise without license to hold in mortmain, and without the formalities required by the statute of Geo. 2.

We shall have occasion to examine the consequences of this alteration

(t) Bevell's case, 4 Rep. 11; Co. Litt. 65 b, 68 a; Harg. Co. Litt. 68 a, note (17).

(u) It was socage tenure for the reasons given, 2 Bla. Com. 82; vid. Anon. Dyer, 52 b; Co. Litt. 142 b; Litt. s. 216; Co. Litt. 143 a; Harg. Co. Litt. 93 a, note (94). That such a rent had fealty incident to it, vid. Litt. s. 216; Co. Litt. 143 a; Wheeler's case, 6 Rep. 6 b; Co. Entr. 613 a, 614. That lands granted by royal charter to a corporation without any reservation would have been held of no one, since a corporation cannot hold by knight service, vid. Co. Litt. 70 b; Wheeler's case 6 Rep. 6 b; Anon. Dyer, 299 b, pl. 35. The same would be the case both before and since the statute of quia emptores, which does not bind the crown, et vid. Dyer, 44 a, pl. 29; Plowd. Com. 240; 9 Rep. 123 a; Yearb. 10 Hen. 7, fol. 23, pl. 26.

(x) 7 Will. 4 & 1 Vict. c. 78, s. 40. "And be it enacted, that it shall be lawful for the mayor, aldermen and burgesses of any borough by their council, to contract for the purchase of, and to have and to hold to them and their successors, any lands not exceeding in the whole five acres, and to build thereon a town hall, council house, police office, gaol or house of correction for the borough." This enactment only applies to the boroughs named in the schedules to the Municipal Corporations Act; vid. 7 Will. 4 & 1 Vict. c. 78, s. 37. It may, therefore, be a question how a borough incorporated since the Municipal Corporations Act is to be empowered to buy lands for these purposes, unless power is given in the charter or by license in mortmain.

(y) Att.-Gen. v. Aspinall, 2 My. & C. 619.

(if it may be so called) of the law, when we arrive at the subject of charitable trusts as corporations.

It has been laid down broadly that a corporation having a license in mortmain, may, in general, buy land to the extent of their license out of the corporate funds.^(z)

A corporation cannot take lands by conveyance from trustees of those lands for charitable purposes, although the conveyance to them disclose that the lands were held by the grantors in trust for those purposes; the Courts of Chancery will decree them to reconvey the lands to the [*109] *trustees, for, as it seems, the corporation may not hold such lands even subject to the same trusts as the original trustees.^(a)

It is at length perfectly settled that a corporation may in general (there are exceptions in the case of colleges in the universities, who cannot hold lands in trust for purposes uncongenial with those of their institution,) hold lands in trust for any one, and even for purposes quite private.^(b)

A corporation cannot hold lands by copy of court-roll;^(c) nor can two corporations be joint tenants of land, but they may be tenants in common,^(d) or a corporation may be tenant in common with a private person; but a corporation aggregate and a common person cannot be joint tenants, for the common person is seised to him and his heirs, and a corporation is seised to them and their successors, and there could be no mutual survivorship as a corporation never dies;^(e) and if lands be given in this way, the effect is to make the corporation and the other donee tenants in common.^(f)

Although, as has been said above, a corporation aggregate cannot hold lands as a copyholder,^(g) yet we find traces in the old law of a heriot custom being payable to the lord of the manor upon each death

(z) Att.-Gen. v. New England Co., cited 2 Keen, 685; S. P. per Lord Hardwicke, C., *Farrar v. Vaughan*, 2 Ves. sen. 188. But the conveyance, if to charitable uses, must have the formalities prescribed by the statute 9 Geo. 2, c. 36; vid. 9 Geo. 4, c. 85, s. 1. And it seems the Court of Chancery will not direct or sanction such application of corporate funds, considering it to be against the policy of the stat. 9 Geo. 2, c. 36; Att.-Gen. v. *Wilson*, 2 Keen, 685.

(a) Att.-Gen. v. *Christ's Hospital*, 3 My. & K. 344; vid. *Vigers v. Dean, &c.*, of St. Paul's, 18 L. J. (N. S.) Q. B. 97.

(b) *Gilb. Uses*, 5, 170; Att.-Gen. v. *Drapers' Co.*, 6 Beav. 382. What not a devise of a trust to a corporation but a beneficial interest; Att.-Gen. v. *Cordwainers' Co.*, 1 My. & C. 632; vid. 9 Sim. 20; 1 H. of Lords, 285.

(c) Att.-Gen. v. *Lewin, Coop. Chan. Cas.* 54; vid. *Dimes v. Grand Junction Canal Co.*, 9 Q. B. 469.

(d) Co. Litt. 190 a; *Watk. Conv.* 103, 8th ed.

(e) *Bennett v. Holbeck*, 2 Wms. Saund. 319, n. (4).

(f) Co Litt. 190 a; *Plowd. Com.* 239.

(g) Nor, semble, can a corporation sole; 1 *Scriv. Copyh.* 108, 4th edit. By the Norman law owners of fiefs and lordships are entitled to fines on the death of tenants or on their forfeiture for crime; and therefore, where a tenant aliens his lands to a corporation, whether aggregate or sole, the corporation is made to indemnify the lord for the loss of the fines, which is done by the corporation conveying the property to some natural person, on whose death or forfeiture, though only a trustee for the corporation, they pay the customary fine to the lord; *Thorn-ton v. Robin*, 1 Moo. P. C. Cas. 439.

of the head of a corporation aggregate ;(*h*) but at any rate the heriot so due can only be a heriot custom and not a heriot service.(*i*)

Besides the estates in land above mentioned which a licensed corporation may buy, it may take by way of grant or gift various descriptions of estates.

If a grant be made, by deed, to any corporation aggregate of many, they have, it has been usually said, a *fee simple*, without the grant being made expressly to them and their successors, because in judgment of law they never die.(*k*)

On this statement of Sir Edward Coke's it seems necessary to remark that the estate which a corporation aggregate has in its lands does not seem to be a fee-simple absolute, but to be conditional upon the maintenance *of the succession; for upon failure of the successors, as in consequence of death of all the members, or surrender of [**110*] charters, or dissolution from any cause, the lands of the corporation revert to the donors,(*l*) this being, as the courts have observed, the only instance in which a possibility of reverter could remain after a fee granted.(*m*) There is something, therefore, quite peculiar in the nature of the "fee" which a corporation takes by a grant or devise.

Sir Edward Coke also says, that in case of a sole corporation, a fee-simple shall sometimes pass without the word successors.

Thus a grant to the king, without the word heirs or the word successors, passes a fee-simple, because in judgment of law the king never dies; and a feoffment in fee of land to a bishop, to have and to hold to him in liberâ eleemosynâ, passes a fee-simple without the word successors.(*n*)

A corporation to whom a grant of an incorporeal hereditament is made by indenture, may accept the deed by the hands of a stranger, to whom it is delivered to their use, and it is not necessary to empower him by deed under the common seal, if they seal the counterpart, for that proves that they intended to accept the grant.(*o*)

If a corporation take lands by enfeoffment, as they may do at the present day, they must constitute some one their attorney by deed under their common seal, empowering him to take livery of the land in their name.(*p*) But where the corporation has a head, a grant to

(*h*) Longo Quinto, 5 Edw. 4, fol. 72 b; vid. tam. Fitz. Abr. Hariot, 7; Kitch. Courts. 264. On the death of the provost of Worcester College, Oxford, a heriot is said to be due to the president and scholars of St. Mary Magdalen College, Oxford, for a copyhold estate held of that society, and the like from Magdalen College to Merton College on the like occasion; vid. Watk. Copyh. by Coventry, 116, n. (1).

(*i*) Fitz. Abr. Hariot, 7.

(*k*) Co. Litt. 9 b.

(*l*) Per Lord Mansfield, C. J., in Burgess v. Wheate, 1 W. Bla. 165; vid. acc. Mayor, &c., of Colchester v. Brook, 7 Q. B. 384.

(*m*) 1 W. Bla. 165.

(*n*) Co. Litt. 9 b.

(*o*) Cooper v. Gooderich, Cro. Eliz. 862.

(*p*) But in pleading, if the corporation entitle themselves by feoffment, it is not necessary for them to show the letter of attorney to receive livery, for all necessary circumstances shall be intended to have been observed; Bailiffs, &c. of Ipswich v. Martin, Cro. Jac. 411. Perhaps this may be referred to the general principle Quando aliquis per chartam aliquid accipit omnia fecisse videtur sine quibus res esse non potuit; Cro. Jac. 84.

them must not be made during the vacancy of the head;(*q*) thus in the cases of mayor and burgesses, dean and chapter, and other like bodies, all grants made during the vacancy of the head are void, for the corporation, in the interval between the death or resignation or deprivation of the head and the appointment of the successor, has no power to exercise any corporate function except to proceed to elect or admit the new head; semble, also, that the corporation must signify its acceptance of the grant by deed under its common seal,(*r*) which cannot be legally affixed in the vacancy of the head; and as the fee cannot be in abeyance, and, therefore cannot wait for the appointment of the new head to constitute a body fit for it to vest in, the consequence is that the grant must be construed to be wholly null and void, and no estate [**111*] whatever to have passed out of the grantor.(*s*) If, however, *there is an intermediate estate, the difficulty does not arise: thus if, during the vacancy of the head, a lease for life, or a gift in tail, be made to A., remainder to the mayor and burgesses of B. and their successors, this grant is good to vest the remainder, whenever, during the continuance of the particular estate, the corporation first becomes complete by the appointment of a head.(*t*) This, therefore, is scarcely an exception to the rule respecting remainders that commence by deed, viz. "that it behoveth that the remainder be in him to whom the remainder is entailed, before the livery of seisin is made to him which shall have the freehold;"(*u*) for though the corporation, before and at the moment of the creation of the particular estate be not in full life and the complete exercise of its functions, which for the time are suspended, yet it has an existence, and cannot be said not to be in *rerum naturâ*, which is one of the cases of exception to the rule;(*x*) and though the remainder do not vest immediately, it suffices if the inheritance pass out of the lessor at the time of making the deed,(*y*) and there be some person or persons in whom the remainder can vest in possession *eo instanti* that the particular estate determines.(*z*)

If, however, a grant be made in remainder to corporation A., and there is no such corporation in existence, either actually or potentially, at the time of the grant, it is wholly void, though such corporation A. be erected before the determination of the particular estate.(*a*) The reason is, that the possibility of the corporation's being erected is too remote.(*b*)

(*q*) Litt. s. 443; Co. Litt. 264 a.

(*r*) Except when the grant is made by indenture, Cro. Eliz. 862, when their sealing the counterpart is a sufficient acceptance.

(*s*) Hence if the master of a college devise lands to the college, they cannot take because at the moment of his death they are an incomplete body; Dalison, 31; Corpus Christi Coll. case, citing 13 Hen. 8, fol. 13, where it is said, per Brook, J., "if the head is severed the corporation is void," i. e. wants active vitality. So Genes. cap. 1, v. 2, "And the earth was without form and void."

(*t*) Co. Litt. 264 a. The state of a corporation during a vacancy of the head seems to be that which Sir E. Coke calls a corporation in abstracto; 10 Rep. 31 a.

(*u*) Litt. s. 721; Co. Litt. 378 a; Cogan v. Cogan, Cro. Eliz. 360.

(*x*) Co. Litt. 378 a.

(*y*) Ib.; Hob. 33.

(*z*) Vid. dict. per North, C. J., Taylor v. Biddall, 2 Mod. 292.

(*a*) Per Hobart, C. J., in Counden v. Clarke, Hob. 33.

(*b*) Chomley's case, 2 Rep. 5.

Still such estate in remainder may be granted by the same charter which creates the corporation;^(c) and there may be circumstances rendering good a conveyance by way of bargain and sale of lands to a corporation, the erection of which was contemplated by the grantor, though no such corporation was in existence at the time of the execution of the deed, nor license to amortize the land obtained; but here the possibility was not too remote, because the grantor, by the same deed, supplied the means of founding and endowing the corporation.^(d)

With respect to the duration of estates which a corporation may take by grant, it appears to be held that there is no authority for considering that the Mortmain Acts prevent the taking and holding of any estate which is not in itself perpetual; ex. gra., a rent issuing out of an estate in tail male.^(e)

II. WHAT ESTATES A CORPORATION, BEING LICENSED, MAY TAKE BY WAY OF DEVISE. [*112]

Before the enactment of statute 32 Henry 8, c. 1, there was no general testamentary power over freehold lands of inheritance. That statute gave a power to devise, and the explaining statute, 34 & 35 Henry 8, c. 5, enabled every one having a sole estate or interest in fee simple, or in coparcenary, or in common in fee simple, to give, dispose, will or devise to any person or persons, except bodies politic and corporate, by last will and testament in writing.^(f) Owing to this express exception, no corporation, sole or aggregate, could take by devise, unless in places where, as in London, there was a custom to devise to corporations, land lying within the district over which the custom extended. The custom of London in this respect having been confirmed by various statutes, and acted upon by the courts for a succession of ages, was held not to be touched by this statute,^(g) or by the Statutes of Mortmain.^(h)

The exclusion of corporations from the benefit of the statute was

(c) Bro. Corporations, 89; Sutton's Hosp. case, 10 Rep. 33 a.

(d) Sutton's Hosp. case, 10 Rep. 1; vid. 3 Ves. jun. 727.

(e) *Vigers v. Dean and Chapter of St. Paul's*, 18 Law J. (N. S.) Q. B. 97.

(f) The statute only rendered devisable a portion of the testator's lands. The 12 Car. 2, c. 24, completed the power of devising lands in this country.

(g) There is some variety in the mode in which the custom is stated in different authorities, but the reader will probably find that the best authorised form of it is, that citizens being freemen and inhabitants, and also paying scot and lot, have the right to devise in mortmain, without license, their lands and real property situate within the city of London, to any corporation, whether sole or aggregate: *Standish v. Short*, J. Bridg. 103; *Lancelot v. Allen*, Cro. Car. 248; *Trinity College case*, Dyer, 255 b; 7 Vin. Abr. 239, pl. 6, 7; *Case of Warden, &c., of Sadlers*, 4 Rep. 54 b; *Case of City of London*, 8 Rep. 129; *Middleton v. Cator*, 4 Bro. Chan. Cas. 409.

The custom does not extend to empower a citizen to alien in mortmain.

Formerly the deviser, as it seems, must have had a license to alien in mortmain, to make the devise valid; *Yearb.* 45 Edw. 3, fol. 26, pl. 39; *Anon.* Dyer, 255 a.

(h) *Elme's case*, Dyer, 373 b; vid. 8 Rep. 129 b.

absolute, and related as well to lands devised to them for their own benefit, as to lands devised to them for any purposes of trust for the benefit of others. A devise of lands for either purpose was held to be void, and the lands so devised descended to the heir absolutely, if they had been devised to the corporation absolutely; charged with the trusts if they had been devised to the corporation upon trusts.⁽ⁱ⁾ If, however, the heir chose to consent to the devise it would be supported in equity, the general rule there being, that consent of heirs will make void devises good.^(k)

This disability, it will be remarked, was perfectly unqualified, relating equally to all corporations, whether licensed or unlicensed; therefore, the effect was to prevent any corporation whatever taking any real estate by devise.

The act of 7 Will. 4 & 1 Vict. c. 26, has repealed 34 & 35 Hen. 8, c. 5, and has not revived the prohibition against the corporations taking real estate by devise. At present, therefore, the law is, that every [*113] *corporation which is empowered by license in mortmain to take and hold real property at all, may take it by way of devise to the extent of its license, as well as by any other means; but that no corporation, without such license, can take real estate by devise any more than before the late Wills Act. For it is necessary to bear in mind, that the operation of the statute last mentioned was to repeal the exception in the old Statute of Wills, which alone rendered corporations incapable of taking by devise to their own use;^(l) and that the repeal of that statute has replaced corporations in the situation, in this respect, in which they stood before its enactment, with this difference in their favour, that the right of *thus* devising to them is quite unrestricted, except by the extent of their licenses in mortmain. In general, therefore, whether for their own benefit, or in trusts, corporations being prevented, by the old Statute of Wills, from taking realty by devise, the estate, as stated above, descended to the heir, either absolutely or charged with the trust intended by the testator to have been administered by the corporation. However, this did not long continue to be the law with respect to trust estates; for by the 43 Eliz. c. 4, reciting that "whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the queen and her progenitors as by sundry other well disposed persons, some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools for learning, free schools, and scholars in Universities, some for repair of bridges, ports, havens, causeways, churches, sea banks and highways, some for education and preferment of orphans, some for or towards relief, stock

(i) *Sonley v. Clockmakers' Company*, 1 Bro. Ch. Cas. 81; commented on by Sir E. Sugden, C., Ir. 1 Dru. & War. 331, 332.

(k) *Lord Cornbury v. Middleton*, Chanc. Cas. 209.

(l) Vid. per Sir John Leach, M. R., in *Att.-Gen. v. Skinners' Company*, 5 Madd. 206; *Incorporated Society, &c., of Dublin v. Richards*, 1 Dru. & War. 295—332.

or maintenance of houses of correction, some for marriages of poor maids, some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes, which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed accordingly to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver, and employ the "same;" proceeded to enact, for redress and remedy of the same, that "the Lord Chancellor might award commissions under the great seal, authorizing commissioners to inquire, by a jury sworn, and by all other good and lawful ways and means, of all and singular such gifts, limitations, assignments and appointments aforesaid, and of the breaches of trust, negligence, misemployments, not employing, concealing, defrauding, misconverting or *misgovernment of any lands, tenements, rents, annuities, profits hereditaments, goods, chattels, money or stocks of money there- [*114] tofore given, limited, appointed or assigned, or which thereafter should be given, limited, appointed or assigned, to or for any of the charitable and godly uses before rehearsed," and to make orders which, not being repugnant to the orders, statutes or decrees of the donors or founders, should stand good, and be executed accordingly, until altered by the Lord Chancellor, upon complaint of any party grieved.(m)

When the courts came to interpret this statute, it was at first decided that a devise to a corporation to a charitable use, that is, to a use of the kinds enumerated in the statute, was wholly and absolutely void in law.(n) Nevertheless the courts of equity, laying hold of the word "appointed" in the statute, held that a devise of lands for any of the above statutory purposes, though not good as conveying the land to the corporation, was good as regarded the charitable disposition of it, and that the heir took the land, subject to and clothed with the use designated by the testator;(o) but a devise tending to a perpetuity was not upheld in favour of a corporation, though a charitable one; thus a devise to a man and the heirs of his body, and if he shall go about to alien, then that his estate shall cease, and the lands go over to Christ's Hospital, was held to be void, even after the death of the original donee without issue; *Pewterers' Company v. Christ's Hospital*, 1 Vern. 161. Perhaps the courts of equity came to this decision partly upon the ground, that, in fact, equity has an inherent jurisdiction in matters of charity

(m) Vid. 43 Eliz. c. 4, s. 1. These commissions have been long disused; Mayor, &c., of *Ludlow v. Greenhouse*, 1 Bli. N. S. 61. The proceeding by way of information has taken their place; id. However, if there be ground for interference the court will act without complaint; *Att.-Gen. v. Coopers' Company*, 19 Ves. 194. A commission issued in Cromwell's time held by *Brougham, C.*, to be void; *Re Atherstone School*, 1834.

(n) *Flood's case*, Hob. 136; *Collison's case*, Hob. 136; *R. v. Newman*, 1 Lev. 284; vid. *Wilmot's Notes*, 13; *Duke*, 77; *Att.-Gen. v. Skinners' Co.*, 5 Mad. 200; *Att.-Gen. v. Master of Brentwood School*, 1 My. & K. 390.

(o) *Rolls' case*, Moore, 879; *Rivall's case*, id. 890.

independent of the stat. 43 Eliz. c. 4.(p) Such a devise was upheld in equity, though it was altogether bad in law on a collateral ground, namely, for a misnomer of the corporation to whom the testator had intended the property to go;(q) though courts of law have held that a devise to a municipal or other corporation of a local character, though it be misnamed in the devise, is good, if the name in the devise be that by which the corporation is popularly known,(r) and it is distinguished sufficiently from other bodies.(s) Then it was held, that under the statute of Elizabeth, a corporation could take an annuity or rent-charge by a devise to a charitable use.(t) Later cases enlarged the doctrine, and it was at length held, that a devise of lands to a corporation to any of the statutory charitable uses was good, not merely in equity, as an appointment to such uses, but in law as a devise; the stat. of 43 Eliz. c. 4, s. 1, being at length interpreted to have repealed pro tanto the [*115] exception in 34 & 35 Hen. 8, c. *5, excluding corporations from being benefited by its provisions, and enabled them to take by devise for these purposes.(u)

It has also been intimated, that there is no authority for holding that the Statutes of Mortmain forbid a corporation to hold that which is not in itself perpetual,(x) so that leases for years, &c., might be devised to corporations to charitable uses to any extent.

A great authority in equity has, however, lately said of the doctrine just stated, viz. that a devise to a college was good, not merely in equity by way of appointment to uses, but also at law,—“I am not aware that this case has ever been followed.(y) I must say that it rests upon no solid foundation.”(z)

Still, it was never thought the statute of Elizabeth had repealed pro tanto any part of the Mortmain Acts; a devise was, to all intents, an

(p) Incorporated Society, &c., v. Richards, 1 Dru. & War. 258.

(q) Anon. Chanc. Cas. 267; Mayor of London's case, Duke, 83; 22 Vin. Abr. 13; Att.-Gen. v. Platt, Finch. Rep. 221; vid. tam. Att.-Gen. v. Sibthorp, 2 Russ. & M. 107.

(r) Counden v. Clerk, Hob. 33; Trinity College case, Dyer, 255 b.

(s) Att.-Gen. v. Mayor, &c., of Rye, 7 Taunt. 546; S. C. 1 J. B. Moo. 267; Chanc. of Oxford's case, 10 Rep. 57 b; Foster v. Walter, Cro. Eliz. 106.

(t) Anon., Moore, 852, 853.

(u) Benet College v. Bp. of London, 2 W. Bla. 1182; Att.-Gen. v. Bowyer, 3 Ves. jun., 727; vid. 10 Rep. 57. 122 b; Wilmot's Notes, 11. 13; Att.-Gen. v. Mayor, &c., of Rye, 7 Taunt. 546, where the principle seems to have been admitted. In Att.-Gen. v. Baines, Chanc. Prec. 272, Lord Cowper, C., observed, that the charity of the judges had carried several cases on this statute great lengths, and thus occasioned the distinction between operating by will and by appointment, which, surely, the makers of the statute never thought of; vid. Att.-Gen. v. Skinners' Co., 2 Russ. 407. The devise must be to a corporation, for if it be made to designated parties, who, though officers of a corporation, are not themselves a corporation to take in succession, the devise fails, though the use may be a good charitable use; Christ Coll. case, 1 W. Bla. 90; S. C. Ambl. 351.

(z) Vigers v. Dean, &c., of St. Paul's, 18 L. J. (N. S.) Q. B. 103; vid. tam. 15 Vin. Abr. 485, pl. 21; Cotton's case, Godb. 192.

(y) Vid. tam. 3 Ves. jun. 727; 7 Taunt. 546. In the last of these cases the point seems to have been admitted, and taken for granted, though it was not expressly touched upon.

(z) Per Sir E. Sugden, C., Ir., 1 Dru. & War. 305.

alienation,(a) and therefore no corporation, not having a license to hold in mortmain, could take land even for the purposes of that statute unless, as we have seen was possible, the mesne lords and the crown chose to sleep upon their rights.(b) The effect of the decisions upon the statute of Elizabeth was simply to enable corporations, holding a license in mortmain, to take real property by devise for charitable uses, sanctioned by the statute to any extent within the limits of such license. If, therefore, lands were devised to a corporation without a license, or to a corporation whose license was exhausted before the devise, the devise failed as to the corporation, and the heir took by descent; but the Courts of Chancery obliged him to follow out the purposes of the testator with respect to the charitable uses, just as the corporation would have been obliged to do had the devise taken effect as to them.(c) A devise of all the tithes and other profits, &c., was made by an impropiator to a curate, and all who should serve the cure after him; the devisee could not take, being incapable, for want of incorporation; it was decreed that the heir of the deviser should take the estate and stand seised in trust for the devisee, and the reason seems to be, that tithes were neither within the Statute De Religiosis, nor the 15 Ric. 2, c. 5.(d)

The legal definition of charity, with reference to the Statute of Charitable *Uses, 43 Eliz. c. 5, is a *gift to a general public use, which extends to the rich as well as the poor*.(e) Generally, devises and [*116] bequests, having for their object the establishment of learning, are considered given to charitable uses under the statute of Elizabeth; and, accordingly, a devise to a school for the education of gentlemen's sons was held to be a devise to a good charitable use within the statute;(f) but that does not extend to make good a devise to a college for purposes not of a collegiate character, and intended chiefly to minister to the vanity of the testator.(g) Again, a devise to a corporation in trust for any person is good, and will be effectuated in equity,(h) and a fortiori a devise to a charitable corporation in trust for any other charitable use would be good, charity being always more favoured in a court of equity than an individual, and therefore a devise to a charitable corporation for its own objects would be good in equity, and perhaps even at common law,(i) that is to say, but for the enactments of 9 Geo. 2, c. 36.

From the above definition of charity under the statute of Elizabeth, it follows, that property held for public purposes is held for charitable uses in the legal sense of the term charity.(k) It has, accordingly, been deci-

(a) Vid. inf.

(b) Vid. sup. pp. 100, 101.

(c) Vid. Wilm. Notes, 10—13; Att.-Gen. v. Vivian, 1 Russ. 226; vid. tam. Att.-Gen. v. Bowyer, 3 Ves. jun. 728.

(d) Anon. 2 Ventr. 349; Wilmot's Notes, 11—13.

(e) Jones v. Williams, Ambl. 651.

(f) Att.-Gen. v. Earl of Lonsdale, 1 Sim. 109.

(g) Att.-Gen. v. Whorwood, 1 Ves. sen. 537.

(h) Sonley v. Clockmakers' Comp. 1 Bro. Ch. Cas. 81, which was not the case of a charity; vid. 1 Dru. & War. 307. 331, 332; and see the Wills Act, 7 Will. 4 & 1 Vict. c. 26; et vid. sup. p. 109.

(i) Incorporated Society in Dublin for promoting English Protestant Schools in Ireland v. Richards, 1 Dru. & War. 331, 332.

(k) Att.-Gen. v. Aspinall, 2 M. & Cra. 613; Att.-Gen. v. Heelis, 2 Sim. & S. 76;

ded that a grant of tolls to a corporation, to be applied in the reparation of the bridges and walls of the corporation without yielding any account thereof, is a grant to charitable uses within the stat. 43 Eliz. c. 4.(7) It seems that a grant from the crown of privileges and property for bettering of the city of Carlisle, and that the citizens thereof might be able to apply themselves to their business, in the said city, under greater tranquillity and in quiet, &c., is a charitable gift within 43 Eliz. c. 4;(m) and there is no doubt that municipal corporations may take by devise in trust and for purposes altogether private;(n) but where part of a devise is void, as being to a bad charitable use, another part of the same devise, assigning a remuneration to the corporation for performing the duties intended to be imposed upon them by the first part of the devise, fails also, as being attendant on a void charity.(o) A bequest of 500*l.* to the church of Dale is a good devise, and the churchwardens shall take the money to employ it in repairing and adorning the church;(p) and every [*117] absolute bequest *of money* to a charitable corporation is good, and equity has no ground to interfere for the appropriation of it, but it will become part of the general funds of the institution; though it is different where the legacy has to be applied exclusively for certain permanent charitable trusts (q)

Corporations were always strictly held to the terms and conditions upon which the devise to the charitable use was made. If the corporation refused to accept the lands on the terms on which they were given, the Court of Chancery obliged them to relinquish to the heir of the donor; nor was it permitted that the terms imposed by the donor or testator should be altered by agreement between the heir of the donor and the donees.(r)

Again, courts of equity will decree accounts against corporations who have misconducted themselves in respect of these species of trusts. In one case an account, extending over a period of 200 years, was decreed against a corporation with respect to the rents and profits of a charity estate, the receipt of which they admitted by their answer, stating that they had, from time to time, debited themselves in their books with the amount.(s)

Att.-Gen. v. Mayor, &c., of Dublin, 1 Bli. N. S. 312. 357; vid. Reg. v. Mayor, &c., of Liverpool, 9 A. & E. 435, where see discussed the question of what are public purposes. As to port duties, &c., 1 Swanst. 308.

(l) Att.-Gen. v. Mayor, &c., Shrewsbury, 6 Beav. 220. So if lands are vested in a corporation for the benefit of the city, &c., this gives the Court of Chancery jurisdiction; Visc. Gort v. Att.-Gen., 6 Dow. 186; vid. Att.-Gen. v. Mayor, &c., of Galway, 1 Molloy, 95; S. C. 1 Beat. 298; 1 Chit. Eq. Ind. 295.

(m) Att.-Gen. v. Mayor, &c., of Carlisle, 2 Sim. 437; Att.-Gen. v. Heelis, 2 Sim. & St. 77. (n) Mayor, &c., of Gloucester v. Osborne, 1 H. Lds. 285.

(o) Durour v. Motteux, 1 Ves. sen. 320.

(p) Att.-Gen. v. Ruper, 2 P. Wms. 125.

(q) Wellbeloved v. Jones, 1 Sim. & St. 43.

(r) Att.-Gen. v. Platt, Finch, R. 221; vid. Att.-Gen. v. Christ's Hospital, 1 Russ. & My. 626, in which case the devise caused a loss to the corporation; vid. *infra*, p. 119.

(s) Att.-Gen. v. Mayor, &c., of Exeter, 1 Jac. 443; vid. Att.-Gen. v. Bowyer, 5 Ves. 500; Att.-Gen. Mayor, &c., of Newbury, 1 Coop. Ch. Case, 72. 81; Att.-Gen. v. Drapers' Company, 4 Beav. 67; Att.-Gen. v. Mayor, &c., of Exeter, 2 Russ. 362; vid. *tam.* 1 Bli. N. S. 46.

In other cases an account of charity property has been decreed against corporations from the time when the accounts rendered by their answers commenced.^(t) One ground on which this strictness is adopted is, that the intention of the testator with respect to the appropriation of the proceeds of his bounty must be rigorously adhered to, and that to allow of any discretion in the corporations to depart from the testator's plan, would be constituting them judges in their own cause, with the strongest possible bias against the testator's will.

Following up the principle, that corporations shall pursue the testator's intention with respect to the charitable purposes, the rule has been laid down in equity, that where lands are given to a corporation for charitable uses, which, in the donor's contemplation, were to last forever, and it becomes impracticable to execute the charity, the heir at law can never have the land, but another charity similar to the former must be substituted by the court, which the corporation must administer as long as the corporation itself exists. When the corporation is dissolved, or otherwise becomes extinct, then, though the lands it holds to its own use will go to the heirs of the donors, those it holds to charitable uses will be administered for those uses by the Court of Chancery.^(u)

*A corporation has been charged with interest of trust money that they have had in their hands for fifteen years,^(x) it being [*118] inconsistent with the interests of the charity and the intentions of the donor that they should appropriate the produce of the fund to themselves.

A corporation being trustee of a charity is looked upon in equity as an individual.^(y) It seems to be in accordance with this principle that it has been decided by the House of Lords that no one injured by the breach of trust of a charitable corporation has a right to be indemnified out of the funds of the charity.^(z) This is the law with respect to a charitable corporation; but, where the corporation is only a trustee of a charity, chancery will not decree an inquiry into the corporate property, in order to enforce payment of the sum due to the injured party out of the corporate property, but will leave the plaintiff to enforce his remedy by the usual processes in cases of corporations.^(a) An injured party therefore, will neither be indemnified in equity out of the charitable fund, nor out of the separate property of the corporation who administers such fund; he must proceed at common law against the individuals, who procured the wrongful acts.

The above constructions of the statute of Elizabeth having been found in some respects productive of some of the inconveniences which the legislature had, for so many ages, been struggling to obviate by the

(t) *Att.-Gen. v. Mayor, &c., of Stafford*, 1 Russ. 547; *Att.-Gen. v. East Retford*, 2 My. & K. 35.

(u) *Vid. Att.-Gen. v. Hicks*, reported Highmore, Mortm. 336—354. A corporation, it seems, is within the rule, that a devisee will be compelled in equity to disclose the trusts of the devise; *vid. Strickland v. Aldridge*, 9 Ves. 516.

(x) *Att.-Gen. v. Mayor, &c., of Stafford*, 3 Barnard, 36.

(y) *Att.-Gen. v. Governors of Foundling Hospital*, 3 Ves. jun. 46.

(z) *Heriot's Hospital v. Ross*, 12 C. & F. 507. The right attaches against the individuals who led the corporation into the abuse.

(a) *Att.-Gen. Bailiffs of East Retford*, 3 My. & C. 484.

Statutes of Mortmain, it is enacted by 9 Geo. 2, c. 36, as follows: Whereas gifts of alienation of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal, whatever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by *any* [*119] *person or persons*(b) whatsoever, in trust or for **the benefit of any* charitable use whatsoever, unless such gift, conveyance, appointment or settlement of any such lands, tenements, or hereditaments, sum or sums of money or personal estate (other than stocks in the public funds) be and be made by deed, indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months, at least, before the death of such donor or grantor (including the days of the execution and death), and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof, and unless such stocks be transferred, in the public books usually kept for the transfer of stocks, six calendar months at least, before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be *without any power of revocation, re-ervation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him*:(c) provided always that nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock, six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchases of any estate or interest in lands, tenements or heredi-

(b) These words, though regularly extending to any corporation, 2 Inst. 722; 13 Bacon's works, 349, Montague's edition, have not *here* that meaning, 2 M. & W. 891.

(c) Sect. 1. N. B. If the deed be made without "any power, &c.," (as in the words in italics) then the omission to enrol is cured by 9 Geo. 4, c. 85, s. 1, as to deeds made prior to that act; Doe v. Hawkins, 2 Q. B. 217. As to enrolling declaration of trust as well as the conveyance, vid. Doe v. Waterton, 3 B. & Ald. 149; Doe v. Lloyd, 1 M. & Gra. 682; vid. 12 M. & W. 845.

taments, or any transfer of any stock to be made, really and bona fide, for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or covin.(d)

It must be kept in mind, that though lands alienated, in general, to corporations without license in mortmain, are alienated in mortmain, and the lord, or in his default the crown, may enter and take possession of them; yet in case of real property, alienated to corporations for charitable purposes, the 9 Geo. 2, c. 36, renders such alienations, as are not conformable to its provisions, utterly *void* and the lands go to the heir, and the statute includes copyhold as well as freehold lands.(e)

It has been laid down that if the heir at law agrees to a devise to a charity, which is defective under this statute, the Court of Chancery will not take it away from the charity; for it then becomes the act of the heir.(f) A devise of money, to be realized out of lands, is considered the same as a devise of the lands themselves, and within the statute.(g)

*It has been laid down generally, that if there be two modes of carrying out a charity mentioned in a will, and one mode is [*120] good under the statute and the other bad, that devise will stand under the statute, and be carried out according to the directions which conform to the statute.(h) A devise with a trust in mortmain may be legal as to the rest of it, though illegal as to that part.(i)

In furtherance of the great principle, that all corporations taking lands for trust purposes shall strictly pursue the intentions of the donor, the courts of equity have even taken the estate from the corporation and ordered it to be conveyed to the proper parties. Thus where a corporation were trustees of a freehold estate for the benefit of a charity, and misapplied the revenues, and grossly misconducted themselves in the execution of their trust, and were unable in consequence to pay the sums due from them, the Court of Chancery directed the trust estate to be conveyed to persons more able and willing to execute the trust faithfully for the benefit of the poor.(k) Nevertheless the Court of Chancery does not exercise a general regulating and controlling power over eleemosynary corporations constituted by charter or act of parliament.(l) The powers of that court with reference to charitable corporations, and corporations holding lands in trust for charitable purposes, are not, as has been observed, solely derived from the statute of Elizabeth; for that statute created no new law on the subject of charitable uses, though it created

(d) Sect. 2.

(e) *Arnold v. Chapman*, 1 Ves. 168; *Doe d. Howson v. Waterton*, 3 B. & Ald. 149. The object and purposes of this statute are very fully explained by its reputed author, Lord Hardwicke, C., in *Att.-Gen. v. Lord Weymouth*, Harg. Coll. Jurid. 436; S. C. Amb. 20.

(f) *Att.-Gen. v. Graves*, Harg. Coll. Jurid. 448; also reported Amb. 155.

(g) *Att.-Gen. v. Lord Weymouth*, Amb. 20; *Curtis v. Hatton*, 14 Ves. 541; *Currie v. Pye*, 17 Ves. 462.

(h) *Grummett v. Grummett*, Harg. Coll. Jurid. 454; S. C. Amb. 210; *vid. Davenport v. Mortimer*, 3 Jur. 287.

(i) *Doe d. Chidgey, v. Harris*, 16 M. & W. 517, 518.

(k) *Mayor, &c., of Coventry v. Att.-Gen.*, 7 Bro. P. C. 235; *Att.-Gen. v. Governors of the Foundling Hospital*, 2 Ves. 42, 47.

(l) 2 Ves. 47; *vid. 1 Coop. Ch. Rep.* 34.

a new and ancillary jurisdiction^(m), namely, that of a commission (now disused), and though it is from the terms of that statute that the jurisdiction has been moulded.⁽ⁿ⁾ An instance of the great extent of the powers of the court in these cases is the following: lands were devised to the poor people maintained in the Reading Hospital for ever, which of course, as the objects of the devise were not incorporated, they were incapable to take; the court however decreed that, the corporation of Reading being governors of the hospital, the lands must be assured to them for the maintenance of the hospital,^(o) though it might have appeared that the devise would have been void for want of a proper description of a devisee capable of taking.

We shall now proceed to state various cases in which grants and devises have been held bad or otherwise upon the above principles.

A grant by the crown for a term of years of the right to lay chains for mooring vessels in the bed of the Thames, is void within the [*121] ^{*statute of Geo. 2.:(p)} so money secured on turnpike tolls was held to be an interest in land within the statute:^(q) so bonds of commissioners for improvement of a town, and navigation shares, have been held within the statute:^(r) so terms for years,^(s) gifts of leaseholds,^(t) money due on mortgage,^(u) bequests of mortgages in fee,^(x) a mortgage for years.^(y) A bequest of money to pay off a mortgage on a chapel where the trustees had never had the whole interest in the land, but only the land minus the mortgaged interest, and the effect would be to give the trustees a larger interest than they had before, was held to be within the stat. 9 Geo. 2, c. 36.^(z) But it seems that a mortgage may be taken and held by a corporation although it have a clause of redemption, such clause not being a power of revocation, &c., for the benefit of the grantor.^(a) A lien of a vendor for unpaid purchase-money is an interest in land within the statute:^(b) so is money secured by assignment of poor rates and county rates;^(c) but railway debentures are not.^(d) Shares in a dock company^(e) and a gas-light company, both incorporated

(m) Per Lord Redesdale in *Att.-Gen. v. Mayor, &c., of Dublin*, 1 Bli. N. S. 347.

(n) *Id.* 2 Vern. 387; 9 Ves. 405; 10 Ves. 541.

(o) *Mayor, &c., of Reading v. Lane, Duke, Charit. Uses*, 81; *vid.* *Incorporated Society, &c., in Ireland v. Richards*, 1 Dru. & War. 295—332.

(p) *Negris v. Coulter*, Ambl. 367; S. C. 1 Dick. 326. *Id.* *Vigers v. Dean, &c., of St. Paul's*, 18 Law J. (N. S.) Q. B. 103.

(q) *Knapp v. Williams*, 4 Ves. 430; the tolls, not the toll-houses, gates, &c., were the security in this case.

(r) *Howse v. Chapman*, 4 Ves. 550. A bequest of personal estate to a charitable corporation is bad, if by the rules of the corporation all money coming to the corporation must be laid out in land; *Wistmore v. Wodroffe*, Ambl. 637.

(s) *Att.-Gen. v. Graves*, Ambl. 155; *Att.-Gen. Tomkins*, Ambl. 216; *vid.* 18 Law J. N. S.) Q. B. 103.

(t) *Shanley v. Baker*, 4 Ves. 732.

(u) *Att.-Gen. v. Meyrick*, 2 Ves. 44; *Att.-Gen. v. Caldwell*, Ambl. 635; *White v. Evans*, 4 Bro. Ch. Cas. 21. *Id.* *Doe v. Hawkins*, 2 Q. B. 216.

(x) *Hall v. Governors of Grey Coat Hospital*, cited Ambl. 368; *Currie v. Pye*, 17 Ves. 464; *Id.* 1 Sim. 162; *Doe d. Graham v. Hawkins*, 2 Q. B. 216.

(y) *Att.-Gen. v. Caldwell*, Ambl. 635.

(z) *Corbyn v. French*, 4 Ves. 418.

(a) *Doe v. Hawkins*, 2 Q. B. 215.

(b) *Harrison v. Harrison*, 1 Russ. & M. 71. (c) *Finch v. Squire*, 10 Ves. 41.

(d) *Myers v. Perrigall*, 18 L. J. (N. S.) Chanc. 185.

(e) *Sparling v. Parker*, 9 Beav. 450.

and possessing land for the purposes of the company's undertakings, were held not to be within the act;(*f*) for a shareholder in a corporation holding real property as a corporation has no interest in that real property, legal or equitable, or any right of possession of the land, or of entry upon any portion of it.(*g*) Duties imposed for the erection and support of the Liverpool Docks were held to be an interest in land.(*h*) Canal shares, though they were declared personal property by the private act, were held to be within the statute,(*i*) but the contrary seems to be the law now.(*k*)

By 38 Geo. 3, c. 60, s. 99, land tax, when redeemed, shall be deemed personal estate and transmissible as such, and not of the nature of real estate. Still land tax is within the 9 Geo. 2, c. 36.

Money may be bequeathed in England to a corporation, for a charitable purpose, to be carried into effect beyond the seas, either in the colonies *or in foreign countries.(*l*) A direction in a devise of money, [*122] that it is to be laid out *on* land, that is, in building on land, which the testator expected that the lord of the manor would grant if some one else did not, the purpose being for the establishment of a school, makes the devise void, as being against the policy of the statute; for it tends to bring more land into mortmain.(*m*) Legacies to be laid out in land in Scotland have been held valid.(*n*) Lands in the colonies are not within the statute;(o) nor lands in the East Indies;(p) nor lands in Ireland;(q) nor are policies of insurance, even where the assets consist partly of real estate,(r) nor is East India stock within it, and therefore a legacy of so much East India stock to the corporation of Christ's Hospital was held good;(s) nor is stock in the public funds.(t) But the money must be bequeathed in a legal way, otherwise the corporation cannot take. Thus where an hospital was incorporated by a statute (12

(*f*) *Id.*; *Thompson v. Thompson*, 1 Colly. 381. So shares in the London Dock Company and in the East and West India Dock Company; *Hilton v. Giraud*, 1 De Gex & Sm. 183. (*g*) 1 Colly. 386; 9 Beav. 457, 458.

(*h*) *R. v. Winstanley*, 8 Price, 179.

(*i*) *Buckeridge v. Ingram*, 2 Ves. jun. 652; *vid. tam. Hollis v. Goldfinch*, 1 B. & C. 205; *Stracey v. Nelson*, 12 M. & W. 535; *vid. 9 Beav. 459*.

(*k*) *Walker v. Milne*, 18 L. J. (N. S.) Chanc. 288.

(*l*) *Society for Propagation of the Gospel v. Att.-Gen.*, 3 Russ. 142.

(*m*) *Mather v. Scott*, 2 Keen, 172; *Att.-Gen. v. Tyndale*, Ambl. 614; *Att.-Gen. v. Hyde*, Ambl. 751; *Shelf. Mortm.* 204; *Chapman v. Brown*, 6 Ves. 404; *Giblett v. Hobson*, 3 My. & K. 517, apparently overruling *Att.-Gen. v. Bowles*, 2 Ves. sen. 547, and *Vaughan v. Farrer*, *id.* 182. The ground that it tends to bring more land into mortmain would not have applied to the case of a gift by abbot and convent to another corporation, which was nevertheless mortmain and required a license; *Fitz. N. B.* 222 d.

(*n*) *Oliphant v. Hendrie*, 1 Bro. Ch. Cas. 571; *Mackintosh v. Townsend*, 16 Ves. 330; *vid. tam. Curtis v. Hutton*, 14 Ves. 537.

(o) *Att.-Gen. v. Giles*, Rolls, 1835, reported *Shelf. Mortm.* 266; *Boyle Charities*, 327, cited 5 Beav. 436; *vid. Att.-Gen. v. Stewart*, 2 Meriv. 143.

(p) *Mitford v. Reynolds*, 1 Turn. & P. 185.

(q) *Wid. now* 7 & 8 Vict. c. 97, s. 16; 8 & 9 Vict. c. 25; 8 & 9 Vict. c. 66, as to Roman Catholic colleges in Ireland.

(r) *March v. Att.-Gen.* 5 Beav. 455.

(s) *Boyle Charit.* 327.

(t) *Pieschel v. Paris*, 2 Sim. & S. 384. But a debt secured by judgment is within, *Collinson v. Pates*, 2 Russ. & M. 344; and the proceeds of land directed in the will to be sold are so, *Curtis v. Hutton*, 14 Ves. 537; *vid. 2 Sim. & S. 595*.

Geo. 2, c. 31) which enabled them to take "all moneys whatsoever," it was held that this must be considered to mean only such moneys as were given according to law, and that therefore a devise of "residue of personal estate," arising by sale of real estate, was void, as being contrary to 9 Geo. 2, c. 36.^(u) But a legacy to the Bath Infirmary, given out of the produce of real estate, has been held valid; because the stat. 19 Geo. 3, c. 23, enables the governors of that institution to acquire lands, or any interest in them, or any money or personal property, to be laid out in land, pursuant to any will or otherwise, not exceeding 1000*l.* per annum.^(x)

The following case is singular. A testator gave 1000*l.* to such charity as he had under his hand formerly directed. The person entitled to the estate, subject to this charge, took possession without paying it. The governors of Christ's Hospital having discovered the charity to the crown, a sign manual directed the money to be paid to the relators for the use of the mathematical boys of the foundation; and on information by the governors to recover the money, although the defendant urged that he had not found the paper alluded to by the testator, and that there was [123] therefore no direction how the 1000*l.* was to be disposed of, and therefore that the devise was void, the Court nevertheless held that the money must go as directed under the sign manual.^(y)

Although the general rule is that a devise ought to take effect on the death of the testator^(z) a devise to a collegiate corporation not in esse at the death of the testator may be good;^(a) thus a devise to a corporation, to be established in the university of Cambridge, and to be named, after the testator, Downing College, in case the crown should grant a charter incorporating the same, and a license to hold lands in mortmain, was held to be valid;^(b) and the reason is that there the devise itself assigned the means of founding and endowing the corporation. But it is said that an absolute devise to a non-existing corporation, as well as a devise to a corporation, which, though in esse at the time of making the will, has ceased to exist at the death of the testator, is void.^(c)

There has never been any doubt that, where a man might devise in mortmain, he might devise an estate to any one for life, with the remainder to a corporation to its own use;^(d) but if the devise of the life estate be upon condition, and the heir enters for condition broken, the remainder to the corporation is gone.^(e)

Generally speaking, the corporation of the college or hospital must be

^(u) *Mogg v. Hodges*, 1 Cox, 9. ^(x) *Makeham v. Hooper*, 4 Bro. Ch. Cas. 153.

^(y) *Att.-Gen. v. Siderfin*, 1 Vern. 224; S. C. 2 Freem. 330; vid. *Shelf. Mortm.* 270.

^(z) 9 Hen. 6, 24 b; *Perk. s.* 505; 8 Vin. Abr. 56, pl. 1; *Corpus Christi College case*, 4 Leon. 223.

^(a) *Att.-Gen. v. Bowyer*, 3 Ves. jun. 727; *Att.-Gen. v. Downing*, *Wilmot's Notes*, 11. 13.

^(b) *Corbyn v. French*, 4 Ves. 418.

^(c) Vid. *supra*, p. 111, the case of a grant of the same kind.

^(d) 8 Vin. Abr. 391, pl. 1.

^(e) *Corpus Christi College case*, 4 Leon. 223; S. C. *Dalis* 31.

capable of all its functions, and not suspended at the death of the testator, otherwise the devise will be void, because the body designated in the will is not in full life when the will takes effect.^(e) Therefore the head of a college cannot devise to the college, which, at his death is in a suspended state, and capable of no corporate act, except electing a successor; it is not a person able to sue an action or to make continual claim.^(f)

Though, as we have seen, money bequeathed to a corporation (not licensed) to be laid out in land cannot be taken by them, because such bequest is within the Statutes of Mortmain, yet money left to add to the buildings of corporations, on land already in mortmain, is well bequeathed, and the corporation shall take, for no more land is thereby put into mortmain, and the statutes are not infringed;^(g) and therefore a bequest by a rector, to be laid out in building a new parsonage house, &c., was held to be not within the statute.^(h) But it is a general rule of construction of wills that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain.⁽ⁱ⁾ A bequest of money to improve, *or [*124] build upon, land not already in mortmain, or to induce the corporation to give the necessary land for the building, is bad.^(k)

The two universities (*i. e.* Oxford and Cambridge), all colleges within them, and the foundations of Eton, Winchester, and Westminster, were excepted out of the statute of 9 Geo. 2, c. 36, so that bequests to them are good since stat. 7 Will. 4 & 1 Vict. c. 26, and conveyances to those bodies need not have the formalities prescribed by 9 Geo. 2.^(l) The devise to a college must nevertheless not be to a charitable use, other than the use of the college itself; or if it is, that will in general avoid the devise; though if part is to another use, and part beneficially to the use of the college, they will take the whole;^(m) and a college may take in trust for the benefit of particular members of the corporate body only.⁽ⁿ⁾ Perhaps it may be worth while to observe that these bodies may either accept a devise,^(o) or they may refuse,^(p) or they may suspend their decision.^(q) Devises to colleges of a frivolous or selfish character,

(e) Ibid.

(f) Litt. s. 443.

(g) Att.-Gen. v. Nash, 3 Bro. Ch. C. 588; Giblett v. Hobson, 3 M. & K. 517; Att.-Gen. v. Hodgson, 10 Jur. 300.

(h) Glubb v. Att.-Gen. Ambl. 373; Att.-Gen. v. Parsons, 8 Ves. 186.

(i) Pritchard v. Arbouin, 3 Russ. 456; Giblett v. Hobson, 3 My. & K. 517; Att.-Gen. v. Munby, 1 Meriv. 327; Pelham v. Anderson, 2 Eden, 296; Att.-Gen. v. Parsons, 8 Ves. 180; Mather v. Scott, 2 Leon. 179. As to the evidence necessary to prove the land designated is already in mortmain, Ingleby v. Dobson, 4 Russ. 342.

(k) Att.-Gen. v. Davies, 7 Ves. 544.

(l) Vid. s. 4, and 7 Will. 4 & 1 Vic. c. 26.

(m) Att.-Gen. v. Tancred, 1 Eden, 15; S. C. 1 W. Bla. 90; vid. 1 Meriv. 127.

(n) Att.-Gen. v. Tancred, 1 Eden, 15; S. C. 1 W. Bla. 90; vid. Browne v. Ramsden, 8 Taunt. 559.

(o) Vid. Att.-Gen. v. Christ's Hospital, 1 Russ. & M. 626; Att.-Gen. v. Platt. Finch, R.

(p) Vid. 2 Keen, 163; 3 Ves. 322.

(q) Att.-Gen. v. Andrewes, 3 Ves. jun. 633. 646; S. C. 7 Ves. 223; St. John's College, Cambridge v. Platt, Finch. Rep. 222; Att.-Gen. v. Master, &c., of Catherine Hall, Cambridge, Jac. R. 392; Att.-Gen. v. Baliol College, Oxford, 9 Mod.

adapted merely for ostentation on the part of the testator, will not be carried out; a good devise to a college must be for purposes identical with, or at least allied to, those of the collegiate body.(*r*)

It may be desirable, although the subject is not quite immediately connected with the purposes of this treatise, to advert shortly to the Statutes of Superstitious Uses.

The effect of the Statute of Superstitious Uses, 23 Hen. 8, c. 10, was to make absolutely void all alienations of manors, lands, tenements, and hereditaments aliened in mortmain, "to the uses and intents to have obits perpetual, or a continual service of a priest for ever, or for sixty or eighty years, or to any other like uses or intents;" but the same uses were authorized if they were limited to continue not longer than twenty years.

The stat. 1 Edw. 6, c. 14, abolishing chauntries, &c., gave the property in all estates devised for such superstitious uses to the crown.(*s*)

It is to be carefully observed, in the interpretation of these statutes, that the superstitious uses meant by them were such uses as were then held to be superstitious.(*t*) But the uses which have been held to be [**125*] *superstitious since those acts, render the devise merely void, and the lands, &c., are not considered forfeited to the crown.(*u*) Still the devise is not void in such a way as to go to the next of kin; but the crown appoints by sign manual what charity the bequest shall be appropriated to.(*x*)

It appears that in some cases, where a superstitious and a charitable use were limited in the same instrument, the money payments destined to the former shall be vested in the crown, but not the lands given for the latter.(*y*) Probably it would be held that the doctrine of superstitious uses still applies to Roman Catholic foundations, the Roman Catholic Penal Acts Repeal Act,(*z*) and the Religious Opinions Relief Act,(*a*) not touching the question; for it seems that the grounds on which the

409; *Att.-Gen. v. Pembroke College*, 2 Sim. & Stu. So of other bodies, *Att.-Gen. v. Christ's Hospital*, 3 Bro. Ch. Cas. 165; *Att.-Gen. v. Christ's Hospital*, 1 Russ. & M. 626; *Att.-Gen. v. Hart*, Prec. Chanc. 225; *Att.-Gen. v. Margaret, &c., Professors*, 1 Vern. 55.

(*r*) *Att.-Gen. v. Whorwood*, 1 Ves. 534; *vid.* 1 My. & K. 430; and per Hardwicke, C., in *Green v. Rutherford*, 1 Ves. sen. 472.

(*s*) Sect. 5; *Att.-Gen. v. Downing*, Wilm. Notes, 10; *R. v. Newman*, 1 Lev. 284; *vid.* 3 Ves. jun. 726.

(*t*) *Vid.* *Att.-Gen. v. Fishmongers' Company*, 2 Beav. 151. 584; S. C. 4 My. & C. 11; *Cary v. Abbott*, 7 Ves. 495; *Porter's case*, 1 Rep. 25 a.

(*u*) *De Garcia v. Lawson*, 4 Ves. 433; *vid.* 3 Salk. 334; 4 My. & C. 11.

(*x*) *Per Sir W. Grant in Cary v. Adams*, 7 Ves. 490.

(*y*) *Hewet v. Wotton*, cited 4 Rep. 109 b; *Chibnal v. Wotton*, *id.*; *vid.* *Adams and Lambert's case*, 4 Rep. 104; *vid.* J. Bridg. 106; *Cro. Jac.* 51, 52; *Shelf. Mortm.* 89. Aliter where the principal cause of the whole gift was a superstitious use, then all went to the king; *Humphrys v. Knight*, *Cro. Car.* 455; *vid.* *tam.*, *Hart v. Brewer*, *Cro. Eliz.* 449.

(*z*) 7 & 8 Vict. c. 102.

(*a*) 9 & 10 Vict. c. 59; *vid.* 31 Geo. 3, c. 39, s. 17; 10 Geo. 4, c. 7, s. 29; 2 & 3 Will. 4, c. 115; *West v. Shuttleworth*, 2 My. & K. 684; *vid.* *Hob.* 122. The last named statute does not authorize superstitious uses; *West v. Shuttleworth*, 2 My. & K. 684. Gifts to Roman Catholic schools are charitable uses; 2 & 3 Will. 4, c. 115. This act has been held to have a retrospective effect; *per Lord Brougham*, *C. Bradshaw v. Tasker*, 2 My. & K. 221. But in *Att.-Gen. v. Drummond*, 2 Dru.

Statutes of Superstitious Uses have been construed, remain unshaken at the present day, although the legislature has changed its policy with respect to the Roman Catholic religion. Thus, a foundation of a collegiate body, with the object and for the purpose of praying for souls, would at the present day, it is apprehended, be bad under the statute of Edw. 6, although the parties designated to be corporators might be laymen, poor, and worthy objects of support, so as to give to the institution some colour of being a hospital, and though it were actually called a hospital by the founder.^(b) Otherwise the statutes do not extend to restrain uses in favour of learning and relief of the poor.^(c)

To resume the subject of charitable devises.

From what has been said, it appears that all dispositions of lands, tenements, or hereditaments, or of any estate or interest therein, or of any stocks, &c., to be laid out in the purchase of real estate, to or in trust for any charitable use whatever, if made without the formalities of the statute 9 Geo. 2, c. 36, are wholly void;^(d) and that this is the case whether the corporation to or for whom they are made is aggregate or sole.^(d) But there is, as has been seen, this important exception to the generality of the above, namely, that the act does not extend to make void dispositions of any lands, &c., made without the formalities required by the act, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges [*126] within either, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundation of the said colleges of Eton, Winchester, and Westminster.^(e) These corporations, however, like all others, must have a license in mortmain previous to the devise, &c., to enable them to hold the lands, &c., in mortmain, and in respect of lands, &c., devised, &c., after their licenses are exhausted, the lords or the crown may enter. On the other hand a license to hold in mortmain, even when embodied in a statute, implies that the lands, &c., be conveyed, &c., to the corporation in the manner prescribed by the 9 Geo. 2, c. 36.^(f) But though this is indispensable, the courts, in other respects, construe favourably common law devises to charitable uses, for the purpose of carrying into effect, as nearly as possible, the testator's intentions. This has been already illus-

& W. 379, 380, Sugden, C. Ir., appeared to doubt the correctness of Lord Brougham's decision in that case.

(b) *Pits v. James*, Hob. 121; S. C. Palm. 124.

(c) *Porter's case*, 1 Rep. 25 b; *Martidale v. Martin*, Cro. Eliz. 288; *Att.-Gen. v. Lady Downing*, Wilm. Notes, 11; vid. *Gibs. Codex*, 645.

(d) 9 Geo. 2, c. 36, s. 3. The master of a college cannot avail himself of the saving to *devise* to his college, because no corporation can take during the vacancy of the head; and therefore a devise to them by the master is void; *Corpus Christi College case*, 4 Leon. 223; S. C. Dalis. 31.

(e) 9 Geo. 2, c. 36, s. 4. The subsequent clause limiting the advowsons to be held by colleges to the number of a moiety of the fellowships is now repealed; 45 Geo. 3, c. 101. The two universities mean the universities of Oxford and Cambridge.

(f) *Mogg v. Hodges*, 2 Ves. sen. 53. Vid. the licenses to several colleges in the universities, 22 Coms. Journ., 708—710, many of them containing also a license to all subjects, whether incorporated or not incorporated, to alien lands, &c., to the corporation, not exceeding in value the amount of its license.

trated from the old cases. The following is an instance of a recent decision: a testator having before 9 Geo. 2, c. 36, left funds to the corporation of Reading, in trust to pay a sum yearly to the poor of Reading for ever, and directed that if his gift should happen to be by the said corporation disposed contrary to his meaning, or if his will, touching the same, should be left unperformed by the space of one whole year, then the said sum should be yearly paid by the said corporation to the treasurer of Christ's Hospital in London, to be applied to the purposes of the hospital, or else that the corporation of Reading should convey over the property to the mayor and commonalty of London, to be employed as aforesaid: some time after the testator's death, a decree was made by the Court of Exchequer in equity, in consequence of the strict execution of the will having been found inconvenient, establishing certain details of a plan for administering the fund in various ways for the use of the poor of Reading, and ordering that, if the corporation of Reading should neglect to perform the requirements of the decree, &c., for one whole year, at any time, a part of the legacy, which had been formed into a fund, should be paid over to the corporation of London to the use of Christ's Hospital, and that the lands, in which the rest of it had been laid out, should be conveyed to the said corporation to the like use. On a bill by the corporation of London against the corporation of Reading, the directions of the decree, as well as those in the will, having been unperformed for more than a year, it was held that the testator's limitation over took effect; [*127] for that it was not within the rule against *perpetuities, being merely the substitution of one corporation and one use, for another corporation and another use; an arrangement which did not render the property either more or less alienable than before; and that as the property had continued in the possession of the corporation of Reading, who, after the acts of neglect, &c., which formed the ground for the substitution, became trustees for Christ's Hospital, there was no adverse possession; and, therefore, though more than twenty years had elapsed since these acts, and since the plaintiff knew of them, the lapse of time was no objection, and the property was decreed to be transferred to the plaintiffs.^(g)

III. We now proceed to consider what kind of estates may pass to a corporation so as to be held by them under a demise. A husbandry lease has been held to be not objectionable within the Statutes of Mortmain, and that any corporation were at liberty, so far as regarded those statutes, to take one;^(h) and it may be laid down without hesitation, that every corporation, within the scope and object of whose institution it is to take a farming lease, may do so at pleasure;^(h) but with respect to the duration of the lease, there seems some discrepancy in the cases. It has been declared that a lease for 100 years to a corporation is mortmain;⁽ⁱ⁾ and the same has been said of a lease for

(g) *Christ's Hospital v. Grainger*, 19 L. J. (N. S.) Chan. 33.

(h) *Master, &c., of Jesus College, Cambridge v. Gibbs*, 1 Y. & Coll. 146.

(i) Per Warburton, J., *Rowles v. Mason*, 2 Brownl. 197; per Tanfield, B., *Cotton's case*, Godb. 192; vid. 15 Vin. Abr. 485, pl. 20: 1 Platt, Leases, 541.

eighty-one years;(k) but on the other hand, it is laid down that a lease for ninety-nine years is good within the Statutes of Mortmain, being a usual term.(l) Moreover, it is said that a lease to a corporation for the life of the lessor is good;(m) and a grant of an estate tail to a corporation has been held not to be mortmain.(n)

A corporation must always have made an express or actual surrender of a lease for years of lands by deed under their common seal, but they might make surrender in law by accepting a new lease; the same continues to be the case, corporations being in this respect, unaffected by the late statutes for simplifying the transfer of real property.(o) Therefore a lease for years, whether of incorporeal or corporeal hereditaments, must be surrendered by deed under the corporation seal, if the surrender be an express one; the first, both on the general ground that of things lying in grant, a disposition or demise can only be made under seal, and can therefore only be surrendered by an instrument of a like nature; the other, both because a lease for years of lands could only be made to a *corporation by deed, and therefore must be surrendered by [*128] deed, and also on the ground of the general application of the late statutes. But a concurrent lease can only be surrendered by operation of law.(p) The above rules, both with respect to charitable and to superstitious uses, apply to leases; thus where a lease was made for twenty-three years of a chapel for the use of a congregation of dissenters, reserving a peppercorn rent during the lessor's life, and 10*l.* a year after his death, it was held that such lease was bad, for, not being within the exception of the second section of the Statute of Charitable Uses(q) as there was no full consideration paid for the lease, it was therefore void as a conveyance for the benefit of a charitable use,(q) not made with the statutory formalities.(r)

We may here remark that it is, in no respect, necessary that the object or charitable purpose for the benefit of which the lease, conveyance, or other transfer of land, &c., is made, should appear upon the face of the instrument; for to require that, would be to open the door to perpetual evasions of the statute;(s) but to arrive at the grantor's intention, the court will look to the accompanying facts both before, at, and after the execution of the lease.(t) In general, lands or other real property can

(k) *Hemming v. Brabazon*, O. Bridg. R. by Bannister, 119.

(l) 15 Vin. Abr. 485, pl. 21; vid. 1 Platt, Leases, 541.

(m) *Bac. Abr. Corporations*, E. 1. In one case it was intimated by the Court of Queen's Bench, that there was no authority for holding that the statutes of mortmain forbid a corporation to hold that which is not in itself perpetual; *Vigers v. Dean of St. Paul's*, 18 L. J. (N. S.) Q. B. 103.

(n) Vid. last note and S. C. in Exch. Ch. 19 L. J. (N. S.) Q. B.

(o) 7 & 8 Vict. c. 76, s. 4; 8 & 9 Vict. c. 106, s. 3; *Sheph. Touchst.* 302.

(p) *Co. Litt.* 338; *Wilson v. Sewell*, 1 Wils. 626.

(q) 9 Geo. 2, c. 36, s. 2.

(r) 9 Geo. 2, c. 36, s. 1; *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 96; vid. *Doe d. Barbour v. Munro*, 12 M. & W. 815.

(s) *Per Bayley, J.*, 2 B. & Ald. 101, 102.

(t) *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 103. One of the judges doubted whether the use in this case was not a superstitious use; but the contrary is now settled; vid. *Att.-Gen. v. Pearson*, 3 Meriv. 353; *West v. Shuttleworth*, 2 My. & K. 684.

only be demised to a corporation aggregate by deed, and they must accept such a demise under their common seal, according to the rule of the common law.^(u) Also, wherever a corporation hold by lease, they must surrender by deed;^(x) except where the acceptance of a fresh lease operates as a surrender in law of the first, in which case it is not necessary that the corporation should manifest their intention to give up the first lease, by writing under seal, or otherwise.^(y)

From what has been said, it appears then that landed property, coming to corporations by whatever means, vests in the invisible and metaphysical entity, the members of the corporation having no individual interests in the land of the corporation, and being to the same extent as any strangers, trespassers if they go upon the land without due authority from the corporation; but to this general rule there are some exceptions: in cases of trading corporations, established chiefly by statute, where the legislature having attempted to combine the characters of the co-partnership and corporation, the reverse of the above principle takes [*129] place, and the property of the corporation consists of the aggregate of the interests or shares, the corporation having only the management of the property.^(z) In such cases the only mode for a proprietor to adopt in order to realize his share of the profits, if it is withheld from him by the corporation, is, not by applying to the Queen's Bench,^(a) who will not interfere in such cases, but by bill in Chancery, where he may have an account decreed;^(b) real property, in such circumstances, being in equity regarded as in the nature of personal estate, although the shares be assignable, and one shareholder is not answerable for the acts of another in relation to the joint concern.^(c)

We next proceed to state how far, and by what means, corporations may deal with their real property.

The principle has been laid down that "all civil corporations, such as the corporations of mayor and commonalty, bailiffs and burgesses of a town, or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act, which establishes them, or by some subsequent act, have, and always have had, an unlimited control over their respective properties, and may alienate in fee, or make what

(u) *Predyman v. Wodry*, Cro. Jac. 110, recognised *Smith v. Adkins*, 8 M. & W. 371; *vid. Owen*, 143; 12 Hen. 7, 25, 26. If the corporation grant over the lease, the grantee, in pleading the lease, may entitle himself thereto without showing the deed, where the lease is of such a nature as that the thing demised in it might have passed without deed, Cro. Jac. 110; and even if it were not of such a nature, 2 Wms. Saund. 305 a.

(x) 8 & 9 Vict. c. 106, s. 3.

(y) *Churchwarden's of St. Saviour's case*, 10 Rep. 67 b. What is such surrender in law, *Lyon v. Reed*, 13 M. & W. 285; observed upon in *Nickells v. Atherstone*, 10 Q. B. 951; approved by Sir E. Sugden, C., in *Creagh v. Blood*, 4 Jon. & L. 133.

(z) *Townsend v. Ash*, 3 Atk. 336; *Bligh v. Brett*, 2 Y. & Col. (Exch. Eq.) 295, 296.

(a) *R. v. Governor, &c., of Bank of England*, 2 B. & Ald. 620.

(b) *Adley v. Whitstable Fishermen*, 17 Ves. 323; 19 Ves. 304.

(c) *Bligh v. Brent*, 2 Y. & Coll. 268.

estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property.”(d)

But the whole of this assertion rests upon the single authority, as regards the courts of common law, of a note at the end of an old case, where it is said, “Note, that it was agreed by all that at this day a corporation of mayor and commonalty, or of bailiffs, burgesses, &c. may, by their common seal, grant their lands, &c., for life, or years, in fee, and that will be good against all their successors.”(e)

It is true that such grants are declared by Sir E. Coke(f) to be good, but as regards cases argued and determined in courts of law, there appears to be no other decided authority whatever (if the above is an authority) for stating that a civil corporation aggregate may alien their lands in fee; nor does there, it is believed, remain any authentic record, or any trace in the books, that such a practice ever obtained the sanction of a court of law upon solemn argument.

It is true that in ancient times, and in the infancy of the law of corporations in this country, we find that many ecclesiastical corporations (almost exclusively monastic corporations) were in the habit of aliening lands and tenements *in fee farm*, reserving a rent to the grantors and their successors, and with other limitations; but these cannot, it is apprehended, be considered, at the present day, as valid proofs to support *the broad doctrine quoted above, for since the statute of quia [*130] emptores terrarum, no such alienations can be made by any one, except the king. Reference to 1 Ann. stat. 1, c. 7, preventing grants in fee, &c., of crown lands.

Thus, A. D. 1237, the Prior and Convent of St. Denis, near Southampton, granted a messuage to Ranulf de Noreis and Hodelina, his wife and their heirs in fee tail, ad perpetuam feodi firmam, but the condition of the grant was, that the grantees and their heirs render to the grantors and their successors a yearly rent of five shillings, and that if the grantees die without heirs, then the messuage was to revert to the grantors, &c. &c.(g)

So the Prior and Convent of the Church of Christ of Canterbury, about A. D. 1143, granted to Ida de Haltun one hide of land, sine omni feodo et sine omni hæreditate de nobis tenendum quamdiu benè et honestè se habuerit, reserving five shillings yearly, with condition that if she demises, the land shall revert to the grantors.(h)

A. D. 1486, the Prioress and Convent of St. Bartholomew, in Newcastle-upon-Tyne, granted certain waste land to Thomas Lokwood and his heirs, ad feodi firmam, to be held by the usual services of the capital lords of the fee, on payment of rent 6s. 8d. a year, with clause of distress.(i)

(d) 1 Kyd, Corp. 168; vid. S. P. Att.-Gen. v. Wilson, 9 Sim. 30, obiter.

(e) Smith v. Barrett, 1 Siderf. 162. Siderfin has never had a high reputation as a reporter. Com. Dig. Franchise, F. 11. 18, cites no other authority for the proposition.

(f) Co. Litt. 325 b.

(g) Mad. Firm. Burg. cap. 1, s. 4; Mad. Formular. Anglic. form. 470.

(h) Mad. Formul. Anglic. form. 501.

(i) Mad. Firm. Burg. cap. 1, s. 4; Mad. Form. Anglic. form. 487.

So about A. D. 1181, the Prior and Convent of the Church of Christ of Canterbury, grant to one and his heirs, 183 acres de nobis tenendas quamdiu census constitutum benè reddiderint et fideliter se erga nos et ecclesiam nostram habuerint, the rent being two marks and a half per an., or 1*l.* 13*s.* 4*d.*

So the prior and Convent of Brayton, 31 Edw. 3, grant to Robert Oughtred and Katerina, his wife, one bushel frumenti boni et puri grani ac benè ventulati, to be taken on their manor of Horselegh, Gloucestershire, every week, for the term of their life and the life of the survivor, with clause of distress on the said manor, if the grant be behind for half a year, &c. &c. Datum apud Brueton die Dominicæ proximâ post festum nativitatis Beatæ Mariæ, 31 Edw. 3.(*k*)

So the Abbot and Convent of Bordesley grant to Thomas Aventure, pro servitio impenso, one annual rent of 13*s.* 4*d.* for the term of his life, with clause of distress on the abbey, dated 12 December, 4 Hen. 6.(*l*)

Thus it appears that none of these grants bear out the proposition, for which some of them have been referred to, viz. as showing that, at [*131] *common law, civil corporations might alien in fee; and there appears to be little doubt that the grants themselves are so anomalous in their nature, and so much opposed, in various respects, to modern ideas of the law of real property, that no argument can be derived from them to prove the present state of the law as to alienation by corporations; nevertheless, as the absence of express decision of the point, in any modern case, rendered it advisable to show clearly, on what grounds alone, the sweeping doctrine is made to rest, which gives to corporations the same power of alienation of their lands that belongs to individuals, when statutory enactments do not interpose,(*m*) they are stated.

Before quitting this important part of the subject, however, it may be desirable to point out, as showing still more clearly the distinction between such grants as those mentioned above, and what are now known under the term alienations in fee, that where the rent was thus reserved on the durable estate of the feud (even without a clause of distress or re-entry in the deed), the feud itself and the chattels thereupon were pledged for the rent; and if the land were unstocked for two years, the

(*k*) Mad. Formul. Anglic. 566; *ibid.* form. 598, is a curious grant by the bailiffs and burgesses of Huntingdon to Sir John Hussey, for services, &c., of 1*l.* 6*s.* 8*d.* annuity, to hold "to him and his assignees, off us and our heirs and successors, for term of life of the said Sir J. Hussey." Sealed with the common seal, and dated 20 February, in the 24th year of Hen. 6.

(*l*) Mad. Form. Anglic. f. 588; *vid.* other grants by corporations of lands for lives, rendering rent, *id.* form. 213. 216, 217. Grant by corporation of a reversion to four persons for their lives, *id.* form. 218. A similar grant to a feme covert and her son, for their lives, *id.* form. 219. Demises of lands for years by corporations may be seen, *id.* form. 220 to 231. Exchanges, *id.* form. 254 to 281. N.B. Madox gives no examples of grants of lands by corporations in fee, properly so called.

(*m*) *Vid.* 1 Kyd, Corporations, 108, note (b). The other authorities there cited, viz. Co. Litt. 44. 300, 301; 1 Burr. 221; relate solely to ecclesiastical corporations. Of the power of alienation by these latter, we shall speak hereafter. It appears that the restraining acts are only declaratory of the common law; Glanv. Lib. vii. c. 1.

lord had his cessavit per biennium to recover the land itself; ⁽ⁿ⁾ and in ancient times he had a process of seizure by distress of the freehold or land itself, the process issuing out of his own court. ^(o) In other words, the reversion was in the grantor. ^(p)

Passing to a period somewhat later than most of these old grants, we still find no authority of a decided case to sanction the idea that corporations were considered to have power to alien. The doctrine does not appear to have been known to the courts during any part of the time over which the reports in the Year Books extend. It is true that Sir Edward Coke, in a note to one of his reports, ^(q) appears, at first sight, to vouch for direct authority for the statement *that to alien is incident to a corporation*, a decision in a Year Book. The passage stands thus: after laying down that when a corporation is duly created, all other incidents are tacitly annexed to it, he proceeds thus:—"And for direct authority on this point in 22 Edw. 4, Grants, 30, it is holden by Brian, Chief Justice, and Choke, that a corporation is sufficient without words to implead or be impleaded, &c., and therefore divers clauses subsequent in the charter are not of necessity but only declaratory, and might well have been left out as (I) by the same to have authority, ability, and capacity to purchase, &c.; but no clause is added that they may alien, &c., and it needeth not, for it is incident."

*Now it is remarkable that this citation, which might seem at first sight to be intended as an authority for the statement that [*132] to alien is incident to a corporation, has nothing in it to justify such inference; for the citation is made not from the Year Book, but from Fitzherbert's Abridgment, title Graunt, pl. 30, where an extract purports to be made from the Year Book, Trin. 22 Edw. 4. In that Year Book, however, there is no such passage. The place meant is Mich. 21 Edw. 4, fol. 55, pl. 28, where the two questions raised in the case before the court were,—

I. Whether the king could grant to a corporation exemption from serving on juries out of their town?

II. Whether having made the mayor, sheriffs and citizens a corporation, the charter was correctly drawn in proceeding "*et concessimus civibus prædictis*," &c., not to serve on juries, &c.? and both questions were resolved by the court in the affirmative, the remarks cited by Fitzherbert, as having fallen from the Chief Justice and Choke, J., being let fall obiter, and having little or no connection with the main question. Moreover, none of the judges, in the course of the case, used any expression sanctioning the idea of the free power of a corporation to alien. Sir Edward Coke must have written this note with some degree of negligence, or he would have discovered the mistake in Fitzherbert's Abridgment.

⁽ⁿ⁾ Gilbert, Rents, 93; Bac. Abr. Rent, K. 6; Harg. Co. Litt. 144 a, note (5): Fitz. N. B. 208 H.; 6 Edw. 1, c. 4; 3 Bla. Com. 232.

^(o) This was the case until the privilege was taken away by a stat. of 52 Hen. 3: Harg. Co. Litt. 144 a, note (2).

^(p) Vin. Abr. Aid of the King, F. pl. 3, marg. where the distinction is clearly pointed out between a grant in fee farm and a grant in fee.

^(q) Case of Sutton's Hospital, 10 Rep. 30 b.

ment, and would have rendered it more clear that the doctrine we are discussing was his own inference merely, and did not rest on the authority of the King's Bench of Edward the Fourth's time. The authority of those judges only extends to the words "That a corporation is sufficient without words to implead or be impleaded, &c.;" not a syllable of the rest of Sir Edward Coke's note, as regards this subject, is supported by what they say.

Now that no trace should remain of any decision in a court of common law, in which, on argument, it has been laid down that corporations generally have power to alien their real property, is certainly a remarkable fact, and seems to point directly to the conclusion that, at common law, no such power was inherent in them. It is also very remarkable that^(r) Sir Edward Coke should be the sole authority, till Lord Holt's time, (except the note by Siderfin) for this very important principle. That corporations were not supposed to have the right of aliening at pleasure, is a view, which seems to be somewhat strengthened, by referring to the statutes of mortmain, and the objects for which they were passed. Thus one of the inconveniences to be remedied by the stat. 7 Edw. 1, stat. 2, c. 1, *De Religiosis*, is stated to be, "that the services which are due of such fees, and which, at the beginning, were provided for the defence of the realm, are wrongfully withdrawn, and the chief lords do lose their escheats for the same." And the reason given in 15 Ric. 2, c. 5, for [*133] including, by express enactment, "mayors, bailiffs, and commons of cities, boroughs, and other towns, which have a perpetual commonalty, &c.," within the penalties of the Statute *De Religiosis*, is that "they be as perpetual as people of religion," and then goes on to enact "that from thenceforth they shall not purchase to them and to their commons upon pain contained in the said Statute *De Religiosis*." And Sir Edward Coke, in explaining what is meant by the word mortmain, intimates that the term arose from the fact of lands alienated to corporations being said to come to dead hands, as far as the lords were concerned; "for that by alienation in mortmain they *lost wholly* their escheats, and in effect their knights' services for the defence of the realm, wards, marriages, reliefs and the like, and therefore was called a dead hand, for that a dead hand yieldeth no service."^(s)

Now, to say the least, it does not seem to be clear how the lords could "lose wholly their escheats," if land aliened to corporations was capable of being again aliened in fee, as unreservedly as if the corporation were an individual. It would seem that in such a case there was no more reason to prohibit alienation to a corporation than to a feme sole, who was equally with the corporation incapable of rendering the services for the defence of the realm, &c.; especially if what is said by Sir Edward Coke^(t) be true, that if the crown grant to a corporation to hold by knight service they shall find a man, &c., or pay escuage. The same

(r) Vid. dict. per Reporter, 10 Rep. 30 b; Co. Litt. 325 b.

(s) Co. Litt. 2 b; and mortmain is explained, Co. Litt. 70 b, to mean "they held fast their inheritance." Vid. 1 Reeve's Hist. Engl. Law, 240, acc.; so Plowb. Com. 193; Wrotesley v. Adams.

(t) Co. Litt. 70 b.

view appears to have been present to the minds of the framers of the stat. 9 Geo. 2, c. 36, intituled "An Act to restrain the Disposition of Lands whereby the same become unalienable," who must have been of opinion that the effect of aliening lands, in the manner the statute was meant to check, was to render such lands unalienable, otherwise the title of the act would be idle and insensible, which cannot be presumed; for though it has been said of the title of this act, and generally, that the title is no part of the act, yet that doctrine cannot be taken to mean that the words placed by the legislature, at the heads of their enactments, may be wholly disregarded, as being frequently devoid of significant meaning.^(u)

The courts, in putting constructions upon statutes, have frequently founded their reasoning, in part, on the titles of those statutes;^(x) and *we may further remark that it is quite manifest, from the de- [*134] bates on the statute 9 Geo. 2 in the House of Lords, that both sides assumed most distinctly that corporations becoming possessed of lands could not alienate. Whoever will consult the fifth volume of Chandler's Debates in the House of Lords, pp. 34, 36, may see ample reason to be convinced of this.

As has been before stated, no decision of the common law courts directly in point, can be found, laying down the law to be, that to alien its real property at pleasure is incident to a corporation. It is true, that in a celebrated case Lord C. J. Holt said, obiter, "It is a fundamental point of law that a fee may be charged or aliened (Litt. 360), and no person, natural *or politic*, who has a fee but may alien it."^(y) But there are peculiarities in the nature of the estate which the corporation has in its real property, to which Lord C. J. Holt does not appear to have adverted, in speaking as though a corporation had a fee, in the same sense, that a natural person is said to have a fee in landed property. For Sir E. Coke, in commenting on the very section of Littleton cited by Sir C. J. Holt, shows that what is there said to be "understood of *conditions annexed* by the party to the grant or sale of the lands, and not to any

(u) The titles of acts of parliament cannot be said not to be enacted by the legislature; for the question is put on the title, and it is agreed to just as much as every section, schedule, &c., in the act. That the title of an act is not surplusage, vid. per Holt, C. J., 19 Vin. Abr. 510, pl. 17, marg.

(x) Per Dodderidge, J., W. Jo. 163; per Bayley, J., 8 B. & C. 469, 470; vid. per Abbott, C. J., and Best, J., in R. v. Carlile, 3 B. & A. 162, 166; per Sir J. Nicholl, in Brett v. Brett, 3 Add. Eccl. R. 210; per Lord Mansfield, C. J., Timmins v. Rawlinson, 3 Burr. 1607; per Aston, J., Askew v. College of Physicians, 4 Burr. 2201; per Yates, J., id. 2389. 2462; per Lord Trevor, C. J., 1 Stra. 325; per cur. Stradling v. Morgan, Plowd. Com. 203; vid. Callis, Sewers, 26; 2 Exch. 283, per cur. Exch. Ch.; Dimes v. Grand Junction Canal Company, 9 Q. B. 515; per cur. Hinton v. Dibbin, 2 Q. B. 663; per Lord Chanc. in Free v. Burgoyne, 2 Bli. N. S. 78; per cur. 7 Q. B. 952.

(y) The Banker's case, Skin. 602. A gift to a corporation aggregate is a fee, per Doddridge, J., Gosse v. Haywood, Rol. Rep. 370, 371; vid. Jenk. Cent. 270, Cas. 88. This may certainly be true of private corporations of such a nature that land cannot be necessary for the maintenance of the purposes of their incorporation; ex gra. the Corporation of Cooks in London; vid. Croft v. Howel, Plowd. Com. 538; but it does not follow that corporations, which public duties assigned to them, can alien the means provided for the due discharge of those duties.

other collateral thing.”(z) Even a private individual may constitute a fee simple conditional of this kind. Thus, where a man devised lands to his wife, to dispose and employ them on herself, or on his or her son or sons, at her will and pleasure, it was held to be fee simple conditional, so that if the wife aliened to a stranger it would be a forfeiture.(a) So a condition may be annexed by custom to an estate in fee simple; as the payment of a heriot in respect of a tenement of free lands held in fee simple of a manor.(b) And the grant of lands, &c., to a corporation differs, in this, from a grant in fee of lands to an individual, that in the latter case the whole interest and property is out of the grantor, “so as he has no possibility of a reverter,”(z) which is not the case in a grant to a corporation, where there always is a possibility of reverter, on the event of the dissolution of the corporation; for in such case the lands revert to the donors, or their heirs,(c) that being a *condition of law* annexed to [*135] *the grant.(d) Also an estate in fee simple is defined to be that estate which a person has “to hold to him and his *heirs* forever,” which obviously excludes corporations; for that successors were not, at any time, considered as heirs, appears from this, that bishops and abbots on succeeding to their sees, paid no reliefs,(e) which they must have done, had they been held to come into possession as heirs, because, of common right, relief was incident to every tenure;(f) “and the reason of the immunity was in respect of the body politic;”(g) that is, the continuous identity of the grantee prevented the cause and occasion of relief from ever arising. It is obvious, also, that except in the case of corporations sole, there never is a point of time at which the successors of the corporation come into possession as a body; the succession is kept up by small additions from time to time, but at irregular times, and consequently, it is only with respect to the successors of corporations sole that statutes, speaking of heirs, have been sometimes construed to extend to successors, when such was manifestly the intention of the legislature.(h) Further, it may be mentioned, that the old law does not appear to support Lord C. J. Holt in the position above laid down; for Bracton expressly notices, that a man might have lands given him with a proviso

(z) Co. Litt. 223 a; vid. 1 W. Bla. 165; Co. Litt. 13 b. The crown may grant a fee simple on condition not to alien; Finch, Law, 84. Also a feoffment to an ecclesiastical corporation, on condition not to alien, is good; Co. Litt. 224 a; Com. Dig. Condition, D. 6.

(a) Anon. Dalison, 58; which case was cited and acted upon in Crockett v. Crockett, 2 Phil. 557.

(b) Damerell v. Protheroe, 10 Q. B. 20; 2 Bla. Com. 424; Litt. s. 73. So by custom of the honour of Gloucester, a fine on alienation of lands in fee simple; Mayne v. Cros, Yearb. 4 Hen. 4, fol. 2, pl. 6.

(c) Att.-Gen. Lord Gore, Barnard. Ch. Rep. 149; Burgess v. Wheate, 1 W. Bla. 165. Vid. per Lord Denman, C. J., 7 Q. B. 384; per Wilmot, J. 1 W. Bla. 592; Pollexf. Arg., Qu. Warr. Cas. 112; Godb. 211; 19 Vin. Abr. 227, pl. 2.

(d) Dean, &c., of Windsor v. Webb, Godb. 211. It is a condition annexed by law to all grants of lands whatsoever, that on failure of the lineage of the grantee, as specified in the grant, the land returns to its ancient proprietor; Plowd. Com. 24; 2 Bla. Com. 110.

(e) Co. Litt. 70 b.

(f) Freeman v. Booth, 3 Lev. 145.

(g) Co. Litt. 70 b.

(h) Co. Litt. 238 a; Wimbish v. Talbois, Plowd. Com. 38, 47.

that he should not alien them to a religious or in mortmain; (*i*) and Sir Edward Coke tells us that he has seen many such deeds of feoffment; (*j*) and he speaks of these lands nevertheless as fees; and there is nothing to show, that, notwithstanding the restraint on their alienation, the estates in them were ever looked on as other than fee simple estates; (*k*) though it is clear that a general restraint on alienation can only be effected by act of parliament; (*l*) and that it is contrary to law, and repugnant to the nature of the thing, to introduce such a condition into a feoffment or a devise. (*m*) However, it was laid down by very learned judges, that a grant of an estate, office, franchise, &c., may be in fee simple, though the thing granted be inalienable; and if the king, by letters-patent, give land to a man and his heirs, with condition that he shall not alien, this is a good condition. (*n*)

Such seems to be the result of an impartial examination of the extant authorities at common law. A very high authority in equity, *however, appears to have pronounced an opinion at variance with [*136] the above view. Lord Eldon, C., seems, in one case, to have asserted the general right of corporations, of whatever nature, at law to alienate their lands held in fee, (*o*) and to have denied that the Courts of Chancery had any control over them, as regarded any disposition of such property, that they might make; but he admitted that the Court of King's Bench, in a previous case, must be taken to have been of a different opinion. (*p*)

Now, all lands granted to a corporation by charter, are granted to be held to them and their successors; in other words (as it would seem,) to be held in order to aid and subserve the purposes of the incorporation, as long as the body politic remains in existence; and, no failure of successors, or on dissolution of the corporation from any other cause, the lands revert to the donors. (*q*) Again, the lands which any civil corporation, *of a public nature*, holds, must be considered as being held, not for the fruition of the existing body of corporators for the time being, but as being held to them and their successors, for the purposes of their incorporation. (*r*) To other purposes, it

(*i*) Bract. fol. 13 a, lib. 1; 1 Reev. Hist. Law, 141. 291. (*j*) 2 Inst. 75.

(*k*) 2 Inst. 66. So in the honour of Gloucester there was a fine on the alienation of fee simple estates, which was held good; Mayer v. Cros, 4 Hen. 4, 2 b. So a heriot may be due by custom in respect of free lands held in fee simple; per cur. 10 Q. B. 25.

(*l*) Jenk. Cent. 270, Cas. 88.

(*m*) Vernon's case, 4 Rep. 1; Manby v. Scott, 1 Siderf. 127, 4th Resol.; vid. Hob. 170.

(*n*) Per Doddridge, J., in Earl of Oxford's case, W. Jones, 123; Yearb. 21 Edw. 4, fol. 84, per Brian, C. J., vid. 5 Edw. 4, fol. 123, Exch. Chamb. acc.

(*o*) Mayor, &c., of Colchester v. Lowten, 1 V. & Beam. 226, A. D. 1813. Vid. Att.-Gen. v. Mayor, &c., of Carmarthen, Coop. Chan. Cas. 30; Att.-Gen. v. Wilson, 9 Sim. 30.

(*p*) Vid. Rex v. Wharton, 2 T. R. 204.

(*q*) Burgess v. Wheate, 1 W. Bla. 165; Mayor, &c., of Colchester v. Brook, 7 Q. B. 384. Where the charter does not grant the lands, and they do not appear to have been granted or devised for the purposes of the corporation, as in the case of some private corporations, all whose purposes may be fulfilled without the possession of land; ex. gra. the Corporation of Cooks, the case may be different, and they may be entitled to dispose of them; Croft v. Howell, Plowd. Com. 538.

(*r*) Anon. Chan. Cas. 269, 270; 4 Vin. Abr. 494, pl. 10. The mode of pleading seisin by a corporation points to the same conclusion, for it is always pleaded that

seems quite contradictory to the fundamental ideas of corporation law to suppose, that they can be diverted,^(s) which aliening them does.

From the instances given above, it is clear that corporations are rigorously held to the performance of the charitable uses for the benefit of which they hold lands; and there appears to be a strict analogy between such cases and those of lands which were originally in trust, as it were, to be applied in furtherance of the purposes for which the corporation was erected, which is the case of all lands held by public corporations in what has been called, though perhaps with some inaccuracy, fee simple.

A great authority has said, that where lands are held by a corporation "clothed with public duties," the Court of Chancery always has and will interfere to prevent the violation or neglect of those duties, and the misapplication of the property.^(t) The whole question seems, [*137] *therefore, to be reduced to this, can any corporation, of a civil and public character, be said to hold lands otherwise than clothed with public duties." Such lands can only be held for corporate purposes, or, in other words, subject to public duties.^(u)

Moreover, there appears to be some difficulty in coming to a satisfactory conclusion on the question, how far the courts of equity will sanction alienation of trust property, for charitable purposes, by the corporation in whom it is vested for those purposes. Lord Eldon appears to have repudiated, for the Court of Chancery, the power of ordering a charity estate to be sold, saying, that an act of parliament would not go so far, and that acts were sometimes passed to authorize the exchange of an estate belonging to a charity for another, but not to convert it into money.^(x) Though four years previously, Sir T. Plumber, M. R., had been of opinion that there is no positive law which says that, in no instance, shall there be an absolute alienation; adding, that no many occasions, by authority of the court,

the corporation "is seised in their demesne as of fee, in their corporate right and capacity;" with one or two exceptions, which, however, serve to support and prove the rule; vid. Com. Dig. Pleader, 2, B. 1. A corporation sole must always plead his seisin in his corporate right; Com. Dig. Pleader, E. 22; Plowd. Com. 102.

(s) Vid. Magdalen College case, 11 Rep. 73 b, 5th Resol. 75 a, 6th Resol., where the reasoning, though confined to colleges, hospitals, &c., seems equally applicable to all other corporations, *mutatis mutandis*.

(t) Vid per Sir C. Pepys, M. R., in *Att.-Gen. v. Mayor, &c., of Liverpool*, 1 My. & C. 201. At present, therefore, an information against a corporation, alleging that it was seised of real estate for purposes of public utility, and that it had sold part of such estate, and was proceeding to sell the rest, would be good; vid. *Att.-Gen. v. The Corporation of Carmarthen*, Coop. 30; *Att.-Gen. v. Mayor, &c., of Plymouth*, 9 Beav. 67; which decides that where a corporation has undertaken the performance of a public trust, they cannot divest themselves of the means of fully executing it. In *Reg. v. Mayor, &c., of Liverpool*, 9 A. & E. 435, corporation funds were treated as property held, since the Municipal Corporations Act, as in trust for the public, which shows that the above doctrine is not unknown to the courts of common law.

(u) Of course nothing that is said in the text applies to such corporations as hold lands for purposes of trade; ex. gra. building societies, or any other corporations within the scope of whose institution it may be to deal in land by sale, &c. Vid. *Lowe v. Govett*, 3 B. & Ad. 864.

(x) *Att.-Gen. v. Buller*, Jac. R. 412, A. D. 1822; vid. *Att.-Gen. v. Brooke*, 18 Ves. 320.

alienations had taken place; and mentioning a case of a dilapidated house, which there were no funds to rebuild, and which it had been found, on a reference to the Master, it would be advantageous to the charity to sell, and Sir W. Grant, M. R., on the authority of a decree by Sir T. Clarke, M. R., or Sir T. Sewell, M. R., had directed to be sold.^(y) Again, it was laid down by Lord Brougham, in the House of Lords, than an alienation may not only be harmless, as regarded as a breach of trust, but may be fit for the trustees to adopt, and be such as, on an information by the Attorney-General, they might be compelled to make; and he put the case of 1000 guineas being offered for the corner of a field for some particular purpose.^(z) On the other hand, it has since been held, that where ten acres of charity land were alienated by the trustees in consideration of 55*l.*, and a fixed rent charge of 6*l.*, it was incumbent on those who claimed the benefit of the alienation to show that the transaction was beneficial for the charity, and that not being done, the transaction was invalid.^(a) And in another subsequent case, though the authority of the court to order a sale was asserted, it was limited to very special cases.^(b) Still later, an order of reference to the Master to inquire whether it would not be *for the benefit of the charity to sell a ruinous house, which [*138] the charity had no funds to repair, was refused.^(c)

Where an estate has been improperly alienated and diverted from a charitable purpose, length of possession, although by a charitable corporation, to the charitable purposes of which the proceeds of the property have been applied, the alienation will not prevail against the original charitable trusts. Thus, where a legacy for the benefit of poor persons of a parish had been laid out in land, and vested in feoffees, who afterwards sold it to a person who, for a pecuniary consideration, disposed of it to the corporation of the governors of Christ's Hospital, and the latter had continued in the enjoyment of the rents and profits for fifty-four years without question, they were obliged to re-convey the property upon the original trusts.^(d)

Perhaps it is not too much to say that the weight of authority is against the assumption of such power by the Courts of Chancery; and at all events it is admitted, apparently on all hands, that corporations have no power of themselves, and without at least coming to the Court of Chancery to enable them, to alienate charitable trusts estates (in which term are now included all the real property of municipal corporations,^(e)) under any circumstances, unless when authorized by parliament.

(y) *Att.-Gen. v. Warren*, 2 Swanst. 300. 302, A. D. 1818.

(z) Per Lord Brougham in *Att.-Gen. v. Hungerford*, 2 Cl. & F. 357.

(a) *Att.-Gen. v. Brettingham*, 3 Beav. 91.

(b) *Att.-Gen. v. Mayor, &c., of Newark*, 1 Hare, 400. A sale was ordered in such a very special case in *Att.-Gen. v. Nethercoat*, cited *id.* 400.

(c) Per Sir E. Sugden, Ch. Irel. In re *Suir, &c., School*, 3 Jon. & Lat. 174, A. D. 1846; *vid. Att.-Gen. v. Corporation of Plymouth*, 9 Beav. 67.

(d) *Att.-Gen. v. Christ's Hospital*, 3 My. & K. 346; et *vid. per Sir E. Sugden, Ch. Irel. in Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 182, 194.

(e) *Parr v. Att.-Gen.*, 8 Cl. & F. 409.

Equity will always decree an account, in those instances where corporations have been empowered by parliament to undertake public duties, of a nature calculated to benefit the inhabitants of the town or city. Thus where a corporation was empowered by statute to supply their city with water, and to levy rates on the inhabitants to meet the expense of bringing the water, &c., and had appropriated part of the revenue arising from the water rates in a manner not strictly falling within the provisions of their local act, they were held to be answerable for all sums thus appropriated.(*f*) But it must be observed, that when a corporation is trustee of funds for public purposes, they cannot be made accountable to any private person in *suit* in equity, though they may be accountable to the crown on an information.(*g*)

This is a distinctive characteristic of a corporation, that it is accountable in equity for misapplication of trust funds, whereas any other body of men, as a parish, can only (where relief can be had at all) be touched through the individuals, or their representatives, who have committed the actual breach of trust.(*h*)

Sometimes, it would appear, that, not merely lands but funds, held by corporations in the circumstances just stated, have been considered as [*139] *funds held for charitable purposes, and the jurisdiction of equity over them has been asserted on that ground, which seems to be asserting the same principle, only less directly, that has just been stated with respect to lands; at any rate this doctrine strengthens the view which has been submitted in the above observations; for if funds in the hands of corporations are treated as inalienable, or, what seems to be the same thing, as inapplicable to any other purposes than those declared purposes for which corporations hold them, it follows that lands held for specific public purposes cannot be applicable to any other purposes, much less to the private purposes, of the existing body of corporators at any given time, in disherison of their successors for ever. Thus we find it laid down, that funds supplied from a gift of the crown, or the gift of the legislature, or from a private gift, for any legal, public or general purpose are charitable funds to be administered by courts of equity.(*i*) Applying this position to the case of real property, no proof appears capable of being given, that any civil corporation, of a public character, ever received lands by grant from the crown, from parliament, or from individuals, for any other than "public or general purposes," that is, the purposes of the corporate existence of the body politic, excepting of course the cases in which corporations hold lands in express trust for specified objects, which they may do for objects of a nature with which the public and the corporation at large have no concern.(*k*) If that be so,

(*f*) Mayor, &c., of Dublin v. Att.-Gen., 3 Cl. & F. 289; Att.-Gen. v. Lord Gort, 6 Dow. P. C. 136.

(*g*) *Skinner's Company v. Irish Society*, 12 Cl. & F. 487.

(*h*) *Ex parte Fowler*, 1 Jac. & W. 70.

(*i*) *Att.-Gen. v. Heelis*, 2 Sim. & S. 76.

(*k*) *Mayor, &c., of Gloucester v. Osborn*, 1 H. Lords' R.; *vid. sup.* p. 116. The doctrine is recognised, that if a corporation which cannot take by the Statutes of Mortmain has an estate devised to it in trust, not for charitable but for private uses, the uses are not defeated by this deficiency; 1 Bro. Cha. Cas. 81.

the difficulty is great of conceiving how it can be competent for a body, with a perpetual succession, to which lands have been granted in furtherance for ever of certain objects, to the support and maintenance of which, in the judgment of the donors, the possession of lands would be instrumental, to part with that land for the personal benefit of the existing members of the corporation, without any regard to such intentions of the donors, and as it were barring the entail to the successors. With respect to lands bought from corporate funds, the same difficulty arises. How is it consonant with the acknowledged principles of the corporation law, that one generation of corporators should have power to devote, to their private emolument, funds that a former generation has invested agreeably to the purposes of the institution? (l)

When corporations are authorised to part with real property, the best mode of conveying it is by feoffment, it is said; (m) though it seems that *bargain and sale of land, by a corporation, will be held a good [*140] and valid conveyance. (n) Of this however there is some doubt (o).

Municipal corporations, since the fifth day of June. A. D. 1835, are restricted as to alienation, mortgage, demise, lease, or other dispositions of their lands, tenements, or hereditaments, by the following special provisions of the Municipal Corporations act, which forever set at rest the above questions as to them.

And be it enacted, that it *shall not be lawful* for the council of any body corporate to be elected under this act, (p) to sell, mortgage or alienate the lands, tenements, or hereditaments of the said body corporate, or any part thereof, except in pursuance of some covenant, contract or agreement, bonâ fide made or entered into, on or before the fifth day of June in this present year (i. e. 1835,) by or on behalf of the body cor-

(l) Hence, when the Bank of England was established, it was expressly empowered by parliament to purchase and *alien* lands; 5 & 6 Will. & M. c. 20, s. 20; 8 & 9 Will. & M. c. 20, s. 26. So the stat. 15 Car. 2, c. 17, incorporating the commissioners of the Bedford Level, expressly empowers them, by s. 2, to purchase lands and to *dispose* of them to the use of the corporation. So the stat. 32 Geo. 2, incorporating London Hospital, Whitechapel road.

(m) Watk. Conv. 411, 8th edit.

(n) Holland v. Born, 2 Leon. 122. Such mode of conveyance, it has been laid down, would at any rate be good if the lease on which the release was to be grounded were made by way of demise at common law, with actual entry by the lessee; Watk. Conv. 496. Now, however, 7 & 8 Vict. c. 76, s. 2, operates to make a release unnecessary; vid. 8 & 9 Vict. c. 106, s. 2.

(o) Vid. Watk. Conv. 413, 8th edit. It is laid down, id. 530, "The parties who may convey by bargain and sale are all persons who may stand seised to a use: therefore it seems a corporation cannot convey by bargain and sale," and the argument of counsel, 1 Rep. 127 a, and the same, 10 Rep. 24 a, are referred to, to show that a corporation cannot be seised to an use. But this doctrine, though very frequently met with in old authorities, seems now to be virtually obsolete.

(p) 5 & 6 Will. 4, c. 76, s. 94. This will include corporations created since the passing of this act, for their councils must be elected under this act. It appears to be doubtful whether a corporation would be indictable for contravening this enactment; Reg. v. Nott, 4 Q. B. 773, arg. Corporations had been authorised generally to sell lands, rents, &c., for the purpose of redeeming the land tax, with the assent of two of the commissioners, who are to execute the deed of sale, as parties thereto; 42 Geo. 3, c. 116, ss. 69. 76; Warner v. Potchett, 3 B. & Ad. 921; Ex parte Northwick, 1 Y. & C. 106; Croydon Hospital v. Farley, 6 Taunt. 467.

porate of any borough, or of some resolution duly entered in the corporation books of such body corporate, on or before the said fifth day of June, or to demise or lease, except in pursuance of some covenant, contract, or agreement, *bonâ fide* made or entered into, on or before the said fifth day of June, by or on the behalf of such body corporate, or in pursuance of some resolution duly entered in the corporation books of such body corporate, on or before the said fifth day of June; or, except in the cases hereinafter mentioned, any lands, tenements or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements, or hereditaments or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or, if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and in every lease which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned) *(g)* be reserved and made payable, during the whole of the term thereby granted, such clear yearly rent *(r)* as to the council shall appear reasonable, without taking any fine for the same: provided nevertheless, [*141] that in every case in which such *council shall deem it expedient to sell and alienate, or to demise and lease, *(s)* for a longer term than thirty-one years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements, or hereditaments, it shall be lawful for such council to represent the circumstances of the case to the lords commissioners of his majesty's treasury; and it shall be lawful for such council, with the approbation of the said lords commissioners, or any three of them, to sell, alienate, and demise any of the lands, tenements, and hereditaments of the said body corporate, in such manner and on such terms and conditions as shall have been approved by the said lords commissioners: provided always, that notice, of the intention of the council to make such application as aforesaid, shall be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough, one calendar month at least before such application, and a copy of the memorial intended to be sent to the said lords commissioners shall be kept in the town clerk's office during such calendar month, and shall be freely open to the inspection of every burgess at all reasonable hours during the same.

Sect. 95. Provided always, and be it enacted, that in all cases in which

(g) Vid. ss. 95, 96.

(r) A rent reserved, payable quarterly or half-yearly, is still a yearly rent, and therefore satisfies these words; Co. Litt. 44 a; Dean of Worcester's case, 6 Rep. 37; 12 M. & W. 362. 397.

(s) Vid. s. 96. The word mortgage being omitted in this part of the clause, in order to remove doubts it was enacted by 6 & 7 Will. 4, c. 104, s. 2, that this power of disposition "shall extend to the disposition of such lands, tenements and hereditaments, with such approbation as aforesaid, whether by way of absolute mortgage or by way of exchange, mortgage or charge, demise or lease, and to every other disposition of the same whatsoever, which shall be so approved of as aforesaid." Semble, this approval ought to be obtained previous to expenditure intended to be covered by the mortgage, &c. vid. Att.-Gen. v. Earl of Mansfield, 2 Russ. 501.

any body corporate shall on the fifth day of June in this present year (1835) have been bound, or engaged, by any covenant or agreement, express or implied, or have been enjoined by any deed, will, or other document, or have been sanctioned or warranted by ancient usage or by custom or practice, to make any renewal of any lease for years, or for life or lives, or for years determinable with any life or lives, at any fixed or determinate or known or accustomed period, or after the lapse of any number of years, or on the dropping of any life or lives, and years determinable after the lapse of any number of years, at a fine certain, or under any special or specific terms or conditions, and also in all cases in which any body corporate shall theretofore have ordinarily made renewal of any lease for years, or for life or lives, or for years determinable with any life or lives at any fixed or determinate or known or accustomed period, or after the lapse of any number of years, or upon the dropping of any life or lives, upon the payment of an arbitrary fine, it shall be lawful for the council of such borough to renew such lease for such term or number of years, either absolutely or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine or premium, either certain or arbitrary, and with or without any covenant for the future renewal thereof, as such body corporate could or might have done in case this act had not been passed.

*Sect. 96. Provided nevertheless, and be it enacted, that in any of the instances hereinafter mentioned it shall be lawful for [*142] the council from time to time to demise and lease, or to enter into any contract or agreement for demising and leasing, any of the said lands, tenements or hereditaments to any person, body politic, corporate or collegiate, for any term not exceeding seventy-five years from the time of making the lease or agreement, that is to say, of tenements or hereditaments, the greater part of the yearly value of which shall at the time of making the lease or agreement consist of any building or buildings, of land or ground proper for the erection of any houses or other building thereupon, with or without gardens, yards, curtilages or other appurtenances to be used therewith, and where the lessee or intended lessee shall covenant or agree to erect a building or buildings thereon of greater yearly value than such land or ground, of land or ground proper for gardens, yards, curtilages or other appurtenances to be used with any other house or other building erected or to be erected on any such ground, belonging either to such body corporate or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building.(t)

By sect. 97 it is provided, that collusive sales, demises, and purchases of corporate property made since the fifth June, 1835, may be set aside ;

(t) No mention, it will be observed, is made in this section of the fine to be taken or the rent to be reserved, although by sect. 94 a yearly rent must be reserved in leases made under that section. In order to remove this ambiguity, it is provided by 6 & 7 Will. 4, c. 104, s. 2, that the power of disposition given to the council by this section " shall extend to demises or leases, either at a reserved rent or a fine, or both, as the council shall think fit." And the corporation might lease their charitable trust lands at a fine, if that had been the usual mode of letting; *Atl.-Gen. v. Crook*, 1 Keen, 121.

and the mode of doing it is fixed, and the costs ordered to be paid out of the borough funds in all cases, whether there were no consideration or an undue consideration for the transaction.^(u) And where a lease had been granted by the unreformed corporation, bearing date, July, 14, 1835, by indenture, and the corporation and the lessee had respectively retained the lease and counterpart, but the reformed corporation being of opinion that the lease was granted collusively, and that the rent reserved was too small, summoned a jury under this section, who found that the rent ought to be much increased, and the lessee elected to pay the increased rent, and the finding of the jury was indorsed on his counterpart of lease, it was held, in an action against him to recover the increased rent by the corporation, that the lessee was bound to produce his counterpart and allow a copy of the indorsement to be taken, although the inquisition itself was in the possession of the corporation.^(x)

[*143] *With respect to demises for years, it seems scarcely necessary to observe, that where, by their constitution, a corporation are restrained from granting leases for more than twenty-one years, they cannot covenant for a renewal of the term, any more than they could have originally granted a lease exceeding twenty-one.^(y) But where there was only some evidence of the lands being held by a corporation subject to a payment to a charitable use, but not sufficient to establish that the property was trust property, and the lands had been usually let by the corporation on leases renewable for ever, the corporation was compelled in equity to grant a new lease.^(z) On a covenant in a corporation lease to renew upon the falling in "of one life for ever," there is no equity to extend it to the case where two lives are suffered to fall in, and it makes no difference that a compensation is offered.^(a)

A corporation might have leased their real property for a life or lives by deed constituting an attorney under their common seal to make livery,^(b) although before the statute of Anne, upon principle, it would have been difficult perhaps to have supported such a disposition of the common property, because during the term they could have no remedy

(u) As to the jurisdiction of the Court of Chancery to restrain appropriations of corporate property not warranted by this act, notwithstanding the special remedies pointed out in sect. 97, *vid. Att.-Gen. v. Aspinall*, 1 My. & C. 613; *Att.-Gen. v. Wilson*, 9 Sim. 30; *vid. infra*; 4 Beav. 325.

(z) *Mayor, &c., of Arundel v. Holmes*, 8 Dowl. 118.

(y) *Lydiatt v. Peach*, 2 Vern. 410; *Taylor v. Dulwich Hospital*, 1 P. Wms. 655; *Watson v. Hemsworth Hospital*, 14 Ves. 333.

(z) *Gozna v. Aldermen, &c., of Grantham*, 3 Russ. 261; *vid. per Lord Hardwicke, C., Barnard. Ch. Rep.* 151.

(a) *Bailey v. Mayor, &c., of Leominster*, 3 Bro. Ch. Cas. 528.

(b) *Throckmorton v. Tracy, Plowd. Com.* 149. The warrant of attorney giving seisin may be contained in the lease itself; *Moyl v. Ewer*, Cro. Eliz. 905; *vid. 2 Wils. 165*; 2 Rol. Abr. 8, pl. 12. But it is not necessary for any one in pleading such lease to show that the corporation made warrant of attorney to give livery, for without livery, it is not a demise; *Vynior's case*, 8 Rep. 82 b; *Throckmorton v. Tracy, Plowd. Com.* 149. Moreover, *omnia rite acta esse presumuntur*, is a maxim applying especially to corporations, and not to be departed from even in their favour; *Yarborough v. Bank of England*, 16 East, 6; *vid. 4 B. & Ald. 315*; Cro. Jac. 153; 3 B. & A. 156. 160, n. (b). The authority given by such warrant could not be granted over; *Finch, Law*, 17; but it might be countermanded at any time before it had been put in execution; *Finch, L.* 32.

for the rent reserved; but that statute(c) enacting "that it shall be lawful for *any person* having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears of rent, &c.," includes corporations, who may therefore, by virtue of it, demise for life or lives, with no more detriment *primâ facie* to the corporate property than in the case of a demise for years. Now, however, as the stat. 8 & 9 Vict. c. 106, s. 2, has enacted that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, it seems doubtful whether livery of seisin is necessary to be given by a corporation any more than a common person, and consequently whether such warrant of attorney is required to complete the conveyance of an estate for life from a corporation.

Where a corporation had leased for ninety-nine years, determinable on three lives, and covenanted that they and their successors, when and as often as either of the said three lives should die, and there should be only two lives remaining in the premises, if the lessee, his *executors, &c., should within the six months next ensuing the [144] decease of such life, &c., apply for a new lease, &c., and pay a fine of 4*l.* for a new lease of the said premises &c., they would add a third life in the said premises, and grant a new lease, &c., &c., and so from time to time ever after, as often as the case should so happen," and the plaintiff (who was one of the lives, and assignee of the interest of another of the lives) did not apply for a renewal of the lease until the other two lives had dropped; and it was held, that, the plaintiff having exercised his election whether to renew or not on the falling of the first life, the corporation were not bound to renew after the falling of the two, and that the lease was forfeited.(d) A lease by a corporation of *charity property* for ninety-nine years, determinable on two lives simpliciter, may be good, if, with a view to all the circumstances, the court can be satisfied that the contract has been for the benefit of the charity, that this mode of letting has been the ancient and uniformly pursued mode, and especially if it be the mode usual in the district where the estate lies.(e) However, a mere husbandry (not a building) lease, for 260,(f) for 99,(g) or for 70(h) years, where the rent is invariable, and where there is no consideration but the rent, will not be supported in equity, because making such a lease is almost equivalent to parting with the inheritance. Still less, in general, can a lease for 999 years be supported;(i) but even such a lease will not be set aside if made in

(c) 8 Ann. c. 14, s. 4; vid. *Talentine v. Denton*, Cro. Jac. 112.

(d) *Bayley v. Bailiff, &c.*, of Leominster, 3 Bro. Chanc. Cas. 329; S. C. 1 Ves. Jun. 476; vid. *Eaton v. Lyon*, 3 Ves. 690.

(e) Att.-Gen. v. Cross, 3 Meriv. 524; Att.-Gen. v. Hungerford, 2 Cla. & F. 379.

(f) Att.-Gen. v. East India Co., 11 Sim. 380.

(g) Att.-Gen. v. Owen, 10 Ves. 555; Att.-Gen. v. Pargeter, 6 Beav. 150; Att.-Gen. v. Morgan, 2 Russ. 306.

(h) Att.-Gen. v. Griffiths, 13 Ves. 575; Att.-Gen. v. Foord, 6 Beav. 288.

(i) Att.-Gen. v. Green, 6 Ves. 452; et vid. Att.-Gen. v. Ladyman, 1 C. P. Coop. Ch. Cas. 180—189; Att.-Gen. v. Ellison, 4 Sim. 238. For the principal cases on the subject of setting aside such leases, vid. C. P. Coop. Ch. Cas. (A. D. 1837), p. 190.

such circumstances as to show that the transaction was for the benefit of the charity at the time, and that the lessee had made valuable improvements on the land at great expense, not being merely ornamented but substantial, as by large buildings, &c.(*k*)

A lease by a corporation of charity property is not impeachable merely because a fine has been taken, especially if that has been the usual course of letting;(l) and generally, the court will not rescind a transaction which was perfectly fair at the time when it was entered into, merely because the property demised has become more valuable from adventitious circumstances.(*m*)

The above principles only apply to a foundation which has, by the founder's will, a discretion as to the duration of leases to be granted of the property. Where the founder has himself prescribed [*145] what shall be the duration, the corporation cannot exceed that limit, either by direct or indirect means:(*n*) and it has been laid down, that it requires an act of parliament to empower a trustee of charity property to deviate from, by overstepping, the intentions of the founder or donor of the estate.(*o*) On the other hand, it seems that courts of equity exercise the power of controlling a trustee for leasing for three lives or thirty-one years, though the founder's will enabled him to do so, when they are satisfied that it is for the benefit of the charity not to act on the power so granted to the trusted.(*p*)

Again, a lease of charitable trust lands, of whatever duration (as it seems,) will be set aside if the land be let at an under-value;(q) but it must be fully proved that the under-value is considerable in amount.(*r*) However, unless it be proved also that the lessee has acted unfairly or dishonestly, he will not in general be turned out;(s) but if he were himself one of the corporation in whom the trust is vested, or one of the governors of the charity, he would, as a matter of course, be prevented from remaining lessee;(t) and, in general, it is held, that whenever a lease is set aside on these grounds, the whole transaction is annulled, so that neither party can sue on the executory covenants of the lease.(*u*) On the other hand, where a lease of charitable lands has

(*k*) *Att.-Gen. v. South Sea Co.*, 4 Beav. 453; *Att.-Gen. v. Kerr*, 2 Beav. 420. Those who deal for and with the estate are put to prove in such cases that the lease is a reasonable one and for the benefit of the charity; *Att.-Gen. v. Owen*, 10 Ves. 560; *Att.-Gen. v. Griffith*, 13 Ves. 575; *Att.-Gen. v. Brook*, 18 Ves. 326; *Att.-Gen. v. Kerr*, 2 Beav. 420.

(*l*) *Att.-Gen. v. Crook*, 1 Keen, 121.
(*m*) *Att.-Gen. v. Pembroke Hall*, 2 Sim. & Stu. 441; S. C. affirmed, 1 R. & My. 751.

(*n*) *Att.-Gen. v. Griffith*, 13 Ves. 565; *Lydiatt v. Fouch*, 2 Vern. 410; *Att.-Gen. v. Master of Hemsworth Hospital*, 14 Ves. 333.

(*o*) *Att.-Gen. v. Mayor, &c., of Rochester*, 2 Sim. 34; *Att.-Gen. v. Warren*, 2 Swanst. 302, 303.

(*p*) *Ex parte Berkhamstead School*, 2 Ves. & B. 138; *vid.* 2 Vern. 596.

(*q*) *Reresby v. Farrer*, 2 Vern. 414; *Att.-Gen. v. Wilson*, 18 Ves. 518.

(*r*) *Att.-Gen. v. Cross*, 3 Meriv. 541; *vid.* 2 Cla. & F. 357; *Att.-Gen. v. Magwood*, 18 Ves. 315.

(*s*) *Ex parte Skinner*, 2 Meriv. 453, 457.
(*t*) *Att.-Gen. v. Dixie*, 13 Ver. 519; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 500; *vid.* *Att.-Gen. v. Green*, 6 Ves. 452, as to additional rent. Allowance may be made for lasting improvements, not being merely ornamental, when lease set aside; *Att.-Gen. v. Baliol College*, 9 Mod. 407, 411; *Att.-Gen. v. Kerr*, 2 Beav. 420; *Att.-Gen. v. Griffith*, 13 Ves. 580.

(*u*) *Att.-Gen. v. Morgan*, 2 Russ. 306.

been granted by the corporation, contrary to their duty and in breach of the trust, the lessee (in circumstances) may be made to account for the rents and profits, and be saddled with the relator's costs.(x)

With respect to the form of corporation leases, it is only necessary to observe, that no particular language is required in such leases any more than in any others.(y) Formerly almost absolute accuracy was required in setting out the name of the corporation demising, and the courts allowed corporations to invalidate their own leases on grounds of misrecital of this nature, that would now be considered quite frivolous,(z) but the injustice of such proceedings was very manifest, and equity very early, at latest in the reign of James 1, began to relieve against this doctrine of the courts of common law, Lord Ellesmere, *C., laying down, in effect, than an error in the name of a corporation demising by lease was of no importance, so long as it could [*146] be seen that the same corporation was meant, and that there was no other corporation to which the name in the lease could be reasonably taken to refer, and he added, that this was the old law, and that judges might have done well at the first to have expounded it so.(a) At present it may be considered to be perfectly settled, that a corporation being proved to have duly executed a lease or other instrument, will not be allowed to urge, in avoidance thereof, that they have miscalled themselves in their own deed.(b) The maxim is, nihil facit error nominis cum de corpore constat.

A lease by a corporation, like every other act of the corporation external to the body politic, must be the result of a regular corporate

(x) *Att.-Gen. v. Corporation of Cashel*, 3 Dru. & Warr. 315, where *Att.-Gen. v. Mayor, &c., of Exeter*, 2 Russ. 362, was cited for the principle on which corporations who have retained the surplus rents of charity lands are to be made to account.

(y) All that is indispensable is, that the words show the parties to have contemplated the creation of a present interest in the subject-matter; *Poole v. Bentley*, 12 East, 168; *Doe d. Morgan v. Powell*, 7 M. & Gra. 989.

(z) *Vid.* 1 Platt, Leases, 182, 183, a list of cases in which objections of literal and other trivial errors in the corporate name have been held fatal to the lease, *vid. etiam*, 6 Taunt. 467—483.

(a) *Cary*, 44. It seems that there are traces of the same being done, 33 Eliz. Ld. *Audley v. Sidenham*, Toth. 228; *vid. Com. Dig. Chancery*, 2 T. 1.

(b) *Croydon Hospital v. Farley*, 6 Taunt. 480; *The case of Lynn Regis*, 10 Rep. 122; *vid.* 4 B. & Ad. 655; *Shep. Touchst.* 234; *Cowp.* 29; *Poph.* 56, 57; *Gilb. Hist. C. B.* 181; 1 B. & A. 699. In a lease by a corporation aggregate, the name or names of the head need not be stated, *Newton v. Travers*, 3 Salk. 103; but in pleading a lease made by a corporation, the correct name of the corporation ought to be stated, it would seem, just as it is necessary to state the full names of individuals mentioned in pleading; *Appelmans v. Blanch*, 14 M. & W. 154; *Turner v. Fitt*, 3 C. B. 701; *Edgar v. Sorell*, Cro. Car. 170; *Turvill v. Aynsworth*, 2 Str. 787; *Rex v. Beech*, *Cowp.* 229; per *Bayley, J.*, in *Jowatt v. Charnock*, 6 M. & Sel. 46. However, in laying the demise in ejection by a corporation, absolute accuracy in the name is not requisite, provided the evidence does not show that the inaccuracy is so flagrant as to amount to a variance; *Doe d. Mayor, &c., of Maldon v. Miller*, 1 B. & A. 699; *vid. Clark's case*, 4 Leon. 11. But a distinction has been taken between laying a demise by a sole and an aggregate corporation, for though in the latter case it is not necessary to state the christian name of the head, the christian name of a corporation sole ought to be stated; *Carter v. Cromwell*, *Dyer*, 36, marg.; *Com. Dig. Pleader*, 2 B. 1.

resolution, that is to say, a resolution passed by a majority of those present at a meeting of the corporation duly summoned, held in the accustomed place, and attended by the integral parts of the corporation; or a resolution duly passed at a meeting of the council, or such other body as may be duly authorized to represent the corporation.(c)

Therefore, no lease can be made by a corporation during the vacancy, by death or otherwise, of the headship, or the office or place of any other integral part of the corporation, for during such vacancy there cannot be a regular corporate meeting, and therefore the powers of the corporation are in suspension or abeyance, and no corporate act can be done except the filling up the vacancy.

The reddendum need not make the rent payable to the corporation and their successors; to make it payable to the corporation is sufficient, and indeed preferable; for a lease by a corporation differs, in this respect, from a lease by a common person, in which, if the rent is reserved to the lessor, without adding "and to his heirs." the rent is gone by his death, and the lessee holds the land for the remainder of the term discharged of rent;(d) but where a corporation leases, its [*147] *characteristic of continuous identity obviates any question of this nature, for it continues the same lessor throughout the term.

A fundamental proposition of corporation law declares, that no interest can pass out of the body politic, except by deed under the common seal.(e) Consequently, every lease by the corporation, whether of corporeal or incorporeal hereditaments, must pass under the corporation seal, otherwise it is void ab initio;(f) and, as it seems, such lease need not be signed,(g) notwithstanding the Statute of Frauds provides that all leases "not signed by the parties making the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases at will only." However, the safe and unobjectionable mode of demising by a corporation is to seal the lease with the common seal, and also to sign it by the hand of an agent duly thereunto authorized by a separate instrument also under the common seal.(h)

(c) *Hascard v. Somamy*, Freem. 504.

(d) Co. Litt. 47 a; Cro. Car. 289; Finch, Law, 65; 2 Wms. Saund. 367. So if a corporation by deed under their common seal grant an annuity to a person in fee, without saying that they grant it for them and their successors, yet the successors are charged with the annuity, because the deed charged the whole corporation; though where a man grants an annuity in fee, without saying his heirs, they shall not be charged, for it is determined by the death of the grantor; Vin. Abr. Annuity, B. pl. 3; id. pl. 1; vid. Anon. Dyer, 24 a.

(e) Yearb. 7 Hen. 7. 9; *Winne v. Bampton*, 3 Atk. 475. Equity, however, will decree execution of an agreement to grant a lease, though such agreement be made at a time when some members of the corporate body are wanting, if the consideration be paid; 3 Atk. 475.

(f) Yearb. 12 Hen. 7. 25, 26; Bro. Abr. Corporations, 51; Co. Litt. 85 a; 5 M. & Gra. 183, note; *Rex v. Inhabitants of Chipping Norton*, 5 East, 239; *R. v. Inhabitants of North Duffield*, 3 M. & Selw. 247.

(g) *Cooch v. Goodman*, 2 Q. B. 580.

(h) Vid. Sup. COMMON SEAL. *Wilks v. Back*, 2 East, 142; *Frontin v. Small*. Stra. 705. But it seems unsettled, whether an attorney may be authorized to execute the lease on behalf of the corporation, either by affixing to it his own seal or the corporation seal, *on the land* out of England, as it might be convenient to do

Generally the deed of a corporation is complete by affixing to it the common seal, and does not require delivery; ⁽ⁱ⁾ but in the case of leases, the usual course was for the corporation to seal the lease with the common seal, together with a warrant or letter of attorney to some one to enter upon the land, and deliver the lease, on behalf of the corporation, to the lessee, ^(k) and until such delivery on the land, no interest passed; ^(l) for though it is true that sealing with the common seal of a corporation is tantamount to a delivery of the deed, yet in the case of a lease which was not intended to come into operation until delivery on the land, it is otherwise; and the sealing did not include an effectual delivery, in the technical sense of the word, so as to make the writing a deed eo instanti; for if it did, the second delivery would be null and void, it being a maxim, that if there be one effectual delivery of a deed, a *second delivery is void. ^(m) An illustration of what has just been said may be found in the case where a corporation made a [*148] lease for lives, dated 26th Nov. 1750, to commence from the day of the date, &c., and empowered an attorney to enter, &c., which he did on the 28th May, 1751, and the court held, that until the latter day the freehold remained in the corporation, and that the lease was good, although made to commence from the day of the date. ⁽ⁿ⁾ In case of a lease for years, the habendum can only be considered as marking the duration of the lessee's interest; the date defines the length of the term; the lease operates as a grant prospectively only. ^(o)

The rule then is, that every lease by a corporation must be made under its common seal. Nevertheless, where a demise is made by a corporation, which is void as being by parol, but the tenant enters and pays rent to them for the premises, such payment and receipt of rent is evidence from which a tenancy from year to year will be presumed, and the tenant will be held to be estopped from disputing the resulting lia-

in some cases, ex. gr. if the corporation held lands in the colonies; vid. Moore, pl. 191; Dyer, 132 a; Sheph. Touchst. 57. If the name of the lessee were left in blank when the deed was sealed, it would be void; 6 M. & W. 214. Also, the presumption appears to be, that the common seal is irremovable from the domicile of the corporation; Jenk. Cent. 10.

⁽ⁱ⁾ Com. Dig. Fait, A. 3; Anon. 1 Ventr. 257; vid. 9 East, 360; Davys, 44 b.

^(k) Willis v. Jermin, Cro. Eliz. 167. Attorney to deliver a lease must be appointed under the common seal; Dumpor v. Syms, Cro. Eliz. 815; Hibblewhite v. M'Morin, 6 M. & W. 214, is an authority that the principle is general.

^(l) Anon. 1 Ventr. 257; Good v. Ash, 3 Keb. 307. The delivery of the lease may be made to the attorney of the lessee; Finch, Law, 66. 73. With reference to pleading, it must be remembered, that a deed is always intended to be delivered and have its essence at the time of the date; and therefore, if a corporation declare on a lease as of such a date, and afterwards reply, &c., that it was delivered subsequently, that is a departure; Oshey v. Hicks, Cro. Jac. 264; Hall v. Denbigh, Cro. Eliz. 773.

^(m) Perk. s. 154, cited with approbation, Cowp. 203; Sheph. Touchst. 60; Co. Litt. 48 b; Stephens v. Eliot, Cro. Eliz. 483; Jennings v. Bragge, 3 Rep. 35 b; Williams v. Ashet, Cro. Eliz. 181; Willis v. Jermyn, Cro. Eliz. 167, 2nd Resol.

⁽ⁿ⁾ Freeman v. West, 2 Wils. 165; Roe d. Hale v. Rashleigh, 3 B. & A. 156; Walter v. Dean and Chapter of Norwich, Moore, 875. The letter of attorney may be contained in the lease itself; Moyl v. Ewer, Cro. Eliz. 905; Dicker v. Nolan, 2 Rol. Abr. 8, pl. 12; Salter v. Kidgley, Carth. 77; Co. Litt. 52 b.

^(o) Shaw v. Kay, 1 Exch. 412; Enys v. Donnithorne, 2 Burr. 1190; 1 Rol. Abr. 849, pl. 11.

bility,(p) for he has had all the advantage from the occupation of the premises that he could have had if the lease had been sealed with the common seal. On the other hand, it has lately been laid down as a general principle, that although to enforce an executory contract against a corporation, it may be necessary to show that it is by deed, yet where the corporation has acted as upon an executed contract, it is to be presumed against them, that every thing has been done that was necessary to make it a binding contract on both parties, they having had all the advantages they would have had if the contract had been regularly made.(q) The court, in pronouncing this decision, observe, "This is by no means inconsistent with the rule, that in general a corporation can only contract by deed; it is merely raising a presumption against them from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case."(r) It might have been added, that the decision is strictly in accordance with a very old rule; that the maxim *Omnia rite esse acta præsumentur* [*149] *obtains absolutely and invariably with respect to the acts and proceedings of corporations so that it will not be departed from even in their favour.(s)

The distinction between contracts executory and executed, as respects corporations, has already been noticed, and it is not necessary to say more upon it at present, but it is desirable, with reference to the subject of leases, to point out that the effect of the decisions respecting the occupation of corporate property is this, that whether the thing enjoyed by the person, holding from the corporation, be a corporeal or an incorporeal hereditament, the corporation may maintain either debt or assumpsit for the use and occupation thereof; for such action does not necessarily imply any demise (it is said); it is enough that the defendant use and occupy the premises by permission of the plaintiff, and a corporation as well as an individual may, without deed, permit a person to use and occupy premises or hereditaments of which they are seised.(t)

(p) *Wood v. Tate*, 2 N. R. 247; *Doe d. Pennington v. Taniere*, 18 Law J. (N. S.) Q. B. 49; *Vin. Abr. Corporations*, K. pl. 11, 41. So where a lessee has enjoyed the thing purported to be demised under a parol lease, he shall not be allowed to set up the want of the forms required by the Statute of Frauds; *Earl of Aylesford's case*, Stra. 783.

(q) *Doe d. Pennington v. Taniere*, 18 L. J. (N. S.) Q. B. 53; *vid. Edwards v. Grand Junction Railway Company*, 7 Sim. 337; 1 My. & C. 650.

(r) *Doe d. Pennington v. Taniere*, 18 L. J. (N. S.) Q. B. 53.

(s) *Yarborough v. Bank of England*, 16 East, 6; 4 B. & Ad. 315; *R. v. Powell*, 8 Mod. 165.

(t) *Barber Surgeons of London v. Pelson*, 2 Lev. 252; *Dean, &c., of Rochester v. Pearce*, 1 Campb. 466; *Mayor, &c., of Stafford v. Till*, 4 Bing. 75; *Mayor, &c., of Carmarthen v. Lewis*, 6 Car. & P. 608. A declaration founded on a parol demise, when the demise ought by law to be under seal, is in ordinary cases bad on general demurrer; *Bird v. Higginson*, 6 A. & E. 824. Though such allegation would be good after verdict, for the court will intend that the deed which was necessary to make the demise valid, was proved at the trial; *vid. Partridge v. Bull*, 1 Ld. Raym. 136; *Yarborough v. Bank of England*, 16 East, 6; *Lightfoot v. Brightman*, Hutt. 54.

The distinction between a lease by a corporation which is voidable and one which is void, is this—

Where a lease from any reason is voidable, there acceptance of rent by the corporation sets it up.

If the lease is actually void from any defect, the payment and receipt of rent is evidence from which a demise from year to year will be presumed in the case of a corporate, just as in that of an individual, lessor.^(u)

A lease may be made by the corporation to a corporator, and though such corporator should become head of the corporation before the end of the term, yet that does not vacate the lease,^(x) notwithstanding the old maxim that the same person cannot be lessor and lessee; but where the head is an integral part of the corporation, and a lease is attempted to be made by the corporation to him, this is a void lease, agreeably to the above principle.^(y) And it is hardly necessary to say that the same *principle applies to a corporation sole; and therefore a bishop, [*156] in his corporate capacity, cannot demise to himself in his natural capacity, but such lease is wholly void.

A lease by a corporation of things lying in grant would always be affirmed by acceptance of rent; and though, for any reason, a lease by a corporation be voidable by them, the acceptance of rent by them proves their election to stand by and set it up; and so if the lease is actually void owing to any defect, such acceptance of rent is evidence from which the existence of a term from year to year will be presumed.^(z)

Corporations making dispositions of their lands by lease to charitable uses have been held not to be within the words "person or persons" in the Charitable Uses Act, 9 Geo. 2, c. 36, s. 1, so that a lease made by a corporation of its lands (being already in mortmain) to such uses is good, without the formalities of that statute.^(a)

The proper mode of demanding their rent is by attorney appointed

(u) Doe d. Pennington v. Taniere, 18 L. J. (N. S.) Q. B. 49; vid. 1 M. & W. 407; quæ tam. whether mere acceptance of rent by a corporation without other circumstances, such as lying by and allowing tenant to lay out money on the land. &c., sets up a voidable lease; vid. Jenkins v. Church, Cowp. 483. At any rate the payments must be made and accepted *as rent*; Right v. Bawden, 3 East, 276.

(x) Vid. 15 Vin. Abr. 362, pl. 3, marg.

(y) Yearb. 21 Edw. 4, fol. 15; 13 Hen. 8, 12; 1 Hen. 5, 10; 14 Hen. 8, 2, 29, 30; 1 Salk. 398; Plowd. C. 155; Salter v. Grosvenor, 8 Mod. 304; Southcott v. Stowell, 2 Mod. 211. So per Lord Mansfield, C. J., 3 Burr. 1563; Adams v. James, J. Bridg. 109. Nor can the head of a corporation take a bond from them, for he cannot be obligor and obligee; 6 Vin. Abr. 304, pl. 2. Nemo potest esse tenens et dominus; Gilb. Ten. 142. So a presentation to a living to the master by a college or hospital is void, because the presenter and presentee are one and the same person; 17 Vin. Abr. 330, pl. 2, marg.; 14 Vin. Abr. 35, C. 2, pl. 1; Wood v. Mayor, &c., of London, Salk. 398; 12 Mod. S. C.; vid. Harris v. Austin, 3 Bulstr. 43. Still "a presentation is not to be compared to a grant or other cases, for that it is singular;" per Coke, C. J., Cro. Jac. 248. On the other hand, there is no objection on this score to a corporator enfeoffing by deed and livery of seisin his corporation, provided he is not an integral part of the corporation; for in such case the same person is not grantor and grantee; Perks. s. 205. But in equity a corporation will not be permitted to make a lease of trust estates to one of themselves; Att.-Gen. v. Earl of Clarendon, 17 Ves. 491.

(z) Doe d. Pennington v. Taniere, 18 L. J. (N. S.) Q. B. 53.

(a) Walker v. Richardson, 2 M. & W. 882; Att.-Gen. v. Glyn, 12 Sim. 84.

under the corporation seal. But a general letter of attorney to demand rent on any part of the land demised is not good; the corporation ought to specify the land out of which the particular rent demanded arises, and ought to mention the name of the party from whom it is to be demanded: if they make it general to demand the rent of any person to whom they have leased land, the letter of attorney will be bad.^(b) On the other hand, the appointment of a bailiff to distrain for rent in arrear need not be by deed, because the making a distress neither vests nor divests any interest (at least this was the reason when the distress was *only a pledge*,) and consequently the power to distrain need not be under the common seal,^(c) for perhaps it may be stated as a general principle, that an appointment where no interest passes, may always be made without deed.^(d) At any rate it has been held that he need not be made bailiff before he distrains, and that it is sufficient if the corporation agree to it afterwards, for that his being bailiff is not traversable, [*151] ^eand that a member may distrain in right of the corporation, and justify as bailiff.^(e)

A stranger to the corporation could not, it would seem, according to principle, distrain without previous authority, and then justify as bailiff, inasmuch as such act would be void, (there being no precedent privity,) and could not be ratified. But there appears to be sufficient privity between the corporation and every member of it, to make it competent for any member to do such an act as their bailiff, although he were not previously authorized. However, all the existing members of a corporation at any given time (not being the corporation) cannot take a distress themselves; if they distrain, it must be by bailiff;^(f) a decision, which, it must be confessed, is opposed to the above view.

A lease for years, by a corporation, may be determined by all the usual modes in which a lease by an individual may be determined, and by one other mode, viz. in consequence of, and immediately upon, the dissolution of the corporation.^(g)

With respect to the power of entry for conditions broken, the general rule of the common law was, that none shall take advantage of con-

(b) Knap v. Jewelch, Brownl. 138. A demand of rent, in the name of the corporation, by its head, (as mayor or dean), is good and effectual, without authority under the common seal; Yearb. 1 Edw. 5, fol. 5, pl. 10. But an acquittance of a debt made by the mayor for the time being was not good, unless made in the name of the corporation, though the practice from very early times was otherwise; Yearb. 2 Ric. 3, fol. 7, pl. 13; 7 Hen. 7, fol. 10, pl. 2.

(c) 26 Hen. 8, 8, b; Plowd. 91; Wilmot v. Mayor, &c., of Coventry, 1 Y. & Col. 518; Cary v. Matthews, 1 Salk. 191; vid. tam. Dixon v. Smelley, N. P. per Holt, C. J., Skin. 413. It would seem that now authority to distrain, sell, and take the rent out of the proceeds, ought to be under the common seal.

(d) Vid. Owen v. Saunders, Salk. 467; S. C. 1 Ld. Raym. 53. 158.

(e) 26 Hen. 8, 8 b.

(f) Case of Master, &c., of Emmanuel College, 2 Brownl. 175.

(g) Att.-Gen. v. Hicks, reported Highm. Mortm. 444. Erasure and alteration of a material part in a corporation lease determines the estate of the lessee, being made after sealing and delivery; and the reason is because in the case of a corporation, a deed is essential to convey the estate; but where a deed is not essential, as in the case of some kinds of leases by common persons, there erasure in the lease does not determine the estate of the lessee; Miller v. Maynwaring, Cro. Car. 399.

ditions executory, who are not parties or privies; and of the latter, none but such as are privies in right; for neither privies in estate, not privies en fait, nor privies in law, shall take such advantage,^(h) but privies in right shall; and therefore if a corporation, whether sole or aggregate, ecclesiastical or temporal, make a lease upon condition, the successors may enter for condition broken, for they are privy in right;⁽ⁱ⁾ or, in another point of view, are the same body or person who made the lease and imposed the condition, and therefore they may perhaps be considered to have a right to enter for condition broken, rather as parties than as privies.

A corporation must enter, for condition broken, on their lessee, by bailiff or attorney, appointed *for the purpose* under their common seal.^(k) This arises out of the general rule that no one can enter, for condition broken, as bailiff to another, without the special command of him to whom he is bailiff,^(l) and a corporation speaks only by its *common seal,^(m) and therefore its special command can only be [*152] proved by showing an authority under seal. If a corporation lease to A., who assigns over his term to B., they must accept B. as their tenant (if they accept him at all) by deed under their common seal,⁽ⁿ⁾ or the original lessee will not be discharged. But as between the corporation and B., if they accepted rent from him, it seems they would be estopped to deny that he was their tenant; for having acted as upon an executed contract, it would be presumed that every thing necessary had been done to make it binding upon both parties, according to the principle before stated,^(o) the payments having been made and received as between landlord and tenant, and not on any other account or consideration.^(p)

A lease held under a corporation must now be surrendered to them (where there is an express surrender made) by deed, where the interest in the lands and hereditaments, held under the lease, was not a copyhold interest.^(q) But a surrender will be made to a corporation, as it will

(h) Perk. ss. 830, 831, 832; Litt. s. 348.

(i) Co. Litt. 214 b; Perk. s. 835.

(k) 1 Rol. Abr. 514; Erneley v. Walrond, Dyer, 102 b. In pleading an entry for forfeiture, it is not necessary to allege that the entry was made by virtue of a warrant or deed under the common seal, for a sufficient entry shall be intended; Edgar v. Sorell, Cro. Car. 169. But if the defendant justifies under a corporation, it is said he ought to show a deed under the common seal; Com. Dig. Pleader, 2 B. 2.

(l) Sheph. Touchst. 154, note 2; vid Eire's case, Moore, 52; Curteis v. Wolverston, Cro. Jac. 57; vid. tam. Fitchet v. Adams, Stra. 1128.

(m) This rule does not extend to make it necessary for a corporation bringing ejectment to state the demise to John Doe to have been made by deed, &c.; Partridge v. Ball, 1 Ld. Raym. 136; Doe d. Mayor, &c., of Canterbury v. Farley, 1 Esp. 198; Dean and Chapter of Rochester v. Pearce, 1 Campb. 466.

(n) Vid. per Bridgman, C. J., Dean and Chapter of Westminster's case, Carter, 16, 17. In debt for rent against A. by the corporation, it is not necessary for him in pleading the acceptance by the plaintiffs of B. as their tenant, to show that such acceptance was by deed, &c., for that being necessary will be implied; Dean and Chapter of Windsor v. Gover, 2 Saund. 305, 305 a.

(o) Doe d. Pennington v. Tainere, 18 L. J. (N. S.) Q. B. 49, 53.

(p) Right v. Dean and Chapter of Wells v. Bawden, 3 East, 260.

(q) 8 & 9 Vict. c. 106, s. 3.

to any other person, by operation of law, without deed, as where the lessee takes a new lease. This kind of surrender takes place independent of the intention of the parties,^(r) provided the second lease be a valid and good lease.^(s) But a concurrent lease can only be surrendered by operation of law and not by deed, because there is no reversion in which it may be drowned.^(t)

Where a lease under a corporation has expired, they cannot be compelled by mandamus to make a new one, for the court will not, in general interfere with a matter, which, like this, is *prima facie* within the discretion of the corporation.^(u) It would be otherwise if the corporation were under obligation to renew by their constitution, or if they had contracted with the lessee to renew, and he would be injured by the refusal; for in the first case the Court of Queen's Bench, and the second, the courts of equity, would interfere to compel them to comply with their duty and obligations. Where a mayor had signed a *contract [*153] for the sale of corporation lands, "on behalf of himself, and the rest of the burgesses and commonalty of the borough," without being constituted the agent of the corporation for that purpose by instrument under seal, it was held in error, reversing the judgment of the court below, that he was not personally liable for the nonperformance of the contract; and that although, not having been duly constituted the agent of the corporation, he was not competent to bind the corporation, they perhaps might have maintained an action for the breach of the contract.^(x)

[*154] *ACTS AND PROCEEDINGS.

WE proceed to examine the rules under which a corporation acts, and enters upon and conducts proceedings. Every corporation being once constituted immediately become entitled to all the incidents of a corporation, so far as these are not excluded (as most incidents may be) by the charter or constituting act of parliament; but if it has become impossible to execute a power, given to a corporation by its charter, in the way appointed by the charter, and the thing to be done is incident to the being of the corporation, it may be done under their common law authority to do all such acts as are properly within the scope of their institution.^(y) This is a principle to which it may be very im-

(r) *Lyon v. Reed*, 13 M. & W. 285. 306; *Creagh v. Blood*, 3 Jon. & L. 133, per Sugden, C., Jr.; vid. *Nickells v. Atherstone*, 16 L. J. (N. S.) Q. B. 371. As to effect of surrender by acceptance of a new lease which is voidable, and afterwards avoided, *Doe d. Biddulph v. Poole*, 17 L. J. (N. S.) Q. B. 144. As to evidence of surrender of a lease of tolls to a corporation, *Walker v. Richardson*, 2 M. & W. 882.

(s) *Wilson v. Sewell*, 1 W. Bla. 626.

(t) *Co. Litt.* 338 a; *Wilson v. Sewell*, 1 W. Bla. 626; vid. *Anon.* 4 Leon. 30.

(u) *R. v. Mayor, &c., of Liverpool*, 1 Barnard. B. R. 83; vid. *inf.* this principle more fully developed under the heads ACTS AND PROCEEDINGS, ELECTIONS, MANDAMUS, &c.

(z) *Bowen v. Morris*, 2 Taunt. 387; vid. 2 Brod. & B. 452.

(y) 1 Rol. Abr. 513, tit. Corporations, G. pl. 5; Yearb. 21 Edw. 4, fol. 55, pl. 28.

portant in some cases to have recourse, as, for instance, where the corporation from negligence have allowed the day to pass on which the charter appoints a certain thing to be performed, or where a condition imposed on them by the charter has not been observed or performed in the appointed way, the default may sometimes be rectified by recurring to the general powers of the corporation as such.

We may note here that where a charter grants certain things affecting the public, and annexes performance of certain conditions, the corporation is liable to an action on the case, if in consequence of their non-performance of any of those conditions injury happens to an individual.^(z)

It may be doubted whether the principle just stated, of recurring to the general powers of the corporation, with respect to chartered corporations acting on their common law powers, hold with respect to those which are constituted by act of parliament; and it would rather seem, according to general principles, that the mode specified in the statute for doing any act or thing must be adhered to with all its circumstances of time, place, &c.; and that such mode being clearly indicated, no other could be adopted. The question does not appear to have been raised in the courts.

Every corporate act must be done at a meeting, either of the whole body politic, or of such select body as may have confided to it, by the constitution, the performance of such act, which meeting must be duly convened by proper summons, and it must be held in the usual place of meeting, the question being (in all cases not expressly provided for by constitution of the corporation) to be decided by a majority of those *present at the meeting, and voting on the question. Those [*155] who do not choose to vote on the question before the meeting, or who vote on any other question, are considered to vote with the majority of the voters on the real question, and so of those who are absent.

When a meeting, at which a specified thing is to be done, is to consist of the different integral parts of a corporation, and each of these integral parts consists of a definite number of corporators, then the meeting will not be properly constituted, unless it be attended by a majority of the members of each integral part respectively.^(a) Where an act is to be done by a select body consisting of a definite number of corporators, it will not be valid, unless a majority of the select body are present at the meeting to do the act. If the act is to be done by an indefinite body, it is valid, if passed by a majority of those present at the meeting, however small a fraction they may be of the body at large.

Formerly it was considered that notice to each member was only required in the case of select bodies, in order to have a properly convened meeting of the body; of late, upon the ground that, in public corporations, it is the duty of a corporator to attend every corporate

^(z) Mayor, &c., of Lyme v. Henley, 1 Scott, 29. So of corporations constituted by statute; Parnaby v. Lancaster Canal Company, 11 A. & E. 223. 230.

^(a) R. v. Bellringer, 4 T. R. 810; R. v. Morris, 4 East, 17.

meeting of which he has due notice, the rule has been laid down that both in select and indefinite bodies the only mode of obtaining a regular corporate meeting is by duly summoning all those corporators whose duty it is to attend it; that is to say, in case of a select body every member of the select body, and also in case of an indefinite body all that are members of it; otherwise acts done at such meetings will be invalid.(b)

Where there is a mode of summoning to corporate meetings founded upon long usage, that mode must be adopted, or the meeting will be irregular, and acts done at it invalid, even though personal notices or summonses were given to the corporators, whose duty it was to attend.(c) Also where particular powers are lodged in a select body, they cannot act in the execution of those separate powers on a general summons of the whole body, but each member of the select body ought to be separately summoned in his distinct capacity.(d)

In corporations of a public nature, it being the duty of every corporator to attend corporate meetings, whether he means to take any part in the business or not, he cannot waive the summons, so as to excuse the summoning officer for not having summoned him on any given occasion, much less so as to make good acts done at a meeting, which is thus defective in respect of all who ought to be, not having [*156] *been, summoned.(e) Nothing but impossibility will excuse the service of summons in such public corporations, because the public have a right to the security arising from the service of notice on each member of the meeting. The impossibility spoken of above arises in the case of a corporation having a local jurisdiction where the corporator has wholly removed from, and deserted, the locality;(f) or where he left it temporarily, but upon reasonable inquiry the corporation cannot get information where he is;(g) or where they do get such information, and find he is at too great a distance to be able to attend at the time appointed for the meeting. In case of other corporations, still more special circumstances must often become ingredients of the question of impossibility, and perhaps almost the only rule that can be given with safety is, that the corporation in such cases should always be in a condition to prove that, at the proper time previous to the meeting, the usual summons was served upon the corporator, or was left at, or in the usual way sent to, the corporator's usual or last known place of abode. Especially in cases of elections, either of members, or officers, must

(b) *R. v. Langhorne*, 4 A. & E. 538. Such acts will not be made good by showing that it was by default of the summoning officer that any corporator was not summoned; *R. v. Mayor of Shrewsbury*, Cas. Temp. Hardw. 147.

(c) *R. v. May*, 5 Burr. 2682; *R. v. Langhorne*, 4 A. & E. 538.

(d) *R. v. Mayor, &c., of Carlisle*, 1 Stra. 385.

(e) *R. v. Langhorne*, 4 A. & E. 538. The presence of every member at the meeting, and the consent of all to waive the proper summons for that time would probably render the meeting a good meeting; *R. v. May*, 5 Burr. 2682.

(f) *R. v. Mayor, &c., of Shrewsbury*, Cas. Tem. Hardw. 151; *R. v. Grimes*, 5 Burr. 2601.

(g) 7 Taunt. 688.

notice of the corporate assembly be given to all corporators within summons.^(h)

From what has been said, it might have been inferred that in cases where the constitution of trading corporations vests the management in a select body, who, in certain specified circumstances, are to perform corporate acts binding the whole body, and in other circumstances the whole corporation are to do the corporate act, the general body of corporators are equally concerned that due summons should be sent to every corporator, who has a right to be present at the meeting, on either of the above occasions; for so only can they be secure that the general interests of the corporation at large will be properly provided for at the meeting. That security which the public have a right to in the case of public corporations, it seems that all persons directly interested in the concerns of trading corporations have equally a right to, in respect to their corporate meetings.

The charters or constituting acts of parliament of such corporations mostly provide, with considerable minuteness, for such matters, although probably, in most cases, the principles of the common law, resting on a number of decisions, and well known and ascertained, would have defined and decided rights of this sort quite as beneficially, and with more uniformity than has been done by the legislature.

A corporator attending an ordinary meeting of the corporation is not *privileged from arrest,⁽ⁱ⁾ though perhaps, if he were a member of a particular class of corporators specially ordered by mandamus [^{*157}] to meet and do certain act, then he would be privileged whilst going to, attending, and returning from that assembly on that occasion.^(k)

Generally every corporator is privileged and exempted from all questions for acts within the competency of the corporation to perform, regularly done under the common seal, in which he has taken a part.

A case, in which a corporator is individually responsible, in an action, for his share in a corporate act, is when it can be shown that he has made the corporate character a shield under which to effect malicious purposes of his own.^(l)

The summons ought usually to give some account of the business intended to be transacted at the meeting; but it has been resolved that neither summons, nor other corporate notice, need be served out of the suburbs of the corporation.^(m) The only meetings for which no sum-

(h) *R. v. May*, 5 Burr. 2681; per Parke, B., 6 Q. B. 707; *Kynaston v. Mayor of Shrewsbury*, 2 Stra. 1051.

(i) *Nixon v. Burt*, 7 Taunt. 688; *Read v. Burt*, 1 Moo. 413.

(k) 7 Taunt. 688.

(l) *Harman v. Tappenden*, 1 East, 555. An action on the case at the suit of the party injured, *id. ibid.*, or probably an indictment, 3 Q. B. 230, lies upon proof of malice; *vid. Att.-Gen. v. Wilson*, Cra. & P. 1; *et vid. 9 Cl. & F. 269, 280: Att.-Gen. v. Redford*, 3 My. & C. 489; *R. v. Watson*, 2 T. R. 204. And where there is no malice, and the parties merely delayed to do a corporate act from a doubt as to the legal bearing of the circumstances in which they had to act, they may become personally responsible for the costs occasioned by such delay; *Reg. v. Mayor, &c., of Cambridge*, 4 Q. B. 801.

(m) Per Lord Hardwicke, C. J., in *R. v. Mayor of Shrewsbury*, 2 Kelynge. 283, 284.

mons is necessary, without it be expressly required by the constitution of the corporation, are the meetings for which set days are appointed by the constitution; because, as every member is intended to be cognisant of the constitution of the corporation to which he belongs, he must be taken to be aware of what are the set days, and what the subjects ordained by the constitution to be brought before the meetings on those days.*(n)* If, however, it is proposed to transact any other business, at one of the set day meetings, than such as is ordained by the constitution to be transacted thereat, summons must be made as in any other case.*(o)* When business, that has been duly and regularly commenced at a meeting duly convened, &c., for the purpose, cannot be brought to a close at that meeting, it seems, though the point is not quite clear from doubt, that to every such meeting the power of adjournment is incident, for the purpose of finishing the business so begun.*(p)* But when notice has been given of a corporate meeting for one particular object, and the meeting takes place, and enters on that business, they cannot go on to any other business without the consent of the whole corporation.*(q)* But although all these forms be duly complied with, and no objection be alleged, either on the ground of the meeting not having been duly summoned, or not having been held in the proper place, or the votes not having been properly taken, although, in short, every thing has been [*158] *done in the most regular manner as regards forms, yet a resolution or corporate act, having for its object to destroy the existing constitution of the corporation, is in the common law courts, if effected, as far as the form of affixing the common seal goes, regarded as null and void, being beyond the competency of the corporation, whilst the courts of equity, in a case where that final step has not yet been taken, will interfere to prevent it by injunction until the hearing. Thus, in the case of a corporation, not of a trading character, but having a capital or common stock in which each corporator was interested individually, and which might become productive of pecuniary benefit to each, where a large majority had concurred, by a regular vote, in a resolution to surrender the existing charter for the purpose of greeting a new one, altering the constituting of the body, it was held in equity that the charter, having limited the powers of those who were to authorize the affixing the common seal, by conditions inconsistent with the notion of applying it for the purpose of annihilating the society, and the common law containing no principle allowing the interest, created by the charter in the funds of the corporation, to be destroyed without the consent of the whole body, an injunction must issue to restrain from affixing the common seal to such contemplated surrender, until the hearing.*(r)*

(n) R. v. Trevenan, 2 B. & A. 339.

(o) Per Coleridge, J., in Reg. v. Grimshaw, Q. B. T. T. 1847.

(p) R. v. Mayor, &c., of Carmarthen, 1 M. & Selw. 704. This power is apparently recognized by the legislature as belonging to meetings of the council in municipal corporations; 5 & 6 Will. 4, c. 76, s. 69.

(q) 6 Vin. Abr. 270, pl. 11.

(r) Ward v. The Society of Attorneys, 1 Colly. 370. The crown, in case of the common seal having been already affixed to the surrender, would probably have been advised not to accept the surrender, so that the proceeding would have been abortive.

There is an obvious distinction between this case and that of municipal and most other corporations, in which it is certainly true that a majority may in general authorize the surrender of the charter, so long as there is nothing (which is usually the case) in their constitution to make it incompetent for the majority to come to such a resolution. But in the case just mentioned there are two points of distinction: First, the powers given to that part of the body to whom was entrusted the duty of affixing the common seal, were such as to exclude an object of this nature: and—Secondly, the mode in which the property of the corporation was held is different from that, in which the property of the other corporations referred to is held; and it is with respect to these last that the decisions forming the law of surrender of charters were made; for in those cases surrendering the charters involved only the parting with property held in right of the corporations, to no part of which was any corporator entitled individually (unless we take into account rights of common held by corporations to be enjoyed by the individual corporators, an exception which can scarcely be considered as coming up to this case, because such individual corporators had not given value for those rights of common, as each of the above mentioned society had done for his share in the common fund), and therefore the surrenders did not place any one in a different situation from that, in which he stood *before becoming a corporator*, whereas the intended surrender of the charter, in the above case, could not be carried into effect *without infringing the pecuniary rights of each member of the corporation, [*159] and therefore ought not to have been carried into effect, at least, without the express consent of every corporator.(s).

With respect to trading corporations, however, it has been laid down, in one case, to be incident to such corporations to apply to parliament to make changes in the object and character of its constitution, although it will not be allowed to do acts inconsistent with the constitution, so long as that constitution remains unchanged.(t) The Court of Chancery will interpose to prevent such acts;(t) and circumstances may arise in which the Court of Queen's Bench will relieve by mandamus against the improper conduct of the majority of the corporation acting contrary to the constitution and objects of the body;(u) and the general principle on which the latter court interferes is this, where an inferior court, or a body of persons, refuse to proceed in some course, which is prescribed by law, the court will oblige them by mandamus; but this interposition will not be made on account of an error or misapprehension in the course of the party, provided such course has been entered upon.(u) Thus, where a railway company were empowered, by their constituent statute, to make a railway, of which the public were to have a beneficial enjoyment, and the company had taken up the rails, a mandamus issued to compel them to reinstate the railway in its former condition.(x) In such cases it is

(s) Vid. *Davies v. Hawkins*, 3 M. & Selw. 488.

(t) *Ware v. Grand Junction Water Company*, 2 Russ. & M. 483.

(u) *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 549.

(x) *Rex v. Severn Railway Company*, 2 B. & A. 646; vid. 1 Q. B. 291; 3 Q. B. 534; 5 Q. B. 892; 6 Q. B. 73; *Rex v. Gamble*, 11 A. & E. 69.

not an answer to the application for the writ that an indictment will lie against the corporation, for that is not an adequate remedy, as the result of such proceeding is not to compel the corporation to reinstate the railway and follow up the objects of their incorporation.(y) But a mandamus does not go to a corporation to enforce against them the general law of the land, if an action at law will lie, notwithstanding that it will be granted in some cases where an indictment may be had.(z) The cases in which corporations may sue upon express contracts, whether under seal or not, have been already discussed; and it has been attempted to reconcile the cases, and deduce rules for the reader's guidance on the embarrassed questions relating thereto; but besides actions respecting express contracts, there are various other occasions on which rights of action accrue to corporations, and which it is now proposed to examine.

There are various duties for which corporations may sue, either stating their claims in the form of special counts, or in the common indebitatus count.

The usual mode of declaring for duties has been for the corporation to state their right, whether by prescription or grant, to the duties, that [*160] *the defendant was liable to pay the duties, and being so liable, promised to pay them, in one count, and to declare generally in indebitatus assumpsit in another count. In one case, it was declared, that the practice had been universal to declare so;(a) and it does not appear that any decisions since the promulgation of the new rules of pleading have expressly altered that practice; but it seems contrary to the intention of the new rules to allow such counts to be used together, for certainly a distinct subject-matter of complaint cannot be said to be intended to be established in respect of each, unless distinct rights can be established; but in fact, however the right be derived, whether from prescription or ancient grant, or grant in modern times, and whether the evidence to be brought forward, in proof of it, rests on letters-patent or long usage and acquiescence in the payment of the duties, the legal assumpsit to pay arises on the right to take, and therefore the right must be the question in dispute on each issue; and therefore, unless distinct rights to the duties are to be set up on the two counts, they cannot, it would seem, be joined consistently with the new rules.(b)

Where a corporation is owner of a port they may sue in indebitatus assumpsit, or debt, for duties incident to a port, as metage,(c) weigh-

(y) *Rex v. Severn Railway Company*, 2 B. & A. 646; *R. v. Bristol Dock Company*, 2 Q. B. 64; 6 B. & C. 181. (z) *Ex parte Robins*, 7 Dowl. 566.

(a) *Per Buller, J., Seward v. Baker*, 1 T. R. 618. But it seems that a claim for port duties may be joined with a count claiming tolls generally, though, as it seems, distinct claims in respect of each count were not intended to be enforced; *vid. instance Brune v. Thompson*, 4 Q. B. 543; *S. C.* 1 Car. & M. 34; *vid. 1 M. & W. 16*. A count for toll traverse might be joined with one for toll-thorough, though the same sum were claimed in both counts; *1 M. & W. 19*.

(b) *Vid. Jenkins v. Treloar*, 1 M. & W. 16. A declaration for tolls, charging that the defendant was indebted to the corporation in a portion of the goods themselves, e. g. in 500 quarters of wheat, without stating the value, is bad for that omission; *Mayor, &c., of Reading v. Clarke*, 4 B. & A. 268; although debt or indebitatus assumpsit will lie for a chattel; *Earl of Falmouth v. Pearse*, 6 B. & C. 385.

(c) *Jenkins v. Treloar*, 1 M. & W. 16. As to what is the legal definition of a port,

age,(d) water-bailiff's dues on goods imported,(e) and generally for all petit customs and port duties they may maintain indebitatus assumpsit or debt, without stating any consideration; for a port duty is held of itself to import a consideration, namely, the liberty of using the port,(f) and it is not necessary for the corporation to show that they own the soil or repair the port, for it may not want repairing once in 200 years.(g) Or they may sue, entitling themselves to the port and the incident duties, by prescription, or grant from the crown,(h) stating that *the defendant became liable to pay such duties, and thereupon promised, [*161] &c.; for the crown may create a port by its prerogative, and create port duties, being reasonable, and for the good of the subject,(i) and grant the port, when the duties follow, or might, in ancient times, grant the duties, retaining or not retaining the port, to a corporation,(k) who may sue for the duties in either case, and entitle themselves, by prescribing or showing the grant according to circumstances, that is, accordingly as the letters-patent have been lost, or can be produced.(l) It may be here observed, that a claim for port duties is not against common right, as is

vid. the authorities collected 5 Q. B. 789, 790; 2 B. & Ad. 43; vid. form of count in debt for petit customs and port dues, 5 Q. B. 773.

(d) Mayor, &c., of London v. Hunt, 3 Lev. 37; vid. 1 Stra. 469.

(e) Mayor, &c., of Hull v. Horner, Cowp. 102. A corporation may have granted to it a port duty, although it has no ownership of the port; Master Pilots, &c., of Newcastle v. Hammond, 18 L. J. (N. S.) Exch. 417.

(f) Mayor, &c., of Exeter v. Trimlet, 2 Wils. 95; Mayor, &c., of Yarmouth, v. Eaton, 3 Burr. 1402; Mayor, &c., of London v. Hunt, 3 Lev. 37; Mayor, &c., of Exeter v. Warren, 5 Q. B. 773.

(g) Vid. 3 Burr. 1406, 1407; Warren v. Prideaux, 1 Mod. 104. It is better not to allege the consideration of keeping the port in repair, because, to do so, lets in questions whether such consideration is sufficiently alleged; Wilkes v. Kirby, 2 Lutw. 1519; vid. 5 Q. B. 781.

(h) 17 Vin. Abr. 264, pl. 5; Mayor, &c., of Exeter v. Trimlet, 2 Wils. 95. The duties are incident to a port, because goods could not be brought there at all for landing, unless there were a port, and that port being granted to the corporation, the permission to land goods there is a consideration for the duty moving from them; vid. per Coleridge, J., 5 Q. B. 794. In pleading to a claim of port dues, if it be necessary to state the right of the subject to repair to ports, it will be demurrable to rest such right on a custom; Bro. Abr. Customes, 59; 7 Vin. Abr. 175, pl. 5. As to the effect of a modern grant of a port by the crown, vid. Hale, De Jur. Marit. Harg. Law Tracts, 33.

(i) Vid. 12 Rep. 34; Cowp. 106. 108; 3 Burr. 1407; 1 T. R. 616; 2 C. M. & R. 398. 404; per Lord Kenyon, Ball v. Herbert, 4 T. R. 261; Davys, 8, 9, 10; 1 W. Bla. 590; 16 Vin. Abr. 578; Mayor, &c., of Exeter v. Warren, 5 Q. B. 773. What is reasonable toll was considered a question for the court; 2 Inst. 222. Of late it has been left to the jury, 4 Q. B. 545, 546, where vid. dict. per Lord Denman, C. J. In all cases where a defendant justifies taking toll, or distraining goods for toll on behalf of a corporation, he must show their title accurately and fully, or the pleading will be bad on general demurrer; Sargent v. Reed, 2 Stra. 1229; S. C. 1 Wils. 91. As to the courts taking judicial notice of the extent of ports, 1 Stra. 469; Stockton, &c., Railway Comp. v. Barrett, in Dom. Proc. 7 M. & Gra. 877.

(k) Mayor, &c., of Exeter v. Warren, 5 Q. B. 773; Mayor, &c., of Southampton v. Scurlag, Mad. Firm. Burgi. 220, ch. 10, s. 29; vid. Cowp. 106, 107. But quære whether the duties must not be defined in amount; Brune v. Thompson, 4 Q. B. 543; Palm. 86.

(l) Where the grant appears in evidence to be enrolled of record, but it is not produced by the plaintiff, it seems the jury ought not to be directed to presume such grant upon mere evidence of usage; Brune v. Thompson, 4 Q. B. 543. Otherwise a grant may be presumed, though, if made, it must have been made within time of legal memory; Mayor, &c., of Hull v. Horner, Cowp. 102.

the case with respect to tolls in a fair or market, but may originate, i. e. (semble) where the duties themselves are ancient duties, in a modern grant from the crown,^(m) and such claim may be enforced either for import⁽ⁿ⁾ or for export^(o) duties. The grant of the port must not, however, interfere with any vested right of a subject, but, provided that is avoided, the crown may create the port and assign its limits, though the soil be in a subject, and such creation is of itself a good consideration for the receipt, by the grantee of the port, of petty customs and port duties throughout the port so assigned, and therefore it is not necessary, as before observed, to allege that a corporation in such case either owns the soil or repairs the port.^(p) Nor is it necessary to prove either of these circumstances to entitle the corporation, provided they can show that they have, in fact, been in the habit of receiving and dealing with such duties and customs, or bring forward other evidence from which a [*162] jury may infer the existence of a port, and *the liability of goods landed there to pay duties to the corporation.^(q) Less weight can be attributed to the acquiescence of parties in the payment of such duties than is usually due to the circumstance of acquiescence in a payment, and therefore that circumstance is not of much force to show that a corporation is entitled to port duties; for ship owners may naturally be inclined to submit to an impost which they conceive to be levied without right, rather than engage in expensive litigation with a wealthy corporation;^(r) but, notwithstanding this obvious consideration, proper evidence of user, and of long enjoyment of such duties, will warrant the presumption of any fact necessary to make the taking of them legal, and where such evidence is brought forward, the jury ought to be directed to

(m) *Jenkins v. Harvey*, 2 C. M. & R. 398, 404; *vid.* 12 Car. 2, c. 4, s. 6; *vid.* *Mayor &c., of Exeter v. Warren*, 5 Q. B. 773. Considerable doubt has been thrown on the doctrine of *Jenkins v. Harvey* by *Brune v. Thompson*, 4 Q. B. 552.

(n) *Mayor, &c., of Hull v. Horner*, *Cowp.* 102; *Master Pilots, &c., of Newcastle v. Hammond*, 18 L. J. (N. S.) Exch. 417.

(o) *Mayor, &c. of Yarmouth v. Eaton*, 3 Burr. 1402. Whether ancient port duties can be applied to new articles of export is a question; *Brune v. Thompson*, 4 Q. B. 543; *vid.* definition of tolls, 2 Inst. 58; 8 Rep. 46 b: of customs, 6 A. & E. 924: *Termes de la Ley*, 201.

(p) *Mayor, &c., of Exeter v. Warren*, 5 Q. B. 773. Every owner of a port is bound to repair, an indictment will lie if he does not; *Wilkes v. Kirby*, 1 Lutw. 1519; as to evidence of the extent and limits of a port, *vid.* 5 Q. B. 773; *Callis, Sewers*, 56, note (b). Or an action on the case will lie against the owner at the suit of one who has lost his navigation on a given occasion by reason of the non repair; *Mayor of Lynn v. Turner*, *Cowp.* 86; *Hart v. Basset*, T. Jo. 156.

(q) *Mayor, &c., of Exeter v. Warren*, 5 Q. B. 773. *Vid.* that case for what is admissible evidence that the corporation had been used to receive the dues. If there is no other evidence of the right to the toll than usage, and the jury find that the alleged amount of toll is unreasonable, a smaller amount found by them to be reasonable cannot be recovered; *Brune v. Thompson*, 4 Q. B. 553. The fact of a place being called a port in a statute, is not conclusive that it is a separate port; thus Teignmouth is called a port, 23 Hen. 8, c. 8, s. 1; yet it was left to the jury to infer, from the whole of the evidence, whether it was not a part of the port of Exeter, which they found it was; *Mayor, &c., of Exeter v. Warren*, 5 Q. B. 773; *vid.* 14 Geo. 3, c. 56, s. 42; 2 B. & Ad. 43. It is called a harbour, 6 & 7 Will. 4, c. xlii. s. 15; *vid.* *Callis, Sewers*, 56, 59; *Hale de Port. Mar. Har.* 47, 50, 51; *Hull Dock Com. v. Brown*, 2 B. & Ad. 43; *Reg. v. Hull Dock Comp.* 7 Q. B. 2.

(r) *Shepherd v. Gosnold*, *Vaugh.* 170; *Hull Dock Comp. v. Browne*, 2 B. & Ad. 43.

presume accordingly.(s) On the other hand non-user of a privilege, or right, conferred on a corporation by its charter, will not, under circumstances, operate to affect their right when it becomes necessary to exercise it; thus, where the corporation of the Trinity House of Hull had a right by charter to appoint pilots, and though, from the time of the grant of the charter to 1828, about 200 years, they had never exercised the right in question, it was held to be no objection.(t)

From what has been said, it appears that a corporation, whether being owner of the franchise of a port, or grantee of the tolls, may maintain the actions mentioned, either for import or export duties, without showing any consideration, as by repairing, &c., and without being owners of the soil. Further, it is no defence to such an action to state, that the corporation, being owners of the port, ought to clean and maintain and repair the port, and that they neglect to do so; for that nonfeasance may be the ground of an indictment,(u) or of an action on the case, under circumstances, by a private individual,(x) but does not bar the right of action in the cases we have been examining.(y) Where a corporation sued ten masters of different merchant ships in indebitatus assumpsit for certain tolls, port duties, buoyage, anchorage, and other dues, in ten separate actions for various sums, the court declared that they had no power to consolidate the actions at the request of the *defendants, although it was sworn that the actions were brought in [*163] respect of the same right, and that the trial of one would decide the right in all.(x) The master of the vessel is the proper party to be sued, because of the difficulty of finding the real exporters or importers of the goods;(y) but where the grant of the duty directs or states it to be payable by the owners of goods imported, and the importer by uniform usage has been held liable, he is the proper person to be sued.(z)

Besides these rights of action to recover tolls, there is always a collateral and alternative remedy by distress,(a) which is considered as being incident to every toll,(b) and it seems it is not necessary that it should be made only on the thing out of which the toll is payable;(c) but any goods of the party are liable. Where a right to tolls has once been established by a court of law in favour of a corporation, they will

(s) 5 Q. B. 800, 801.

(t) *Beilby v. Raper*, 3 B. & Ad. 284.

(u) *Per Powell, J., Wilkes v. Kirby*, 2 Lutw. 1519; *Mayor, &c., of Lyme v. Henley*, 2 C. & F. 331; *vid. Att.-Gen. v. Corporation of Shrewsbury*, 6 Beav. 220.

(x) *Mayor, &c., of Lynn v. Turner*, Cowp. 86. The plaintiff, however, must, it seems, show special damage; *Mayor, &c., of Colchester v. Brook*, 7 Q. B. 773.

(y) *Mayor, &c., of Exeter v. Warren*, 5 Q. B. 800.

(z) *Corporation of Saltash v. Jackman*, 1 D. & L. 851.

(y) *Vinkistone v. Ebdon*, 1 Salk. 249.

(z) *Master Pilots, &c., of Newcastle, v. Hammond*, 18 L. J. (N. S.) Exch. 417.

(a) If in trespass or trover, for seizing and detaining a ship till the tolls, port duties and charges be paid, the corporation justify, they must not allege a right to distrain for the toll only, because, as every justification must extend to the whole of the thing complained of, the plea will be defective for that cause; *Pitts v. Gaince*, 1 Ld. Raym. 558.

(b) *Hickman's case*, Noy, R. 37; *Yearb. 30 Edw. 3*, 20; *Heddy v. Wheelhouse*, Cro. Eliz. 558.

(c) *Vinkistone v. Ebdon*, Carth. 357; *S. C.* 1 Salk. 249; 1 Ld. Raym. 384; 12 Mod. 216; *vid. 6 M. & W. 564*; 4 C. B. 545.

be entitled to a decree from a court of equity for an account(*d*) if it be necessary.

Indebitatus assumpsit also lies at the suit of a corporation having a grant of beaconage and buoyage, against the masters or owners of ships passing their beacons or buoys, though the ships do not come to anchor near such buoys.(*e*) Other tolls prima facie arising from ownership of the soil of a port are, anchorage for every anchor cast; ballastage, for the liberty to take ballast from the bottom of the port; keelage, for every vessel coming within the port; lestage, a duty on goods unladen; moorage, a payment for liberty of fastening ships to posts on shore.(*f*) The corporation of the city might have brought indebitatus assumpsit for *seavage* or *shewage*, which is a duty on every one who exposes foreign goods for sale, which have been entered at the custom house.(*g*) The corporation of London had also a right by custom to a duty called weighage for goods brought into the port, and might bring an action for it without shewing any consideration for the claim; and the action was well [*164] brought against the master of the vessel, and need not *be brought against the owner of the goods.(*h*) A corporation having a port and port dues may also bring indebitatus assumpsit for wharfage,(*i*) cranage, &c.,(*k*) being duties for the use of wharfs belonging to the corporation, and for drawing goods out of vessels by means of a crane kept and maintained by the corporation.(*l*) Lastage is a duty of so much in every last of corn exported from the port of the corporation,(*m*) and may be sued for in like manner, and as in the case of the exaction of other port dues, it seems a quo warranto information may issue, in order to know by what authority such impost is levied on the subject.(*n*)

Also by custom a corporation may have a toll-traverse for every boat

(*d*) *Mayor, &c., of Carlisle v. Wilson*, 13 Ves. 276; *Mayor, &c., of London v. Ainsley*, 1 Anstr. 158.

(*e*) *Vid. Masters, &c., of Trinity House v. Clark*, 4 M. & Selw. 288. Where the charter imposes the duty on the masters and owners of ships passing, &c. (3 T. R. 769.)

(*f*) *Harg. Hale, Jur. Marit.* 74—76; *vid. id.* 76, 86, for other terms relative to ports and port duties.

(*g*) *Mayor, &c., of London v. Goree*, 1 Vent. 298; *vid.* 3 Keb. 491; *Mayor, &c., of London v. Bre, Freem.* 400, 401. All other corporations are prohibited from taking this duty under a penalty of 20*l.* by 19 Hen. 7, c. 8, s. 1, 2; *vid. Carth.* 92; 1 Show. 35. In this case, and it seems all other cases, of tolls and port dues originating in a custom, the payment may be demanded on goods which are quite new articles of commerce, if they fall within the reason of the custom; for every custom extends to things within the reason of it, though they have had their origin within the time of legal memory; *Vanacker's case*, 1 Ld. Raym. 496, 4th edit. 499; *Snelling's case*, 5 Rep. 82 b; S. C. Cro. Eliz. 409; *vid.* 4 Q. B. 552; 3 & 4 Will. 4, c. 66.

(*h*) *Mayor, &c., of London v. Hunt*, Exch. Ch. 3 Lev. 37; *vid.* 1 Stra. 469.

(*i*) As to when the right to wharfage at common law does not exist, *vid. Hull Dock Comp. v. La Marche*, 8 B. & C. 42. For the amounts of wharfage and cranage demandable in the port of London, *vid.* 8 B. & C. 46, 47; 22 Car. 2, c. 2, s. 21; 3 Burr. 1408.

(*k*) *Mayor, &c., of Truro v. Reynalds*, 1 M. & Sc. 273. As to the custom of London, in respect of cranage, *Dyer*, 352, A. pl. 27. As to justifying taking a distress for wharfage, *Crispe v. Belwood*, 3 Lev. 425; *vid. Colton v. Smith, Cowp.* 47.

(*l*) 8 Rep. 47 a.

(*m*) *Vid. Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bla. 206. As to metage, *Mayor, &c., of Rochester v. Lee*, 10 Jur. 40.

(*n*) *Vid.* 1 H. Bla. 214.

that passes a river running by the town.(o) It has been said that a corporation claiming a toll-traverse by prescription or patent ought to make particular mention of the sum which is to be paid in respect of it, because such claim is contrary to common right.(p) Toll-traverse is defined to be toll for going over the proper soil of another;(q) and the use of the soil is a sufficient consideration for the toll, and it is not necessary to state any other in support of it.(r) Therefore the corporation must have the ownership of the soil to support the action of distress for this duty. This duty may arise in respect of a private bridge under circumstances,(s) and in such case is not strictly connected with ownership of soil properly so called, it being the ownership of the bridge that gives the right. In such case the toll is in the nature of pontage,(t) which is a duty for carrying or passing over a bridge. Pannage is a duty for paving the streets; passage for ferrying persons, &c., over a river;(u) and the corporation refusing or neglecting to perform any of these duties will be answerable in damages to those whom such refusal or failure injures.(x) Primage is a duty due by prescription (it is said) to the crown of so much per tun and so much *per last on wet and dry [*165] goods respectively, imported from beyond seas. A corporation having a grant of it may sue in debt.(y) Toll-thorough is a claim in respect of cattle, &c., passing through the ville, or street, or river of the corporation, and is always in a highway; and a corporation in prescribing for it must show something done by them beneficial to the party against whom it is claimed, as that they repair a causeway, bridge, &c.(z) But the repair of some streets in a town is not a sufficient consideration to support a claim to toll-through in parts of the town.(a) A general liability to repair is not a sufficient consideration, as in the case of a port;(b)

(o) The case of Gloucester, Yearb., 21 Hen. 7, 16, pl. 25, recognised *Hill v. Hanks*, 2 Bulst. 203. Distress may be taken for such toll; *Cro. Eliz.* 711; 1 B. & C. 223. As to evidence, *Vines v. Mayor, &c., of Reading*, 1 Y. & J. 4.

(p) *Yid. Yearb.* 9 Hen. 6, 45; *Smith v. Shephard*, *Cro. Eliz.* 711; *Palm.* 85.

(q) *Fitz. N. B.* 227; *Com. Dig. Toll, D.*, the soil not being a common highway. As to justifying under claim of toll-traverse, *Rickards v. Bennett*, 1 B. & C. 223; *vid.* 6 Bing. N. C. 528; 2 Wils. 296.

(r) *Per Best, J.*, 1 B. & C. 234; *vid.* 1 T. R. 667, *acc.* As to evidence of a right to toll-traverse, *Reg. v. Marquis of Salisbury*, 8 A. & E. 716; *vid.* *Moo. & M.* 426; 6 Car. & P. 457; 2 M. & Sc. 843.

(s) *Reg. v. Marquis of Salisbury*, 8 A. & E. 716.

(t) *Vid.* 8 Rep. 47; *Yelv.* 159; 2 Inst. 222; *Palm.* 77; *vid.* indictment against a corporation for non-repair of a bridge, 6 M. & Selw. 365, note. That it is not necessary to lay that they have repaired *ratione tenuræ*, 21 Edw. 4, 38, pl. 3; *Callis, Sewers*, 116.

(u) 8 Rep. 46, 47; *Yelv.* 163; *Brownl.* 215.

(z) *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251.

(y) *Master Pilots, &c., of Newcastle v. Hammond*, 18 L. J. (N. S.) Exch. 417. *Prisage* defined, *Hale, J.*, *Marit. Harg.* 75, 121; *prisage*, *id.* 76.

(a) *Smith v. Shephard*, *Cro. Eliz.* 711; *per Best, J.*, 1 B. & C. 234, 235; *vid.* *Mayor, &c., of Nottingham v. Lambert, Willes*, 111, as to prescribing for such toll; *Tagg v. Simmonds*, 4 D. & L. 582, as to plea justifying under right of corporation to distrain for such toll; *vid.* 6 M. & W. 564.

(b) *Brett v. Beales*, 10 B. & C. 508; *vid.* *per Holt, C. J.*, *Mayor, &c. of Warrington v. Mosley*, *Comb.* 297. Distress for this toll may be taken in the highway, 3 *Com. Dig.* 111; *Smith v. Shephard*, *Cro. Eliz.* 710.

(c) *Mayor, &c., of Yarmouth v. Eaton*, 3 Burr. 1402; *Mayor, &c., of Lynn v. Turner, Cowp.* 86; *Haspurt v. Wills*, 1 Vent. 71; *S. C.* 1 Mod. 47.

but a special consideration must be shown, because toll-through is against common right,^(c) and it seems that they must show they are bound to and do repair the very street, bridge, &c., in respect of passing over which the toll is demanded.^(d) But a corporation may declare in general indubitatis assumpsit for tolls, and prove a right of this nature in support of the count.^(e) This toll can only arise by prescription, custom, ancient grant, or act of parliament, which last is the modern mode of conveying the right to canal, railway and other companies; therefore a corporation who render a river navigable within time of memory, and support locks, &c., on it, cannot claim as a right, without an act of parliament, a certain sum as such toll,^(f) for passing along it.

Fairs and markets are places of public resort for the buying and selling at certain times, of goods and cattle brought there. They are either constituted, appointed, and established by letters-patent from the crown, granting the franchise of holding a fair or market, or they depend upon immemorial usage and prescription, which supposes a grant from the crown;^(g) or (of late years) they are "constructed" by act of parliament, perhaps upon the precedent of 10 & 11 Will. 3, c. 24, constituting Billingsgate market.^(h) This is the legal definition of the words (fair being only a more extensive market),⁽ⁱ⁾ but the latter word is sometimes used, by [*166] the courts and by the legislature, to signify the *assembly of persons present at a market. In the following remarks we shall speak of markets almost exclusively while discussing the subject of tolls, because the greatest part of fairs in England (it is said) are free from toll.^(k) Also it will be understood that such markets only are meant as have their origin in grant or prescription; the incidents of those that have been constructed by statute must depend upon the provisions of the private act in each case, and therefore no useful purpose could be answered by treating of them. But corporations being very frequently, either by grant or prescription, grantees or lords of markets, together with the tolls, to which therefore they have a direct right, or being owners of the soil of spots to which markets are attached, and having therefore a consequential right to certain payments, dues or tolls, in respect of such ownership, it is necessary to explain at some length, and in detail, the means by which they are enabled to enforce the claim in each case.

(c) *Mayor, &c., of Exeter v. Trimlet*, 3 Burr. 1407.

(d) *Hill v. Smith*, 4 Taunt. 520; *Brett v. Beales*, 10 B. & C. 510.

(e) *Mayor, &c., of Carlisle v. Wilson*, 5 East, 2.

(f) *Juxon v. Thornhill*, Cro. Car. 132; 16 Vin. Abr. D. a. pl. 1, pa. 577. As to canal company's tolls, 8 & 9 Vict. c. 42, s. 4.

(g) 2 Inst. 220; 1 Black. Com. 274. As to evidence of such franchises, 6 M. & W. 234; 13 M. & W. 313.

(h) 10 Vict. c. 14, where the word "person" extends to corporations as well aggregate as sole, s. 3. Vid. 5 M. & W. 375. Jus Nundinarum a Senatu aut a principe impetrandum est; Arodii Decret. Lib. ii. 133. That the right of market and of taking tolls was a prerogative of the crown before the Conquest, vid. 2 Kemble's Saxons in Eland, 73. 75.

(i) Vin. Abr. Market, A. 3, pl. 1,

(k) Cro. Eliz. 591. "Mart" is a greater fair held every year; 2 Inst. 221. As to pleading sale in open fair, Cro. Eliz. 485. Every fair is a market, but not e contra; 2 Inst. 406. The stat. 13 Edw. 1, c. 6, forbids fairs and markets being held in churchyards.

Now there are two principal classes or kinds of toll^(l) demandable in relation to markets; viz. that which is properly called market toll, the right to which is derived immediately from a grant or prescription; the other, that which is payable to the owner of the soil on which the market is established, and which is a legal, though not immediate, consequence of such ownership, depending ultimately on contract.

Market toll is defined to be "most properly a payment used in cities, towns, markets and fairs for goods and cattle brought thither to be bought and sold, and is always to be paid by the buyer, and not by the seller, except there be some custom otherwise."^(m) That is, market toll is a duty payable by the buyer of goods and cattle brought into markets and fairs held in cities, towns other places where markets and fairs are established, and sold in the market or fair, such goods and cattle being tollable goods and cattle. Market toll is not incident to a market as of common right,⁽ⁿ⁾ and therefore the grant of a market *does not convey a right to claim market toll; for there may be and are many [*167] free markets; and the grantee or lord of the market has, as such merely, no right to claim market toll; he must have a grant of, or prescriptive right to take, tolls; if he has them by grant, they must be expressly given by clear words in the letters-patent.^(o) It seems, the amount ought to be reasonable;^(p) and a grant of a fair or market with an express grant of tolls, passes reasonable tolls, though no amount be spe-

(l) Tolnetum is a general word for all duties or payments in respect of a fair or market (including stallage) which are payable either by buyer or seller; *Bennington v. Taylor*, 2 Lutw. 1519. The word toll in a grant may include stallage; *Lockwood v. Wood*, 6 Q. B. 31. In some respects, however, toll and stallage are opposed; vid. 9 A. & E. 425; *Palm*. 76. 86; 2 Show. 34; 7 B. & C. 50. A member of a corporation may be a witness in support of a claim by the corporation for tolls, because his interest in the question is indirect and inconsiderable, the tolls being received for the benefit of the whole corporation; *Mayor of London's case*, 1 Ventr. 351; *City of London's case*, 2 Lev. 231; vid. *Dodswell v. Nott*, 2 Vern. 317; 6 & 7 Vict. c. 85, s. 1; 13 M. & W. 645, per Parke, B.

(m) *Termes de la Ley*; *Vin. Abr. Toll*, D. pl. 2; *Fitz. N. B.* 228, E.; 2 Inst. 58; *Com. Dig. Toll*, A; *Yearb.* 7 Hen. 4, 44; 2 Rol. Abr. 522, pl. 5; per Bayley, J., 3 B. & A. 370. Therefore no toll is due till the goods are actually sold, *Leight v. Pym*, 2 Lutw. 1331; 2 Inst. 221; unless there be an immemorial usage to the contrary, *Yearb.* 9 Hen. 6, 45; 2 Inst. 221; *Hill v. Hawker*, Moor. 835; i. e. a usage making the party who brings goods into the market to be sold liable for a certain payment in respect of such goods, whether actually sold or not.

(n) *Heddy v. Wheelhouse*, Cro. Eliz. 558. 591; *Holloway v. Smith*, 2 Stra. 1171; *Com. Dig. Market*, F. 1; *Cruise Dig. Franchise*, 79; *Lowdon v. Hierons*, 2 J. B. Moo. 102. As toll is not incident to a market, the toll may be forfeited, but the market remain; per cur. *Case of Corporation of Maidenhead*, *Palm*. 82.

(o) *Lightfoot v. Lerrett*, J. Bridgm. 89; *Holloway v. Smith*, 2 Stra. 1171; *Holcroft v. Heal*, 1 B. & P. 402; *Earl of Egremont v. Saul*, 6 A. & E. 924. It is a general rule that a burden on the public can only be imposed by the clearest and most unambiguous words, even in a statute; 2 Sc. N. R. 337; 2 B. & Ad. 58, 59. If the crown makes a grant of a market without expressly granting tolls, a fresh grant cannot convey the right to claim them without a proportionate benefit to the subject; 2 Inst. 220.

(p) 2 Inst. 220; *Heddy v. Wellhouse*, Moor. 474. Formerly it was held that the judges were to decide what should be a reasonable toll from consideration of the circumstances; but at the present day it seems to be a question for the jury; *Gard v. Callard*, 6 M. & Selw. 69; 2 Inst. 222; 5 Q. B. 546; vid. tam. per Dallas, J., in *Lowdon v. Hierons*, 2 J. B. Moo. 113; *Wright v. Bruister*, 4 B. & Ad. 116.

cified in the grant;(q) if the corporation claims by prescription, it will be bad, if the toll is either insufficiently ascertained, or unreasonable.(r)

From what has been said, it follows that all actions for market tolls are *stricti juris*; if, therefore, a corporation adopts the method of action for the recovery of market tolls withheld, the claim must be laid (and proved) strictly,(s) especially as the record will be evidence of the right in future.(t) But a corporation may lay their title to have an immemorial market, without its being necessary to prove that they were a corporation by prescription,(u) the question in the case being whether a certain custom existed from time immemorial to prevent persons selling out of the market, &c. As has been stated, market toll can only be taken in respect of articles of a tollable nature *actually* brought into the market and there sold;(x) and this principle is so strictly adhered to, that it is held the crown cannot grant a toll for goods not brought into the market.(y) It has been observed, that not only debt lies for tolls withheld, but an action on the case for selling tollable goods in a market without paying toll.(z)

It is obviously therefore important to fix the precise meaning of the words *the market*, with reference to locality, and this can only be fully done by an examination of the letters-patent on each case as explained by the usage; but it is clear that there is no impossibility in law in the [*168] *whole of the town or city, to the corporation of which the grant is made, being considered, with the exception of the churchyards. as *the market* intended by the grant,(a) though usage has in most cases confined *the market* to some particular spot in the town.(b) If, however, there is nothing in the letters-patent to prevent it, as where the grantee is authorized to hold the market *infra villam* generally, it is settled that on giving due notice, the spot on which the market is holden may be altered and removed to another place within the town, as may be most convenient for the inhabitants of the town, and the persons repairing

(q) *Corporation of Stamford v. Paulett*, 1 Cro. & J. 57, 400; *vid. Brune v. Thompson*, 4 Q. B. 543.

(r) A toll claimed, by prescription, of a penny for every pig brought into the market is not necessarily unreasonable; *Wright v. Bruister*, 4 B. & Ad. 116. How to make cognizance under a prescription to distrain for such duty, *Savery v. Smith*, 2 Lutw. 1144.

(s) *Moseley v. Pierson*, 4 T. R. 107, 108; *vid. Seward v. Baker*, 1 T. R. 616; *vid. 6 B. & C. 385*; *Mayor, &c., of Reading v. Clarke*, 4 B. & A. 268.

(t) 4 T. R. 108; 4 Taunt. 529; 6 M. & W. 234; 2 B. & Ald. 360; 1 Q. B. 790; *City of London v. Clerke, Carth.* 181.

(u) *Mayor, &c., of Macclesfield v. Pedley*, 4 B. & Ad. 403. Proof by a corporation of right to market tolls; *Lancum v. Lovell*, 6 Car. & P. 437.

(z) *Per Powell, J., in Kerby v. Whichelow*, 2 Lutw. 1498; *Hill v. Smith*, 4 Taunt. 520; *Wells v. Miles*, 4 B. & A. 564. As to parliamentary markets in this respect, *vid. 10 Vict. c. 14, s. 13*.

(y) *Per Powell, J.*, 2 Lutw. 1502; *Com. Dig. Market, F. 1, Toll, E.*; 4 B. & A. 566.

(z) *Sprosley v. Evans*, 1 Rol. Abr. 103, et *vid. 1 Vin. Abr.* 598, pl. 2; *Steinson v. Heath*, 3 Lev. 400; 1 Com. Dig. 224, A. 3.

(a) 2 Inst. 220; *Curwen v. Salkeld*, 3 East, 538; *vid. 4 B. & A. 565*.

(b) *Per Anderson, J., Anon. Godb.* 131. As to parliamentary markets, *vid. 10 Vict. c. 14, s. 13*; *Bridgland v. Shapter*, 5 M. & W. 375. By the statute of Winton, 13 Edw. 1, c. 6, fairs and markets are prohibited to be held in churchyards.

thither for the purpose of buying and selling on the market days,(c) and a corporation, by their acceptance of the grant, have an obligation cast upon them to provide convenient accommodation for all who are ready to buy and sell in the market.(d) If the corporation neglect to do so, or if after having once appropriated a particular site for the use of the public as a market-place, they afterwards employ, or permit it wholly or in part to be employed, for other purposes, without providing as convenient a place for the public to buy and sell in elsewhere within the limits of the grant, the consequence would be, there would be a good defence to an action brought by the corporation against any person for selling out of their market to the prejudice of their right, provided such person had been prevented from selling in the market by the want of convenient room,(e) or this breach of public duty on the part of the corporation might operate as a forfeiture of the franchise of holding the market, and furnish a ground for a *scire facias* to repeal the letters-patent;(f) or perhaps the corporation might be indictable for a misdemeanor; and if so, an action would lie against them at the suit of any one who should have received any special injury by their default in the matter.(g) For it is a general proposition *that where the law casts a duty on any [*169] one which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures;(h) and when the king creates a market and grants such things as may be chargeable on the subject, the law presumes that the king creates it for the general good, and that the subject has *quid pro quo*,(i) every grant to the grievance

(c) *Curwen v. Salkeld*, 3 East, 538; answer to the judges, *In re The Islington Market Bill*, Dom. Proc. 12 M. & W. 23; *De Rutzen v. Lloyd*, 5 A. & E. 456. The public must be as well provided for as before; *Rex v. Starkey*, 7 A. & E. 95. As to evidence of assent of inhabitants to the removal, *In re Chertsey Market*, 6 Price, 301. The grant or prescription specifies the days of the week on which the fair or market is to be holden. In general, a market or fair may be held on any day but Sunday; 2 Inst 220; 29 Car. 2, c. 7, s. 1; *Chit. Contr.* 424, 3rd edit. Within the city of London every day except Sunday is market day; 5 Rep. 83 b; 8 Rep. 127; *vid.* 27 Hen. 6, c. 5; *Hob.* 87.

(d) 12 M. & W. 23; *vid.* *Laybourn v. Crisp*, 4 M. & W. 320. They cannot hold the markets beyond the limits of the borough, even though the charter or prescription assigns no limits within which it is to be held; *R. v. Cotterill*, 1 B. & A. 74.

(e) *Prince v. Lewis*, 5 B. & C. 363; *Mosley v. Walker*, 7 B. & C. 40; *vid.* 12 M. & W. 23; S. C. 3 Cla. & F. 513; *Yearb.* 22 Hen. 6, 14; *Huzzey v. Field*, 2 C. M. & R. 436. *Prima facie* a grant of a market to a corporation enables them to hold the market anywhere within the borough; *vid.* 5 A. & E. 462; 7 A. & E. 95.

(f) *Peter v. Kendall*, 6 B. & C. 703.

(g) 12 M. & W. 23. He must not be *only* injured as one of the public, 7 Q. B. 377; but if he have been put to needless inconvenience, as to have been obliged to carry his goods to another market, &c., it will be sufficient to state that to support the action; *Mayor, &c., of Lynn v. Turner*, Cowp. 86; *Wilkes v. Hungerford Market Co.*, 2 Scott, 446; *Rose v. Miles*, 4 M. & Selw. 101; *Rose v. Groves*, 1 D. & L. 63; *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223; *Hart v. Basset*, T. Jones, 156.

(h) *Ferguson v. Earl of Kinnoul*, 9 Cla. & F. 251; *vid.* *Mayor, &c., of Lynn v. Turner*, Cowp. 86; *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223. In case of a demise of the market by the corporation (which may be without deed if from year to year only, 6 Vin. Abr. 292, pl. 41) and the lessee misconducting the market, he, and not the corporation must be sued.

(i) *The Maidenhead case*, Palm. 77; *vid.* 11 Rep. 86 b; *Yearbs.* 13 Hen. 4, 14 20 Edw. 3, 15 b; 9 Hen. 6, 45; 3 Inst. 236; 2 T. R. 565. To all franchises there is annexed by law a condition that they be not misused; *Com. Dig.* Condition, R.;

and prejudice of the subject being void; and therefore it is laid down that a grant specifying an unreasonable amount of toll is void,^(k) and the market or fair in such case becomes free;^(l) but if the grantee of a reasonable toll takes and usurps an excessive or outrageous one, or takes toll where none is due, the franchise or liberty of having and holding the market is forfeitable to the king on quo warranto,^(m) upon the ground of the abuse and usurpation, and the party injured may have satisfaction in damages by an action.⁽ⁿ⁾ It has been solemnly adjudged and declared that the subject has the same right to question the payment of unreasonable toll, whether the amount demanded is specified in the grant or not.⁽ⁿ⁾ The same principle apparently applies to a toll claimed by custom; if the amount be unreasonable, the custom would probably be declared void by the courts.^(o) With respect to the question of what goods are tollable, or what articles of commerce or traffic are liable to the payment of market toll, but very little is to be found in the books, probably because the decision of the question is only to be collected from the usage of each market. Of common right (it has been said), market toll is payable solely for live cattle, and not for victual or other ware; for in respect of these the lord is satisfied in stallage and piecage, which are incident to the soil;^(p) but either by grant or custom toll is taken at the present day on various other articles besides live cattle, especially on corn; and indeed the only restriction which seems to have [*170] *been pointed out in any decided case, is the vague one that toll is not payable "for hens, geese, and many other things of *that nature*."^(q) A corporation may demise their market tolls by lease under their common seal,^(r) or they may hold a fair or market by a grant from the crown, reserving rent; for though no distress can be taken on incorporeal hereditaments, as tolls are, yet the crown by prerogative may distrain on any lands of the corporation.^(s) A doubt may also be entertained,

2 Inst. 223. The franchise of having a market not forfeitable for non-user, 13 Vin. Abr. 512, pl. 9; Finch, Law, 165.

(k) 2 Inst. 220. When the thing demanded for wares and merchandizes does so burden the commodity as the merchant cannot have a convenient gain by trading therewith, and thereby the trade itself is lost or hindered, that is an evil toll; 2 Inst. 58.

(l) Stat. Westm. First, cap. 31; 2 Inst. 220; Finch, Law, 164; Palm. 76; 3 Mod. 108; admitted, *R. v. Mayor, &c., of London* 2 Show. 265. 276. Other authorities say the right of toll only is forfeited; vid. infra.

(m) Fitz. N. B. 94, F.; 4 Rep. 94 b.

(n) *Corporation of Stamford v. Paulett*, 1 C. & J. 81. But a defendant being a foreigner, i. e. a stranger to the corporation, will not be empowered to inspect the corporation books for this or any other purpose; *Mayor, &c., of Southampton v. Graves*, 8 T. R. 590.

(o) The doctrine of Sir E. Coke, 2 Inst. 664, that a custom which once was reasonable becoming grievous by lapse of time, &c., can only be set aside by parliament, does not seem now to be regarded as law; for the courts declare customs to be void without entering on the question whether they once were reasonable; vid. 10 Q. B. 42. However, a custom is not void merely because no reason can be given for it, as may be inferred from decisions, with respect to the practice of the courts; vid. 2 M. & Selw. 25; 14 M. & W. 152; 8 Sc. N. R. 599.

(p) *Heddy v. Welhouse*, Moor. 474.

(q) *Escot v. Laureny, Owen*, 109.

(r) *R. v. Chipping Norton*, 5 East, 239; vid. sup. p. 169, note (h).

(s) *Saffron Walden case*, Moor. 163; *Att.-Gen. v. Mayor, &c., of Coventry*, 2 Vern. 714; S. C. 1 P. Wms. 307; *Vin. Abr. Reservation*, B. pl. 2, G. pl. 7. But

whether without very distinct words in the grant authorizing it, or words sufficiently large to comprehend it, a demand of market toll for things not in use or not known at the time of the grant would be maintainable.(c) This is in principle the same question as whether ancient port duties can be levied on new articles of export, which has been raised and discussed, but not decided, though declared to be a proper question to be considered.(u) In case of corporations constituted by statute, or of corporations not constituted originally by parliament, but empowered by statute to take market, or any other toll or tax, it is apprehended there could be no doubt but that unless the legislature had used words showing in the most unambiguous manner that it was intended to convey the right of taxing *all* goods imported or exported, or brought to market (as the case may be), whether known or used at the time of the passing of the act or not, the corporation could not exact anything in respect of such goods; for it is an universally recognized principle in the interpretation of acts of parliament, which purport to impose a tax upon the subject, that the intention of the legislature to do so must clearly appear from the words used, and that if there be any ambiguity in the language, the construction must be favourable to the subject.(x) And there appears to be no ground to infer that the same principles of construction are not to be applied to a grant of this kind; indeed, they appear to apply a fortiori to a grant from the crown than to a statutory power of taxing.

The mode of directly recovering tolls by way of action has been treated of; but besides that, there is incident(y) to every toll in a fair market, another mode of directly recovering arrears of toll due, viz., by a distress(z) levied on the goods or even implements of trade of the *seller;(a) and if the officers of the corporation are disturbed in distraining for the toll, an action of trespass will lie at the suit of [*171] the corporation.(b) In fact the remedy by distress was at one time considered so peculiarly adapted to the recovery of arrears of tolls due, that it was contended *indebitatus assumpsit* would not lie, but the objection was overruled.(c) The right, however, does not extend to goods damage

such rent cannot be reserved to a common person so as to enable him to distrain; though an action of debt will lie on the lease; Co. Litt. 47 a; Co. Litt. 142 a.

(t) Vid. argu. Maidenhead case, Palm. 85.

(u) Mayor, &c., of Liverpool v. Bolton, vid. 4 Q. B. 546. 552; vid. etiam, Mayor, &c., of Carlisle v. Wilson, 5 East, 2.

(x) Waterhouse v. Keen, 4 B. & C. 208; Dean d. Manifold v. Diamond, 4 B. & C. 243. 245; Hull Dock Co. v. La Marche, 8 B. & C. 48; North and South Shields Ferry Co. v. Barker, 2 Exch. 147; vid. 2 Sc. N. R. 337; 2 B. & Ad. 58, 59.

(y) 2 Lutw. 1379; Cro. Eliz. 558; Noy R. 37; Yearb. 30, Edw. 3, 20. As to justifying in virtue of such right to distrain, vid. Savery v. Smith, 2 Lutw. 1144; Harris v. Hawkins, 1 Keb. 342; Specot v. Carpenter, 2 Jones, 207; Osburton v. James, 2 Lutw. 1379; Agar v. Lisle, Hob. 187. (z) Bradby, Distr. 13.

(a) Vinkistone v. Ebdon, 1 Lord Raym. 387; S. C. 5 Mod. 359; Carth. 357; vid. 6 M. & W. 564. If a corporation justify detaining goods till toll and charges should be paid, it is not enough that they allege a right to distrain for toll only, because every justification must extend to the whole of the thing complained of; Pitts v. Gamince, 1 Lord Raym. 558; vid. 8 A. & E. 161.

(b) 20 Vin. Abr. 298, pl. 4; Fitz. N. B. 91, G. H.; Prior of St. Bartholomew's v. Barton, 9 Hen. 6, 45. It seems not necessary to allege that the toll was due for a tollable article, provided the thing for which it was due is mentioned; Owen, 109.

(c) Cock v. Vivian, 2 Barnard. B. R. 243. As to the proper mode of replying

feasant in the market, being there to be sold; for such goods cannot be distrained damage feasant, either before(*d*) or after they are sold,(*e*) because they were not brought there to be sold *pro bono publico*.

Another remedy which a corporation, having a market, may prosecute in respect of the tolls, is an action on the case for the undue subtraction of tolls, whereby the corporation was defrauded of the tolls which otherwise they might and ought to have had and received. Thus, if A. has a market and toll, and B. is coming with goods to the market, for which, if sold, toll would be due, and C. hinders B. coming to the market, A. may have an action against C. because of the possibility of damage.(*f*) A person who brings his goods close to the market, and then goes into the market and gets customers for them there, commits a fraud on the market, and is liable in an action on the case. A seller by sample will not be allowed to violate this rule; for, selling in the market, he is benefitted by the market* as well as the seller of goods actually brought there and sold in bulk; it seems, therefore, that his goods are considered as constructively brought into the market, and, therefore, to be liable to stallage; and, therefore, if he refuses to pay the same rate of stallage that is payable by the seller in bulk in the market to the owner of the market and soil, he will be liable to an action on the case, for the injury done to the market, at the suit of such owner.(*g*) Such action for the fraud on his market is the only proper [*172] remedy for the owner of the market in such case; an ordinary *action for tolls would be bad;(h) so would a distress for the toll evaded;(i) so would an action on the case against the buyer for fraudulently buying corn out of the market, whereby the plaintiff was deprived of the toll.(*k*) In fact this species of toll or stallage is not

to a justification alleging a prescriptive right in a corporation to levy a duty called a tensary towards the repairing the prison, and to distrain for it, *Griffith v. Williams*, 1 Wils. 338; *vid. Morewood v. Wood*, 4 T. R. 157; per *Patteson, J.*, *Giles v. Grove*, 17 L. J. (N. S.) Q. 325.

(*d*) *Mayor of Launceston's case*, Cro. Eliz. 75; *Trassell v. Morris*, Noy, 19.

(*e*) *Sawyer v. Wilkinson*, Cro. Eliz. 627.

(*f*) *Turner v. Sterling*, 2 Vent. 26; per *Powell, J.*, in *Ashby v. White*, 6 Mod. 49; *Bridgland v. Shapter*, 5 M. & W. 375. According to the old practice of the Court of Chancery, perhaps, cases might be conceived, e. g. if the market was held by the corporation in fee-farm, *Currier v. Cryer*, Hardr. 21, 2 Com. Dig. 135. in which an injunction would have been granted to prevent any ascertained class of persons from repairing to any other market than that of the district to which they belonged; *vid. Mayor, &c., of Scarborough v. Skelton*, Hardr. 184; *Green v. Robinson*, Hardr. 174, 177; *vid. etiam* 3 Mod. 127.

(*g*) *Bailiffs, &c., of Tewkesbury v. Bricknell*, 2 Taunt. 120. In declaring, it is not necessary to allege that the toll was reasonable, or that it was of such an amount; *Chapman v. Flexman*, 2 Vent. 292; *Fitz. N. B.* 91, G.; *Yearb.* 9 Hen. 6, 45; 6 M. & Selw. 69.

(*h*) 4 T. R. 107. A prescription to take toll on goods sold by sample is bad; *Hill v. Smith*, 4 Taunt. 520; *vid.* 4 B. & Ald. 559.

(*i*) *Blakey v. Dimsdale*, Cowp. 661. If their servant or officer is disturbed in taking toll, they may have case or trespass; *Dent v. Oliver*, Cro. Jac. 122. On the other hand, their officer is indictable for neglect of duty, if he takes tolls or payments from the market people, and refuses to perform the services on the ground of which the payments are made; per *Coke, C. J.*, *Hill v. Hanks*, 2 Bulstr. 203.

(*k*) *Bailiffs of Tewkesbury v. Diston*, 6 East, 438; *vid.* 7 B. & C. 50. So in

leviable from the buyer at all, for it is a payment in the nature of compensation^(l) to the owner of the soil for the use of his land &c., and as such is always payable by the seller; and this brings us to this second division of tolls, viz. such as are due as a consequence of the ownership of the soil, and which we have stated to be indirectly a consequence of the ownership, because it is not the necessary and immediate consequence, but it depends upon agreement or custom what amount of tolls of this kind the owner shall take.

Whether the ownership of the soil must be in the lord of the market in all cases has been a disputed point; it has been urged^(m) that the lord is to have the correction of the market, which he cannot have when he has not the soil; and that if he is not owner of the soil, all persons repairing to the market would be liable as trespassers,⁽ⁿ⁾ and that, therefore, the lord cannot part with the soil on which the market is established; but in none of the old cases does this principle appear to have been understood as part of the law of market; on the contrary, the severance of the right of market, and the ownership of the soil, by operation of law, is contemplated in some of them without any expressions tending to the conclusion that there was anything in such severance, when produced by operation of law, beyond the legal competence of the owner of the soil also to effect at his pleasure. Thus it is observed, that stallage and piccage (which, it will be seen hereafter, are the payments of this nature of the most importance) are incident to the soil; so that if the king grant a fair or market, with toll certain, to one and his heirs, to be held on land which is borough-English, and the grantee dies, the heir at common law shall have the fair or market and *the toll^(o) (*i. e.* the market toll,) but the youngest son shall have stallage and piccage with the soil by the custom.^(p) It [*173] seems remarkable and strange that there should be no notice taken of the deviation from the general principle in such cases, if in reality a

London an action on case lay for not weighing goods sold at the common beam kept by the corporation; *Jefferies v. Watkins*, 3 Mod. 161.

(*l*) 5 A. & E. 458, note. The right to claim it does not restrain the lord of the market from removing it to another place; *id.*

(*m*) *Vid.* per Littledale, J., 7 A. & E. 95. 101. 106, who cites per Bayley, J., 7 B. & C. 55; *vid. tam.* per Bayley, J., 3 B. & A. 370, *semb. cont.* In *Lockwood v. Wood*, 6 Q. B. 46, 47, the court uses language implying that they may be different persons, and that in the plainest manner. So in *Mayor, &c., of Norwich v. Swann*, 2 W. Bla. 1116, it was laid down that right of market and right of soil are things totally distinct; *vid.* *Thompson v. Gibson*, 7 M. & W. 456; *Heddy v. Wellhouse*, Moor. 474. In *Yearb.* 11 Hen. 6, fol. 23, pl. 20, it was held that a corporation may prescribe to hold a fair in the frank tenement of another. *Vid.* per Lord Cottenham, C., in *Attorney-General v. Jones*, 19 Law J. (N. S.) Chanc. 270, in accordance with the opinion expressed in the text.

(*n*) Elsewhere it seems to be laid down clearly that all persons have a legal right to come upon the close where the market is established to buy and sell on market days; *vid.* 1 Wils. 115; *Palm.* 82; 1 *Ld. Raym.* 149; *Wigley v. Peachy*, 1 *Ld. Raym.* 1589; *Tyson v. Smith*, 6 A. & E. 752; *Mayor of Launceston's case*, Cro. Eliz. 75; *vid. id.* 627, 628; *Noy*, R. 19.

(*o*) N. B. The word toll in a grant may include stallage; *Lockwood v. Wood*, 6 Q. B. 31.

(*p*) *Heddy v. Wellhouse*, Moor. 474; *Mayor, &c., of Northampton v. Ward*, 1 Wils. 109.

general principle subsisted, by which the ownership of the soil was declared to be inseparable from the lordship of the market. In a late case it was held that a grant of a market, with all tolls and profits, &c., to H. and his heirs, &c., where neither the crown nor H. had a right to the soil on which it was to be held, was good, and would enable H. to claim stallage, when he became possessed as owner of the spot on which the market was established.^(g) On the other hand, in the stat. Westm. 1st, c. 31, and in Lord Coke's comment upon it,^(r) the necessary identity of the lord of the market and the owner of the vill seems to be supposed. On the whole, however, the law now seems to be understood, that the lordship of the market and the ownership of the soil are not inseparable, but that a grantee of a market may hold the market on land belonging to any other person, by the mere sufferance and permission of such other person, but that unless the grantee had actual possession of the soil he could not claim stallage.^(s) The mere sufferance and permission of such other person will be all that is necessary, for this reason (as it seems,) that wherever a market is established by law, there all persons have, of common right, a title to enter to buy and sell^(t) on the market days during the time of market, otherwise they might be treated as trespassers, notwithstanding such mere sufferance and permission; because a license to enter and remain upon land for a certain time cannot be given without deed,^(u) and it is manifestly impracticable to adopt such a course in case of a market; and as a license cannot be transferred, it would be equally unavailable to give leave to enter by deed under seal, to the grantee of the market and those claiming under him.

Amongst the various and conflicting definitions of the word stallage, it is not very easy to discriminate with accuracy, but the following explanation may perhaps be found to reconcile many of the cases, and to be agreeable to the later decisions on the subject of markets. As has been observed before, in effect, every buyer has at common law a full right to repair to any market, and make use of it in buying, without payment of any toll or tax whatever; it is only an express grant, or a well-ascertained and reasonable prescription, that can make him liable [*174] to the lord of the market for any payments on his purchases. But in the case of the seller the circumstances are very different; he mostly requires room and accommodation, as stalls, tables, rails, &c., to enable him to pitch and display his goods, which may often be also of such a nature as to require protection from the weather, and if live cattle, may render necessary some means of restraining from escape, as pens, &c. A payment by the seller to the owner of the soil, or the

(g) Lockwood v. Wood, 6 Q. B. 31.

(r) 2 Inst. 222.

(s) Lockwood v. Wood, 6 Q. B. 46, 47; Yearb. 11 Hen. 6, fol. 23, pl. 20, per Paston, J., that mayor and commonalty may prescribe to have a fair in another's freehold.

(t) Wigley v. Peach, Ld. Raym. 1589; Mayor, &c., of Northampton v. Ward, 1 Wils. 115, and cases there cited; vid. sup. p. 172, note (n). So, as it seems, in case of a ferry, the passengers have a right to use the land on the banks for embarking and disembarking; 6 B. & C. 702.

(u) Wood v. Leadbitter, 13 M. & W. 838.

actual possessor of it, who furnishes such accommodations, demanded and made in consideration of such accommodation, whether the goods are sold or not, is one description of stallage.(x) The other description is a payment made by the seller for the right of placing his own stalls, tables, stools, &c., on the market place on market days, during the time of market, in like manner due, whether the goods are sold or not.(y)

In both these cases of stallage the payment is, in general, matter of agreement between the seller and the owner of the soil,(z) and uncertain, inasmuch that it may vary at different times and on different occasions for the same accommodation; *ex. gra.* it may be greater on occasion of a fair than of a market (both being held on the same ground,) and it may even be different for different situations in the same market place,(a) unless a custom or grant, or prescription, binds the owner to the exaction of specific sums only,(b) in which case no more shall be paid. In fact, the payment is in the nature of rent,(c) and due to the owner of the soil of common right(d) although he may be restrained by particular circumstances, from demanding it in particular cases, as where an exemption from such payments is legally claimed by a corporation, for their corporators, in respect of their own stalls, &c., upon the ground of grant or prescription;(e) and there is no authority, apparently, for considering that such exemption can extend further than to enable such person repairing to a market for the purpose of selling, to place in the market their own stalls, &c., without payment; it would not, it seems, in ordinary cases, be good to enable them to use the stalls, &c., of the owner of the soil without payment. *Al- though as has been said, stallage usually arises in respect of a [*175] contract, and although it has been held that neither debt nor indebitatus assumpsit would lie for stallage,(f) yet that statement has been declared to be extra judicial, and it is now settled that either form of action will lie for arrears of stallage, and that there is no reason to

(x) Blount's Law Dict.; Minshew; Spelm. Gloss.: Boyer in voc. Estallage; Du Fresno; Kennett, Paroch. Antiq. Gloss.; Termes de la Ley; Cowell, Interp.

(y) Trespass will lie at the suit of a corporation who have the freehold or actual possession of the soil of the market place, against a person who places stalls, tables, &c., there without their leave; Mayor, &c., of Norwich v. Swann, 2 W. Bla. 1116; vid. form of declaration, 9 Wentw. Prec. 113; Mayor, &c., of Northampton v. Ward, 1 Wils. 107; S. C. 2 Stra. 1238.

(z) Mayor, &c., of Northampton v. Ward, 1 Wils. 114. The right to take stallage is frequently conveyed by grant along with the right to take market tolls; Palm. 76; 6 Q. B. 31. This seems to be *ex majori cautela*; 2 Show. 34; 1 B. & Pul. 402. And a prescription (which always supposes a grant) to take certain toll by way of stallage is good; Tyson v. Smith, 9 A. & E. 425. A custom to take it in a particular way resolves itself into agreement; 9 A. & E. 425.

(a) Vid. Lockwood v. Wood, 6 Q. B. 50, 51; R. v. Cotterill, 1 B. & A. 69; Duke of Bedford v. Emmett, 3 B. & A. 371. 373.

(b) Mayor, &c., of Northampton v. Ward, 1 Wils. 114; Spelm. Gloss. Stallangiator; Prescription for stallage, 2 Lutw. 1517; vid. 6 Q. B. 31; Quo. Warr. case. p. 16.

(c) Per Lord Denman, C. J., 6 Q. B. 54.

(d) 1 Wils. 115, i. e. some payment or other is due of common right, not any particular sum.

(e) 6 Q. B. 54. 62. 62; Tyson v. Smith, 9 A. & E. 406. Inhabitants cannot claim such exemption, at least under a modern grant, from a subject; Lockwood v. Wood, 6 Q. B. 62; vid. Hill v. Priour, 2 Show. 34.

(f) Mayor, &c., of Northampton v. Ward, 1 Wils. 115.

state in the declaration any particular contract.(g) For the first description of stallage, therefore, debt or indebitatus assumpsit may be brought by a corporation, being owners or in actual possession of the soil on which a market is held, and furnishing accommodation of stalls, &c.; for the second description, actions in these forms will also lie; for the corporation have besides, the remedy of trespass to prevent stalls, &c., being placed upon their market place without their leave. The corporation however are not, therefore, entitled arbitrarily to exclude any one from the market; and, probably, a plea showing that there was convenient room in the market place for his necessary stalls, &c., but that the corporation maliciously refused to admit him, notwithstanding a tender of the proper amount of stallage on his part,(h) would be a good bar to the action, for of common right every one is entitled to repair to a market to buy or to sell. A custom that certain persons as the inhabitants of a particular district, or corporations, at the time of market, might set up stalls, booths, &c., *paying so much to the owner of the soil*, might also be taken advantage of by plea, and would be a good answer to the action in such case.(i) It has been decided to be extortion in the owner of the soil of a market to set up stalls, so as to leave no room for the market people *to stand and sell*, and thus oblige every one attending the market for the purpose of selling to use the stalls, and pay stallage for the use of them.(l)

In general, also, there is the same mode of preventing frauds on the lord of the soil in respect of stallage as of market toll strictly so called. Thus, if a person bring cattle to a place a few yards from a market, and then go into the market to seek for customers and bring them to the place where he left his cattle, and sell the cattle there to such customers, an action on the case lies against him for the fraud on the market;(l) for the owner, by such conduct, is deprived of the stallage which he would have been entitled to demand for the use of his pens, &c. It is [*176] *material to observe, with reference to this remedy, than an immemorial custom excluding all persons from selling out of the market place (though within the limits of the borough) tollable articles on the market day, is a valid custom,(m) and the exclusion may be

(g) *Mayor, &c., of Newport v. Saunders*, 3 B. & Ad. 413. As to prescribing when the claim rests on prescription, *Berrington v. Taylor*, 2 Lutw. 1517; *vid.* 9 A. & E. 424.

(h) *Vid.* *Bigbey v. Pechy*, 2 Barnard. K. B. 161.

(i) *Tyson v. Smith*, 6 A. & E. 745, affirmed, Exch. Ch. 9 A. & E. 406. As to form of plea, *vid.* 6 A. & E. 745, 746. As to evidence of such customs, *Laybourne v. Crisp*, 4 M. & W. 320.

(k) *Rex v. Burdett*, 1 Ld. Raym. 148. It is also extortion in the clerk of the market to exact more than the sums usually payable from persons frequenting the market for his trouble in examining the weights and measures, &c., and an information will lie against him; *Rex v. Robe*, Stra. 999; *Anon.*, 2 Barnard. B. R. 310. So information will lie against officer of corporation for assaulting a farmer, throwing down his corn, and hindering him from selling in the market, because he would not pay toll; *Anon.*, 2 Barnard. 138.

(l) *Bridgland v. Shapter*, 5 M. & W. 375; *vid.* precedents of declaration for selling out of the market place, 7 B. & C. 40; 12 M. & W. 18. As to pleading such sale, 11 Hen. 6, fol. 19, pl. 13; fol. 25, pl. 2.

(m) *Mayor, &c., of Macclesfield v. Pedley*, 4 B. & Ad. 397; *vid.* *Moseley v. Chadwick*, 7 B. & C. 47; *Mayor, &c., of Devizes v. Clark*, 3 A. & E. 506.

enforced; but the grant of a market does not of itself imply such exclusion,^(u) and it seems that it may be taken for law that a grant from the crown could not, at the present day, convey the right to enforce so great a restriction on trade, and certainly the crown could not now convey the right, so as to interfere with previously vested rights, though an ancient grant to this effect is valid.^(o) In cases where there is no such exclusion in existence, it may be a material question to consider whether a sale of marketable goods made in a shop without the limits of the market place, on the market day and during the time of market, is such a sale in market overt^(p) as passes the property. There is still another (alternative and collateral) remedy for stallage in certain cases; for though it has been said that distress would not lie for stallage, because it is an uncertain payment,^(q) yet, at any rate, that reason does not apply to a prescriptive claim to stallage, for that must always be a fixed and well-known sum, and, in case of a prescriptive claim, it has been treated as clear that the lord of the market and soil may distrain;^(r) probably the prescription or custom to pay a fixed stallage, in most cases, includes the prescription or custom to distrain.^(s)

Picage is a payment, or right to demand payment, whenever, in order to fix his stalls, booths, pens, rails, posts, &c., for the convenience of arranging, displaying or restraining his goods, cattle, or articles of sale, the seller is under the necessity of breaking the soil of the close on which the market or fair is established.^(t) This right is frequently conveyed to the owner of the soil in the same letters-patent^(u) as grant the market and the right of claiming market toll, but in this case, as in that of stallage, the word seems to be inserted only *ex majori cautela*, as is very commonly done in the old grants of markets, for it seems clear that the claim for *some* compensation to the owner or actual possessor of the soil of the market place is due of common right, the amount of the payment being in most cases left to be fixed by agreement between the parties, though it is frequently ascertained by immemorial custom. *In [*177] such cases it is to be observed, that the custom, in fact, comes back to an agreement which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our times, that it has become the law of the particular place.^(x) It may be, therefore, stated generally that

(n) *Mayor, &c., of Macclesfield v. Chapman*, 12 M. & W. 18; *vid.* 10 Vict. c. 14, s. 13.

(o) 7 B. & C. 40; 12 M. & W. 19. Every grant of a market is made subject to the implied condition that it shall not injure the neighbouring tradespeople; *Reg. v. Butler*, 3 Lev. 222; *Reg. v. Aeris*, 10 Mod. 259; 2 Inst. 406. *Plowd. Com.* 84 A., 236 A.

(p) As to whether a grant of a new market by the crown at the present day could operate to make such shops markets overt, *quære*; *Clifton v. Cancellor*, *Moor.* 624; *Com. Dig. Market, E.*; 8 Rep. 127.

(q) *Mayor, &c., of Northampton v. Ward*, 1 Wils. 115.

(r) *Per cur. Tyson v. Smith*, 9 A. & E. 425.

(s) *Vid. Harris v. Hawins*, 1 Keb. 342; *vid.* 6 M. & W. 564; 6 & 7 Vict. c. 30.

(t) *Termes de la Ley*; 2 Stra. 1238. It is necessarily, like stallage, an uncertain payment; *Qu. Warr. case, Treby's argum.* p. 21; *Palm.* 77.

(u) *Vid.* 3 B. & A. 367.

(x) *Tyson v. Smith*, 9 A. & E. 425, 426. Therefore a claim by custom of so much

piecage, like stallage, as to its amount, is regulated by agreement between the lord of the soil, or actual possessor of the soil, and the sellers who have occasion to break the soil for the above mentioned purpose.

Claims of this nature, standing on the same footing as stallage, may be sued for by a corporation entitled to the soil in precisely the same manner, or may be distrained for, as well upon the goods in respect of which the breaking the soil is necessary, as on other goods of the offender.^(y) Connected with the claims for stallage, and piecage by the owner of the soil on which a market is established, there is another for sweeping and cleansing the market place, &c., but this is not due as of common right, but requires a special custom to support it.^(z) Pennage is a payment for the use of the pens furnished by the owner of the soil, which differs little in its nature from stallage.^(a) Toll-turn is a duty payable for cattle or goods in their return from a fair or market.^(b) Another toll or duty connected with markets is murage, levied for the making or repairing of the walls of the town and other public works,^(c) upon goods sold in market overt;^(d) or, as seems to be the better opinion, upon every cart, wain, and horse laden that comes into the town.^(e) It must be reasonable, and is due either by grant or prescription,^(f) and is due in a highway but not in a private way.^(g)

It must be observed, that a corporation suing several parties for tolls due from them respectively, must bring a separate action against each party, and cannot join them in one action.^(h) Further, when once the right to tolls has been established to be in a corporation by the result of an action at law, the Courts of Chancery will decree an account of the arrears.⁽ⁱ⁾ A corporation may lease their market and tolls, and sue [*178] in covenant for the rent reserved in the indenture of demise,^(k) and it has been ruled at nisi prius that assumpsit for use and

piecage for each stall, &c., fixed in the soil would seem to be good; vid. Com. Dig. Market, F. 2. The doctrine of 2 Inst. 664, that a custom which once was reasonable becoming grievous by lapse of time, and not answerable to the reason on which it was grounded, can only be abrogated by parliament, vid. *Hix v. Gardiner*, 2 Bulst. 195, 196, seems now to be disregarded, for the courts take upon them to declare customs to be void; vid. *Rogers v. Brenton*, 10 Q. B. 42; *Hilton v. Earl Granville*, 5 Q. B. 701.

^(y) *Vinkinstone v. Ebdon*, 1 Salk. 248; vid. 6 M. & W. 564. What amounts to ratification of distress made by bailiff of corporation, *Lewis v. Read*, 13 M. & W. 834.

^(z) *Hill v. Hawker*, Moor. 835; S. C. nom. *Hill v. Hanks*, 2 Bulst. 201; 1 Roll. R. 44; vid. Quo. Warr. Cas. p. 6; 9 Hen. 6, 45; 21 Hen. 7, 16.

^(a) *Vid. Rex v. Marsden*, 3 Burr. 1812—1823.

^(b) Com. Dig. Toll, B.; *Cro. Eliz.* 711; *R. v. Boston*, W. Jones, 162.

^(c) 8 Rep. 47.

^(d) *Case of Customs*, Davys, 13. As to the effect of a grant of tolls for this purpose, *Att-Gen. v. Mayor, &c., of Shrewsbury*, 6 Beav. 220; *Att-Gen. v. Mayor, &c., of Galway*, 1 Molloy, 95; S. C. 1 Beat. 298. ^(e) 2 Inst. 222.

^(f) 2 Inst. 222; per Coke, C. J., *Hill v. Hanks*, 2 Bulst. 203.

^(g) *Fitz. N. B.* 227, note (c); 13 Hen. 4, 15. It ought to be so reasonable that the subject have more benefit thereby than charge; *Yearb.* 13 Hen. 4. 14; 5 Rep. 63 b.

^(h) *Corporation of Saltash v. Jackman*, 1 D. & L. 851.

⁽ⁱ⁾ *Mayor, &c., of Carlisle v. Wilson*, 13 Ves. 276; *Mayor, &c., of London v. Ainsley*, 1 Anstr. 158.

^(k) *Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571.

occupation of their tolls will lie at the suit of a corporation,^(l) but the decision does not seem to be in accordance with principle, for an incorporeal hereditament cannot be occupied.

But, however this may be, there can be no question that an owner of tolls, unjustly detained from him by a corporation, may sue them in assumpsit for money had and received to his use,^(m) although in general a corporation, and especially a municipal corporation, cannot bind itself, as regards its interests, except under seal.

To an action for a particular amount of toll by a corporation, it would *primâ facie* be an answer, to show that various amounts had been taken by them at different times, or from different persons, in respect of the same kind of toll; but if their lessee of their tolls vary, by a temporary arrangement, the amount of tolls claimed from individuals, that will not affect the right to the tolls if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties.⁽ⁿ⁾

A corporation seised in fee of an ancient market, has at its disposal a means of protecting and realizing its rights in such market, in addition to those rights of action and distress for the tolls which have been mentioned; for it is laid down that if any one erects a new market within seven miles of such ancient market, that is the subject of an action on the case at the suit of the owner of the ancient market, as being a nuisance to such market,^(o) and if that new market be held on the same day or days as the ancient one, it shall be, on that ground alone, intended by the court to be a nuisance to the old one,^(p) but, if on other days, then it shall be put in issue whether it was a nuisance or not, and the plaintiff must prove it to the jury to be so.^(p) In case the new market, holden on the same day as the ancient one, has been erected by letters-patent from the crown, the second patent is void and may be repealed by *scire facias*,^(q) and so, if being holden on other days, it occasions damage to the owner of the ancient market; for the letters-patent granting a fair or market always contain a clause that it shall not be to the nuisance of another fair or market. Yet these words *are said^(r) to be only [*179] put in for an example, for if it occasions any damage *in any other thing* the grant shall be revoked,^(r) and such clause, if omitted, would be implied by law.^(s) Where the new market has been erected

(l) *Mayor, &c., of Carmathen v. Lewis*, 6 Car. & P. 608, qu. tam., vid. 2 M. & Gra. 249, n. In *Palmer v. Gooden*, 8 M. & W. 890, it was held there could not be an entry on tolls; vid. 15 M. & W. 571; 2 Bos. & P. 223; 13 M. & W. 282.

(m) *Hall v. Mayor, &c., of Swansea*, 5 Q. B. 526. Though in many cases a corporation may bring an action where there is no contract under seal, the right is not necessarily mutual; *Arnold v. Mayor, &c., of Poole*, 4 M. & Gra. 896; vid. 5 Q. B. 543. (n) *Lancum v. Lovell*, 6 Car. & P. 463.

(o) 2 Rol. Abr. 140; *Fitz. Abr. Action on the Case*, pl. 28; *Terry v. Page*, Lill. Entr. 30; 3 Bla. Com. 218; 1 Reev. Hist. Engl. Law, 346.

(p) *Fitz. N. B.* 184, A. note (b); 3 Bla. Com. 219. Answer of the judges in Re *Islington Market Bill*, in Dom. Proc. 12 M. & W. 20, 21; S. C. 3 Cla. & F. 513.

(q) Yearb. 22 Hen. 6. 14, and upon the enrolment in chancery of such patent the corporation may have *scire facias* to repeal it; *Brewster v. Weld*, 6 Mod. 229; vid. per *Wilmot, J.*, 3 Burr. 1818.

(r) 2 Inst. 406; 2 Vent. 344; 12 M. & W. 18.

(s) *R. v. Butler*, 3 Lev. 222; S. C. 2 Vent. 344. The courts of equity will not

without letters-patent, within the prohibited distance of the ancient one, it may be a nuisance though holden on different days from the ancient one; and, therefore, a corporation may have an action on the case against the party erecting such market, and, on recovering a verdict, the plaintiffs will be presumed to have suffered from the nuisance, though it appears that the market was held on a different day from theirs.(t) But where, in such case, it appeared that the defendant had been allowed to use it for a considerable time without interruption from the plaintiff, such uninterrupted user was held to be of itself a bar to the action, and the plaintiff was nonsuited.(u) Also, it is to be observed, that the corporation need not wait until the new market (if erected under letters-patent) is abated, in consequence of the repeal of them by scire facias, but may immediately bring an action on the case for the injury to their market, just as they may where the new market is erected (or levied as it is termed) without the sanction of letters-patent.(x)

It was in one case left undecided whether a private person (and so whether a corporation) could prosecute an information in the nature of a quo warranto against another for setting up and holding a market without authority to do so;(y) but it has been decided that such an information will not lie against persons for merely *encouraging and promoting the holding a market without authority*.(z)

But wherever there is an usurpation on the crown by the holding of [*180] the market and exacting tolls, &c., the attorney-general may file such information.(a) And it seems that holding a market without

grant an injunction to stay the use of a market; on the ground that there are at the disposal of the party injured the remedies at law of sci. fa. or action on the case; *Anon.*, 2 Ves. 414. Fraud in the execution of a writ of ad quod damnum, on the return to which a grant of a market has been made, is a ground for sci. fa. to repeal the patent; *R. v. Butler*, 2 Ventr. 344; S. C. affirm. Dom. Proc. 3 Lev. 220.

(t) 41 Edw. 3, 24, B.; 11 Hen. 4, 47, B.; *Fitz. N. B.* 184, A., note (b), 125; 11 Hen. 4, 5, 6; *Yard v. Ford*, 2 Saund. R. 172; S. C. 1 Lev. 296. It is not necessary, in declaring, for the corporation to state that they were seised in fee of the market place, or that they were seised of an ancient market as of fee and right; *vid.* 1 Wms. Saund. 172, note (1); 1 Bos. & P. 400; 2 Wms. Saund. 113, note (1); *Escot v. Laureny*, Owen, 109; *Dent v. Oliver*, Cro. Jac. 43; *Chapman v. Flexman*, 2 Ventr. 291; *Barklie's case*, 3 Keb. 529. Nor if the corporation prescribe for the franchise of the market is it necessary to show that the corporation were a corporation by prescription; *Pitts v. Gaince*, 1 Ld. Raym. 558; *Mayor, &c., of Macclesfield v. Pedley*, 4 B. & Ad. 403. Or the corporation may make application to the attorney-general, who, on being satisfied as to the grounds of the application, will file an information in the nature of quo warranto against the party for the usurpation of the franchises; *Ibbetson's case*, Cas. Temp. Hardw. 261. Or they may have an information on motion; *vid.* 3 Burr. 1815, where Lord Mansfield doubts, but from Co. Entr. 527. 543, B, it appears without sufficient grounds.

(u) *Holcroft v. Heel*, 1 Bos. & P. 400; where a user of twenty-three years without interruption was held sufficient bar. But see now 2 & 3 Will. 4, c. 71; *Campbell v. Wilson*, 3 East, 298, 299, per Le Blanc, J., *Rex v. Smith*, 4 Esp. 111.

(x) 2 Inst. 406; answer of the judges in *Re Islington Market Bill*, in Dom. Proc. 12 M. & W. 24; *vid.* *Mosley v. Chadwick*, 7 B. & C. 47, note; 15 Vin. Abr. 249; *Fitz. N. B.* 125; 1 Rol. Abr. 140.

(y) *Ibbotson's case*, Cas. Temp. Hardw. 261; *Rex v. Marsden*, 3 Burr. 1812. Such information is not within 9 Ann. c. 20, so as to give a prosecutor costs; 3 Burr. 1819; *vid.* Co. Entr. 527. 543, B.; *Anon.* 6 Mod. 183.

(z) *R. v. Marsden*, 3 Burr. 1816.

(a) *R. v. Marsden*, 3 Burr. 1812—1823; 5 Com. Dig. 351; and it has been said

demanding market toll is not of itself an usurpation on the crown ;(*b*) for, it is said, there is no usurpation of a franchise in such a case, though it may be a misdemeanor and the subject of an indictment.(*c*) However, every usurpation on the crown is a misdemeanor, and formations in the nature of quo warranto punish the misdemeanor, and oust from the franchise usurped, at the same time.(*d*) If the defendant appears and shows that he has the market by prescription, and no misuser of the franchise is alleged and proved against him, then, as it seems, judgment must be given against the crown ; but if he fails in proof of the prescriptive right to the market, or if a misuser be made out, then the judgment will be (in the first case) ouster from the market ; for it cannot be that the franchise shall be seized into the hands of the crown or forfeited ; for there is no franchise, as it is said, but, semble, not advisedly ;(*e*) in the second case, the right to hold the market being shown, but an abuse of the franchise being proved, the judgment shall be that the right to hold the market be seized into the hands of the crown.(*f*) If the defendant appears and shows that he holds the market by virtue of letters-patent from the crown, the judgment must be against the crown, if there be no misuser alleged and proved ; if that be alleged and proved, the judgment, it seems, shall be seizure(*g*) of the franchise till redeemed by the patentee, and if that be not done within the same term(*h*) there must be a scire facias to repeal the letters-patent. Or perhaps the correct course in such case is not to proceed by quo warranto at all, but to bring scire facias in the first instance.(*i*)

If the defendant holds the market under the provisions of an act of parliament, it seems that to obtain a repeal of that act is the only mode of redress in case of any misuser of the powers given by it, for though in many cases an indictment would lie, in almost all it would be an inadequate remedy. In case the defendant does not appear to the quo warranto it seems somewhat doubtful what judgment ought to be *given.(*j*) It is also somewhat doubtful whether an injunction [*181] to stay the use of the defendant's market could be obtained even

that persons frequenting such market were punishable by fine, 3 Mod. 127 ; vid. stat. 27 Edw. 3, c. 1. The authorized exaction of tolls seems to be a misdemeanor under 12 Hen. 7, c. 6.

(*b*) Anon., 2 Show. 201 ; qu. tam. S. C. Tremaine, 449 ; vid. 2 Hawk. P. C. 262, s. 9 ; that none can hold a fair or market without grant or prescription, 2 Inst. 220. Indictment will lie for so doing, Anon., 6 Mod. 183 ; 5 Com. Dig. 505 ; vid. 1 Mod. 124 ; and that an indictment lies against a corporation for misfeasance at common law, vid. Reg. v. Great North of England Railway Company, 9 Q. B. 315.

(*c*) Per Lord Mansfield, C. J., 3 Burr. 1816 ; Mosley v. Chadwick, 7 B. & C. 47, n.

(*d*) 3 Burr. 1819.

(*e*) R. v. Staverton, Yelv. 192 ; Att.-Gen. arg. Quo. Warr. Cas. p. 14 ; Co. Entr. 527. 529.

(*f*) Vid. per Holt, C. J., R. v. Mayor, &c., of London, 1 Show. 280 ; S. C. Skin. 310.

(*g*) 2 Inst. 222 ; 2 T. R. 528. Taking outrageous toll is an instance of such misuser as forfeits the market in this way ; 2 Inst. 219. 222 ; vid. tam. Palm. 82 ; inf. p. 181.

(*h*) Vid. 2 Inst. 282 ; 2 T. R. 554. 568.

(*i*) Vid. answer of the judges, In re The Islington Market Bill, in Dom. Proc. 12 M. & W. 23.

(*j*) Vid. 15 Edw. 4, 7, B. ; Rex v. Quadryng, R. v. Amery, 2 T. R. 522, et seq., 550 ; 2 Bro. P. C. 336 ; Yearb. 2 Edw. 3, 29.

after the right had been established at law; Lord Hardwicke, C., refused an injunction, saying, that if in any case he interposed it would be after the title was established at law.^(k)

Misuser of the Piepoudre Court, which is incident to every market,^(l) or abuser of the right of taking toll, are either of them causes of forfeiture of the franchise into the king's hands, at least until the owner have made fine for his misdemeanor; but there is a good deal of obscurity about the real state of the law in this respect.^(m) Holding the fair or market beyond the time or number of days allowed in the grant or prescription is cause of forfeiture.⁽ⁿ⁾

Taking outrageous toll (that is, more than is due, or taking toll where none is due) forfeits not the market, but the right of taking toll;^(o) for the maxim is in eo quod peccat in eo puniatur. Non-user of a fair or market is also cause of forfeiture.^(p)

It may be of some importance to observe, that the remedies pointed out above for the recovery of tools, market dues, petty customs, &c., generally speaking, are the only remedies which it is open to adopt. Equity will not, in general, interfere to establish rights of tolls, &c. Thus where the lord of a market brought his bill for toll of corn brought to market, charging that defendant combined to sell by sample at his house, thereby preventing corn being brought to the market, and prayed a discovery, the bill was held to be demurrable, because these were questions of law, and to be decided in the courts of common law,^(q) after which only such a bill might be brought.^(r)

So a bill for beaconage was dismissed.^(s) So a bill for tolls due to a corporation of a town does not lie, though the town had been originally granted in fee farm, a circumstance which, it had been said, gave the Court of Equity in Exchequer jurisdiction;^(t) and a similar principle was recognised in the case of a bill brought, in the first instance, for wharfage, keyage, and other dues.^(u) Accordingly, also, a bill will not lie to establish a right to toll-thorough.^(x) But where the action [*182] of indebitatus assumpsit would not give so complete a remedy, and the right has been previously established at law, a bill for an account and discovery, &c., of sums due as toll-thorough may be main-

(k) Anon., 2 Ves. 414.

(l) Yearb. 1 Hen. 4, fol. 5, pl. 8. per Gascoigne, C. J.

(m) Vin. Abr. Market, F. pl. 5, 6, 7, 8.

(n) Stat. Northampt., 2 Edw. 3, c. 15; 2 Rol. Abr. 124, l. 30.

(o) 2 Inst. 221; Palm. 82; Treby's Arg. Quo. Warr. Cas. 37. Where the tolls are given by act of parliament (semb.) assumpsit will lie for the difference between tolls taken from plaintiff and what ought to have been taken; vid. Kent v. Great Western Railway Company, 4 Dowl. & L. 481.

(p) Manw. For. 81; Com. Dig. Liberties, C. 1.

(q) Hawley v. Taylor, 3 Atk. 815; vid. tam. Mayor, &c., of Reading v. Winkworth, 5 Price, 473.

(r) Northleigh v. Luscombe, 2 Ambl. 612; vid. City of London v. Perkins, 3 Bro. P. C. 607; Mayor, &c., of London v. Ainsley, 1 Anstr. 158.

(s) Mayor, &c. of Boston v. Jackson, Bunb. 101.

(t) Mayor, &c., of Nottingham v. Wood, Bunb. 330.

(u) Town of Poole v. Bennett, Bunb. 270; i. e. until the right has been established at law a bill for an account, &c., will not lie, Northleigh v. Luscombe, 2 Ambl. 612; City of London v. Perkins, 3 Bro. P. C. 607; vid. 1 Anstr. 158.

(x) Att.-Gen. v. Ayre, Bunb. 68.

tained, and the account may extend over the six years previous to the suit, and though it was urged that the plaintiffs, having established the right at law, were only entitled at most to a discovery, and having got that, must use it in another action at law, but could not have relief in equity as well as a discovery, the objection was overruled.(y) Where, however, the parties whom the corporation would have to sue at law are numerous and with distinct rights, or to be sued for distinct offences against the corporation's right, the courts of equity will not compel them to establish the right or custom in a court of law before granting relief.(z)

The subject of markets and tolls would not be complete without some notice of exemptions from tolls. In early times the crown frequently gave charters of exemption from toll in one or more market towns in England to the corporations of favoured boroughs; such right of exemption to be exercised and enjoyed by the corporators of the corporation in whom it was vested. Thus the corporation of London have a liberty or privilege, granted and confirmed by various charters and statutes, that the *citizens* of London, and all their goods, should be quit and free of and from all toll, and passage, and lastage, and other customs throughout the whole kingdom of England and the ports of the seas, except only the due and ancient customs of the crown and the prisage of wines.(a) The proper remedy for a corporation, whose corporators were denied the benefit of this exemption in a corporate town, formerly was by writ de essendo quietum de Theolonio.(b) On appearance being entered, the plaintiffs declared, stating the defendants to have been summoned to answer of a plea, wherefore they required the corporators of the plaintiffs' corporation to yield toll, passage, and lastage (or as the case may be) of their goods and things within the said borough and the port thereof.(c) The corporation is properly made plaintiff in such case;(d) but a freemen of London, as such merely, is not exempted

(y) *Mayor, &c., of Carlisle v. Wilson*, 13 Ves. 276. What is a sufficient allegation in a bill for an account that the right has been previously established at law, *Mayor, &c., of Rochester v. Lee*, 10 Jurist, 40.

(z) *Mayor, &c., of Malden v. Coates*, 4 Mad. 454, 455; *Mayor, &c., of York v. Pilkington*, 1 Atk. 282; *vid.* 2 Atk. 484. But an injunction has been granted to restrain a corporation from proceeding with an action at law for petty customs, till answer, where the defence at law might arise out of the answer; *Anon.*, 2 Ves. 620.

(a) *Vid.* 1 H. Bla. 206. As to exemption from prisage of wines, *vid.* five cases and fully commented on in *Mayor, &c., of London, v. Mayor, &c., of Lynn*, in Dom. Proc. 1 B. & Pul. 487; per *Aston, J.*, *Cocksedge v. Fanshaw*, Dougl. 117.

(b) *Vid.* *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bla. 206. That a corporation may take a grant or may prescribe for the benefit of its individual members, *vid.* *Stables v. Mellon*, 2 Lev. 246. One who claims exemption under such charter must show it; *Buckham v. Dundridge*, Rol. R. 296; 13 Vin. Abr. 82; *vid. tam.* *Bain v. Cooper*, 8 M. & W. 753.

(c) *Vid.* 1 H. Bla. 210, form of declaration. As to evidence in such proceeding, 1 H. Bla. 211. Mode of compelling appearance, 1 H. Bla. 206.

(d) *Mayor, &c., of London v. Mayor, &c., of Lynn*, in Dom. Proc., 1 Bos. & P. 487; S. C. 7 Bro. P. C. 120, 2nd edit. It was held that the crown could grant that any vill, be exempt from toll, in every city and vill in England, with respect to all their merchandizes; *Lewde v. Wilde*, Yearb. 49 Edw. 3, fol. 6, pl. 10; S. C., 2 Rol. Abr. 198; and so a charter, of Hen. 6, to Corpus Christi College, Oxford that they and their successors, and their tenants and servants, should be discharged from payment of toll for pontage and passage in every place in England,

[*183] *from toll, although the charters give the exemption to omnes homines et omnes cives of London, unless he be resident within the city and paying scot and bearing lot ;(e) and this is perfectly agreeable to the definition of a citizen, viz., "a freeman and inhabitant who pays scot and lot." (f) which we find laid down elsewhere. Hence it appears that an inhabitant of a port cannot, by procuring himself to be made a freeman of the city of London, obtained a right to be free from tolls throughout the kingdom.(g) Where a charter grants exemption from "toll," that word may, under circumstances, include exemption from stallage.(h)

However, the Municipal Corporations Act has rendered questions of exemptions from municipal toll, (except for the citizens of London, which corporation is unaffected by the act), of less importance, because it has abolished all exemptions of corporators by charter from lawful tolls, &c., excepting only in the cases of persons who, on the 5th of June, 1835, were inhabitants, or entitled to be admitted freemen or burgesses of any borough, or were the wives or widows, sons or daughters of any freeman or burgess of any borough, or were bound as apprentices at that date.(i) Therefore beyond the lives of the classes of persons designated, no exemptions from tolls can survive, except for the citizens of London, under the conditions mentioned. We may add, that a mere *claim* of tolls from persons exempt may suffice to ground an action.(k) It may be also observed, that a prescriptive right in a corporation to take tolls is not destroyed by a charter accepted by the corporation, confirming all the ancient rights of the corporation, but exempting the inhabitants of the borough from the payment of tolls in all places except London ; that is, the inhabitants must pay the prescriptive tolls to their corporation, notwithstanding the charter.(l) In cases of exemptions granted to other [*184] than municipal corporations, "that they and all their *men shall be quit of toll, &c.," the tenants to the corporation of lands in-

has been held good; *Wood v. Hawkswell*, 2 Roll. Abr. 198. But this would not exempt from tolls of any sort goods which the corporation might buy and sell as merchandize, but only to goods for their own use; *Roll. Abr. Prerogative le Roy*, T pl. 2; *vid. inf. DEAN AND CHAPTER*. 1 A. & E. 401.

(e) *Mayor, &c., of London v. Mayor, &c., of Liverpool*, 1 B. & P. 522, n. *Scot* or *shot* means share of municipal burdens ; *lot* means the turn or lot to perform public functions; *Merew. & Stephens's Hist. of Boroughs*, 901. 1090, 1091.

(f) *Case of Customs, Davys*, 10, B. (g) *Vid.* 1 H. Bla. 212 ; 1 B. & P. 522, n.

(h) *Lockwood v. Wood*, 6 Q. B. 31.

(i) 5 & 6 Will. 4, c. 76, s. 2. This does not extend to affect exemptions from tolls enjoyed by virtue of other than corporate rights ; 6 & 7 Will. 4, c. 104, s. 9. Tenants in ancient demesne therefore are still exempt from toll for goods bought or sold for or out of their tenements ; 2 Inst. 221 ; *Cro. Eliz.* 227 ; *Fitz. N. B.* 228, A. ; *Com. Dig. Toll*, G. 1 ; *Yearb.* 7 Hen. 4, 44 ; 9 Hen. 6, 25 ; *vid. Lord Middleton v. Lambert*, 1 A. & E. 401. Such exemptions were held to be illegal, oppressive, and beyond the competence of the crown to grant, in the reign of Rich. 2, *vid. Yearb.* 2 Hen. 4, fol. 29, pl. 16. The exemption appears to extend beyond actual tenants in ancient demesne to inhabitants of houses built on land in ancient demesne ; *Town of Leicester case*, 2 Leon. 190. How to plead ancient demesne, *Savery v. Smith*, 2 Lutw. 1144 ; *vid.* 3 Lev. 190 ; *Lev. Entr.* 194 ; *Ward v. Knight*, 1 Leon. 231. Also a customary exemption for inhabitants, (6 Q. B. 31.) seems to be saved ; *vid.* 1 Show. 255. 257.

(k) *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 B. & P. 487.

(l) *Mayor, &c., of Truro v. Reynolds*, 8 Bing. 275.

cluded in their charter are exempt from said toll, &c., not only for articles going to, or coming from, the lands in question, for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandise.^(m) Usually in grants of exemption from toll to one "and his men," what we now call freeholders were intended⁽ⁿ⁾ by the latter phrase. But this was not always the case.

It remains to mention, with respect to future exemptions from or remissions of toll, that where a municipal corporation, before the passing of the Municipal Corporations Act, had lawfully charged the tolls payable to the corporation, the council cannot alter or reduce the amount, or grant any remission of, or exemption from, such tolls, unless with the consent in writing, under the hands of a majority in number and amount of the creditors to whom such debt is due. They may, however, reduce or alter such tolls as soon as such debt and all arrears of interest due thereon shall have been fully paid and satisfied.^(o) And one corporation may at the present day covenant with another (their tolls being uncharged that the burgesses, &c., of the other, shall be free from tolls with their merchandise in the covenantor's town, &c., and the covenantee may bring an action for breach of such covenant.^(p)

As we have seen, the inheritance of an exemption from tolls, may be vested in a corporation, to be enjoyed by the individual members of the corporation, subject to conditions and restrictions; so a right of common in gross may be vested, as to the inheritance of it, in a body politic, and be enjoyed by the corporators for their commonable cattle levant and couchant within the precincts of the corporate jurisdiction, and the corporation may prescribe for such common, or a corporator may justify by prescribing in them for such common,^(q) for it is well settled that a corporation may take a grant, or may prescribe for the benefit of the individual members of the corporation.^(r)

^(m) *Lord Middleton v. Lambert*, 1 A. & E. 401; *vid.* S. C. as to exemptions from toll-thorough and toll-traverse.

⁽ⁿ⁾ *Yearb.* 14 Hen. 6, 12; *Harg.* note (2), *Co. Litt.* 64 b; *vid.* as to the meaning of freehold in the old law, *Harg.* *Co. Litt.* 266 b, note (217); *Co. Litt.* 330 b, note (285); *R. v. Graham*, *Corb. & Dan. El. Cas.* 155.

^(o) 6 & 7 Will. 4, c. 71, s. 92.

^(p) *Mayor, &c., of Lincoln v. Mayor, &c., of Derby*, *Yearb.* 48 Edw. 3, 17. The declaration need not lay the breach to have been by the corporation taking the tolls of the plaintiff's burgesses, &c., provided it states that the tolls were taken by corporators (or servants) of the corporation defendants; *id.*, *ibid.* Indeed it is probable that in most cases a mere claim of toll would be sufficient breach of the covenant; *vid.* *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 B. & P. 487.

^(q) *Mellor v. Spateman*, 1 Saund. 339—346 e. All claim of common, as inhabitant of a town, can only be for beasts levant and couchant; 1 Wms. Saund. 346, note (3). See further as to such claims, *Merew. & St. Hist. Bor.* 1531, and the cases there cited; 2 Car. 2, c. 12; *id.* 1694. Generally a franchise may be vested in a corporation for the benefit of the members of it, for the breach of which the corporation may have an action; *Mayor, &c., of Winton v. Wilks*, 2 Ld. Raym. 1134, 4th edit.

^(r) *Stables v. Mellon*, 2 Lev. 246; 48 Edw. 3, 17; *Bro. Abr. Prescription*, pl. 28; 1 Rol. Abr. 567; *Waller v. Hanger*, 1 Mod. 832; *per Holt, C. J.*, Ld. Raym. 952. Thus the universities have, by ancient grant, the inheritance of returning members to parliament vested in the bodies politic, the right of voting being in the corporators; *vid.* 12 Rep. 120, 121; 4 Inst. 48; *per Holt*, in *Ashby v. White*, 2 Ld. Raym. 938. 951.

[*185] *But they cannot prescribe for common in gross without number,^(s) because there cannot be common in gross without number.^(t)

So the inheritance in a thing may be vested in the corporation, the enjoyment of which may be confined to a certain class or trade amongst the corporators, to the exclusion of the rest.^(u) Thus by custom, corporators, *being proprietors of ships*, may have the sole right of digging gravel in a manor belonging to the corporation, for ballast for their ships, to the exclusion of the rest of the members.^(u) And it seems that in all such cases, as in the case of the exemption from tolls mentioned above,^(x) one available mode of obtaining redress for disturbance by a stranger of the corporators in the enjoyment of such right, is by suit in the name of the corporation.^(y)

Since the alteration which has been made in the limits of boroughs by the late acts, it is very important in many cases, to ascertain that the corporator, in whose favour the right is claimed, is within the prescription or grant in respect of his place of residence, &c.;^(z) for if the right be claimed "for every admitted freeman of the town and borough inhabiting within the said town and borough," &c., and the limits of the borough have been altered by parliament, on a plea of denying the right, the variance will be fatal, though it be proved that the party actually did reside within the old limits of the borough; because the statute^(a) reserves rights of common, &c., to those who reside within the old limits only. But though it seems that, as has been said, the corporation might bring the action for disturbance of the right of common by a stranger, and show, in support of such action, a disturbance of one or more of their corporators entitled to enjoy the common, yet such corporator may elect to bring the action himself,^(b) prescribing in the corporation,^(d) and there is nothing in the judgment in the case^(c) adverted to to show, as was contended in argument, that the right of a corporator in such case now

(s) *Mellor v. Spateman*, 1 Saund. 346 e; vid. tam. 15 Ed. 4, 29 b. So the corporation may have by grant an exemption from duties on wines, which shall be enjoyed not by the corporation as a body, but by the members individually; *Waller v. Hanger*, cited per Holt, C. J.; *Ashby v. White*, 2 Ld. Raym. 952, 4th edit.

(t) Per Kelynge, C. J., 1 Saund. 346 e; *Benson v. Chester*, 8 T. R. 396.

(u) *Mayor, &c., of Lynn v. Taylor*, 3 Lev. 160.

(x) *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 B. & P. 487.

(y) Any corporator being injured in the enjoyment of the right by another, or by a stranger, might bring an action for the injury in his own name, prescribing in the corporation; vid. *Mellor v. Spateman*, 1 Saund. 343. An exemption granted to a corporation, that their corporators shall not serve on juries out of the corporate district, could only be claimed by the corporators themselves, when they came to the book to be sworn; Bro. Abr. 65, Corporations; 2 Wils. 136; vid. 1 Keb. 840; or by plea, 2 Show. 526; *Rex v. Sellars*, vid. 2 Inst. 130; 1 Com. Dig. 219.

(z) *Beardsworth v. Torkington*, 1 Q. B. 782.

(a) 2 & 3 Will. 4, c. 64, s. 35; 6 & 7 Will. 4, c. 76, s. 2.

(b) *Sir T. Chaworth's case*, Yearb. 9 Hen. 6, fol. 62, pl. 16; *Mellor v. Spateman*, 1 Saund. 343; per Choke, C. J., in *Boteler v. Bristow*, Yearb. 15 Edw. 4, fol. 29, pl. 7; *Beardsworth v. Torkington*, 1 Q. B. 782; vid. S. C. as to pleading the name of the corporation in such case, *White v. Coleman*, Freem. 134, 135. Where the commoner prescribed under the corporation as having right of common of estovers for them and for every inhabitant of the vill to burn in quibuslibet messuagiis suis, the court inclined that suis shall intend the houses of every inhabitant, and both new and old houses; id.

(c) 1 Q. B. 791.

depends solely upon the reservation in *section 2 of the Municipal Corporations Act, and that the existing corporation has no- [*186] thing to do with such rights. But it must be remembered that though by the Municipal Corporations Act the new boroughs are not made the same as the old for all intents and purposes, yet the corporations newly named and modelled under that act are not *new corporations*, but merely continuances, (so to speak) of the old ones; (*d*) therefore, it seems that they, or one of their corporators, may claim a right of this nature by prescription just as rightfully as before the alteration, (*e*) provided the above difficulty is avoided.

So a corporation, being owners of a ferry, and lords of the manor within which it lies, may bring debt for breach of bye-law imposing certain restrictions on the inhabitant boatmen of the manor. (*f*) Neither a corporation, nor any other person, can set up a ferry *de novo*, without a grant from the crown, (*g*) or an act of parliament. (*h*) But it seems that a corporation may take a grant of an ancient ferry from another corporation, in whom it was vested by prescription. (*i*) An information in the nature of *quo warranto* lies against them, if they set up an exclusive ferry without title, but it does not lie for merely taking money of passengers. (*k*)

On the other hand, equity will not enjoin by decree persons to use the common ferry of a corporation and no other; (*l*) nor will equity, in ordinary cases, suppress another person's ferry set up to the nuisance of plaintiff's. But if a sole right to a ferry appear by record, that court will grant an injunction before answer, (*l*) to restrain others from using ferry boats there, provided there are satisfactory affidavits produced that the plaintiffs keep up sufficient ferry boats. (*m*)

So a corporation may bring trespass for an interference in their several fishery, (*n*) and prescribe for the sole and several right of fishing in such fishery, or they may bring case for an injury to the oyster beds in such fishery, merely stating their possession at the time, when, &c., of the fishery and the oyster beds. (*o*) In the case of oysters, it is necessary to aver the possession of the beds to be in the corporation at the time when the injury was done; but in an action for disturbance of fishery for swimming fish, it seems not to be necessary to claim the soil, for there may be a several fishery of this kind in *alieno solo*; (*p*) and trespass lies

(*d*) *Att.-Gen. v. Kerr*, 2 Beav. 429; *Att.-Gen. v. Mayor, &c., of Newcastle*, 5 Beav. 314, 315.

(*e*) *Vid.* the reasoning of the court in *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 385, 386.

(*f*) *The Gravesend case*, 2 Brownl. 177. A ferry is a franchise, which can only be set up by royal license or grant, *Com. Dig. Piscary, B.*; *Hardw.* 163; or Act of Parliament. *North and South Shields Ferry Comp. v. Barker*, 2 Exch. 149.

(*g*) *Blisset v. Hurt*, Willes, 508.

(*h*) *Vid.* *North and South Shields Ferry Comp. v. Barker*, 2 Exch. 136.

(*i*) *Vid.* 2 Exch. 141.

(*k*) *Rex v. Reynell*, Stra. 1161.

(*l*) *Churchman v. Tunstall*, Hardr. 162.

(*m*) *Anon.* 1 Ves. 476.

(*n*) *Richardson v. Mayor, &c., of Orford*, 2 H. Bla. 182; *Mayor, &c., of Maldon v. Woolvet*, 12 A. & E. 13; *vid.* 8 Q. B. 1000.

(*o*) *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339.

(*p*) *Holford v. Bailey*, 8 Q. B. 1000; *Aston's Entries*, 508. That a fishery is an hereditament, *vid.* *Davys*, 55 b; *Com. Dig. Piscary, A.*

[*187] *for breaking and entering such fishery at the suit of a corporation who own it.

Where a corporation has been in possession of a fishery for a long time, claiming the sole right, they may bring a bill in equity to be quieted in the possession, though they have not established their right at law; and it is not a good cause of demurrer to such bill, that the defendants have distinct rights, for on an issue to try the general right, they may take advantage of them.(q) But if the lord of a manor brings a bill to establish a right, and be quieted in the possession of a fishery, against the lord of another manor, the defendant, in such case, may demur, for the right should first be tried at law.(r) The first of these cases, however, was decided partly upon the consideration that the plaintiff's claim extended through five manors, and that it would have been endless to have established their complete claim by actions at law against each of the lords.(s) As in the case of a fair or market, the claim of a franchise of a sole fishery, *ex gra.* for oysters and other fish in an arm of the sea, is properly disputed by *quo warranto* information filed *ex officio* by the attorney-general.(t)

Another duty analogous to tolls on sales in markets, is that called land cheap, for which a corporation, under a custom, may prescribe in a *que estate*, as thus; that they and all those whose estate, &c., time whereof, &c., have used to repair bridges, &c., in consideration whereof, they have used time whereof, &c., to receive for all lands sold within the precinct of the borough, a certain rate of tenpence in the pound out of the purchase money:(u) it was objected against the prescription, that it was laid in a *que estate*, but it was held well enough, for a man may have had the borough, and may have granted it to the corporation;(x) and a bill for an account of arrears due to plaintiffs in respect of such toll was allowed in equity.(y)

A corporation may be lords of a manor,(z) and as such have a right

(q) *Mayor, &c., of York v. Pilkington*, 1 Atk. 282. Pending the suit in Chancery, a prosecution by plaintiffs of the defendant for fishing in their fishery will be stayed; S. C. 2 Atk. 302.

(r) *Lord Teynham v. Herbert*, 2 Atk. 483. *Semb.* the crown, after a fishery has been lost by dissolution of the corporation, could not make a fresh grant of it since *Mag. Chart.*; 7 Q. B. 339.

(s) 2 Atk. 484; 1 Atk. 282; *vid.* *Mayor, &c., of Malden v. Coates*, 4 Madd. 454, 455.

(t) *R. v. Fitzwater*, 3 Keb. 459. 465. 485. 519; S. C. 2 Lev. 139; pleadings, *Trem. P. C.* 446.

(u) *Case of Corporation of Malden*, 3 Keb. 532; *vid.* *per Holt, C. J.*, in *Vinkenstone v. Ebdon*, 1 Ld. Raym. 386.

(x) 3 Keb. 532; *vid. tam.* *Bugby v. Hall*, 3 Keb. 532; *Slackman v. West. Cro. Jac.* 673; S. C. *Palm.* 387; 2 Rol. R. 576; 18 Vin. Abr. 137, *acc.*

(y) *Mayor, &c., of Malden v. Coates*, 4 Madd. 447. They might have distrained for the amount due, as was done in *Brickwood v. Nutt*, 3 Keb. 281; and *Bugby v. Hall*, 3 Keb. 532.

(z) *Madox, Firm. Burg. cap. 1, s. 4*; *Com. Dig. Franchise, F. 19*; *Rex v. Master, &c., of Brewers' Company*, 3 B. & C. 172. And they may, as such, prescribe for themselves, their farmers and tenants, to have a right of fowling in another's warren, *Davies's case*, 3 Mod. 246; but a custom in the inhabitants of a borough to such effect would be bad, *Hardy v. Holliday*, 4 T. R. 718. On the other hand, a corporation cannot hold lands by copy of court roll; *Att.-Gen. v. Lewin, Coop. Chan. Cas. (A. D. 1837)*, 54.

to claim tolls therein;(*a*) but the remedy against a claim of excessive toll imposed by them, in such case, is by presentment at the court *leet.(*b*) Their remedy against an attorney, whom they have employed as steward, and who refuses to deliver up muniments, [*188] court rolls, &c., is by application to the summary jurisdiction of the superior courts at Westminster.(*c*)

A corporation, lords of a manor, may have an action on the case for a disturbance in holding their leet,(*d*) and they may be liable to an information in the nature of a quo warranto for holding it after a long disuser.(*e*) A corporation, having a manor, may prescribe in a que estate for liberties appurtenant to the manor.(*f*)

In general a lord of a manor may appoint or retain a steward to hold the court baron and court leet without deed, and he might bring debt for his salary,(*g*) the retainer continuing until he be discharged by the lord; but it seems, as such appointment affects the real estate of the lord, a corporation, when lords of a manor, ought to appoint their steward under their common seal, for he is to take admittances and surrenders, and do other acts, vesting or divesting interests in land in and out of the corporation; and the consideration that the crown cannot make a steward of a royal manor, except by letters-patent,(*h*) seems to favour this supposition. Where a corporation have from time immemorial been lords of a manor, and been used to hold the court leet in the Guildhall of their borough, and in pursuance of an act of parliament convey the manor to A., he has a right to hold the court in the Guildhall,(*i*) although the property in that building was in the corporation.

It also seems, that in no case, whether of steward to a private person or to a corporation, can surrender *out of court* to a steward appointed by parol be good.(*k*) Where a bailiff of a corporation, lords of a manor, distrains for an amercement affeered at the court leet, he need not, in justifying in an action of trespass, allege that he distrained by warrant under the corporate seal,(*l*) for such warrant is not necessary, and the reason why he need not have a warrant is, that the distress neither vests

(*a*) Vid. form Brune v. Thompson, 1 Car. & M. 34.

(*b*) Sanderson's case, 4 Leon, 21.

(*c*) Ex parte Corpus Christi College, Oxon. 6 Taunt. 106. They may bring trespass against a person who takes wreck within precincts over which they have a grant of wreck; Bailiffs of Dunwich v. Sterry, 1 B. & Ad. 831; Fitz. N. B. 91, D.; vid. 9 & 10 Vict. c. 99. (*d*) Com. Dig. Franchises, F. 19.

(*e*) Rex v. Bridge, 1 W. Bla. 46.

(*f*) Dickman v. Allen, 2 Vent. 139; vid. the reason, Co. Litt. 121 a; 10 Rep. 59 b.

(*g*) Co. Litt. 61 b; Dyer, 248, A., pl. 79; Donne v. Hopkins, 4 Rep. 30 b; Smithson v. Cage, Cro Jac. 526.

(*h*) Harg. Co. Litt. 61 b, note (410); 19 Vin. Abr. 596; Coke. Copyh. 56, sect. 45.

(*i*) R. v. Bailiff, &c., of Ilchester, 2 B. & C. 764. On refusal of the corporation, a mandamus will go to permit the holding of the court, id.; R. v. Grantham, 2 W. Bla. 716.

(*k*) Blagrove v. Wood, Godb. 142, pl. 175 vid. Coke, Copyh., that they must appoint steward by deed, sect. 45.

(*l*) Vid. note, 1 Salk. 191, which states that the contrary decision in Matthews v. Cary, 1 Salk. 107; S. C. Carth. 73; 1 Show. 61; 3 Mod. 137, was reversed in Exch. Ch.; vid. Manby v. Long, 3 Lev. 107.

nor divests an interest in or out of the corporation.^(m) If however the bailiff seizes goods forfeited to the lords, there he must be empowered by warrant under their common seal,⁽ⁿ⁾ *for the seizure for the [*189] forfeiture alters the property,^(o) whereas in the former case the amercement is a duty vested in the corporation by the affeerment, for which they may either distrain or bring an action of debt.^(p) However, the point is by no means free from doubt, for it has been held, that a private person, being lord of a manor, may if he chooses to distrain, either sell the cattle, goods, &c., distrained, or may impound them;^(q) from the first branch of which alternatives it follows, that the taking must be considered as vesting the property in the lord, and therefore, according to the above principle, the bailiff, where a corporation has the manor, ought to be empowered in this as well as in the other case, by warrant under the common seal, for the taking equally vests the property in the corporation. So if the bailiff of a corporation, lords of a manor, make conusance for seizing a heriot, he ought to show the warrant under the common seal, for it is the seizure that vests the property in the corporation.^(r)

A corporation may bring an action of ejectment, and may, like a natural person, proceed in the action without executing a power of attorney authorising a person to enter and make the demise to John Doe on the land,^(s) as was required by the old practice;^(t) they may also state the demise, without averring that it was under seal;^(u) and a notice to quit by their steward or other officer usually employed in such matters, will be good, without showing his authority under seal; the bringing the ejectment being a sufficient adoption of his act, as it is said.^(v) And although it is desirable, in order to avoid delay and trouble, to state the name or style of the corporation with accuracy, in this action as in others, yet a demise in a declaration in ejectment may be good, though the name of the corporation be stated in it without strict and literal

(m) 1 Salk. 191; *Manby v. Long*, 3 Lev. 107; 1 Wms. Saund. 347 e. note (4); for it is only in the nature of a pledge, and cannot in general be sold.

(n) It seems the proper mode of pleading is to allege that he took the distress by command of the steward of the court leet, not of the lords; *Matthews v. Cary*, Carth. 75; vid. *Gryffiths v. Biddle*, Cro. Car. 275. But that there is great diversity of opinions as to the proper mode of making conusance as bailiff to the lord of a manor, vid. *Com. Dig. Pleader*, 3 K. 27, 28, and the cases cited there.

(o) And in making conusance in replevin, he must state and set forth such warrant, for there he is an actor, and makes title for a return of the goods; *Stephens v. Houghton*, Stra. 847; vid. 1 Show. 61, pl. 57.

(p) *Freeman v. Abbot of Ramsey*, Yearb. 10 Edw. 3, 9, 10; vid. 8 Rep. 43 b; 11 Rep. 45 a; 1 Wils. 250, 251. They may also bring debt for an amercement in their own court baron, 1 Wils. 250; vid. pleadings, 2 Salk. 772; or distrain, Co. Entr. 570, B. 573.

(q) *Griesly's case*, 8 Rep. 43 b; vid. the pleadings, Co. Entr. 572.

(r) Vid. pleadings, Co. Entr. 613, A. B.; Yearb. 38 Edw. 3, 7; *Abington v. Lipscombe*, 1 Q. B. 766; *Price v. Woodhouse*, 4 D. & L. 286; 2 Inst. 132.

(s) *Chit. Archb. Pract.* 1037, 8th edit.

(t) *Gilbert, Ejectment*, 35.

(u) *Patrick v. Balls*, Carth. 390; 1 Ld. Raym. 136; *Farley d. Mayor, &c.*, of Canterbury v. Wood, 1 Esp. 198; *Noble v. Mayor, &c.*, Newark, 1 Keb. 345.

(v) *Roe v. Pierce*, 2 Campb. 96. As no interest is vested in the corporation by the notice to quit alone, there is no need of an authority under seal. Qu. whether the adoption of the act ought not to be before the day of the demise; vid. *Fitchet v. Adams*, 2 Stra. 1129.

accuracy.(y) But a distinction has been taken between the case of a sole and aggregate corporation in this respect, for the Christian name of the former ought to be stated in the demise,(z) but to state the name of the head of a corporation aggregate in the demise, has been held to be unnecessary,(z) as it is to state it in *a lease.(a) With respect [*190] however to the statutory quasi corporation, consisting of the churchwardens and overseers of the poor of a parish, it has been laid down generally, that when they sue in respect of land held by them in the nature of a body corporate, they must insert their proper names, and, in addition, describe themselves as churchwardens and overseers of the poor,(b) and this decision is doubtless applicable to the statement of the demise in an ejectment brought by them.

Where a tenancy at will had been created by the officer of a corporation on lands of the corporation, and some time after, the successor of such officer determined the will, and it appeared from the defendant's admissions that he had considered these officers as having authority from the corporation, and it did not appear that the corporation, being a statutory one, was not empowered by parliament to constitute an agent without seal, it was held to have been properly left to the jury to say whether they inferred an authority, without telling them that the authority ought to have been under seal, and a new trial was refused.(c)

It seems never to have been disputed, that a corporation could bring an action of trespass quare clausum fregit for an unauthorised entry on their lands,(d) and they may also bring trespass de bonis asportatis for taking their goods,(e) and they may also have trespass for assault or battery, or false imprisonment, of the mayor, or (semble) other officer of the corporation, for an injury done to him in the execution of his office and duty,(f) or, there seems to be little doubt, that they may prosecute criminally any one guilty of such misconduct as amounts to an assault on, or obstruction of, an officer of theirs, in the execution of his duty;(g) but in either case they must appoint or retain the attorney, to carry on

(y) Doe d. Mayor, &c., of Maldon v. Miller, 1 B. & A. 699.

(z) Carter v. Crumwell, Dyer, 86, marg.; Com. Dig. Pleader, 2 B. 1.

(a) Newton v. Travers, 3 Salk. 103.

(b) Ward v. Clerke, 13 Law J. (N. S.) Exch. 229.

(c) Doe d. Birmingham Canal Company v. Bold, 11 Q. B. 127; qu. tam. for the determination of the estate at will re-vested an interest in the corporation, and semble, ought therefore to have been shown to be done by authority under their seal; Cro. Eliz. 815; 1 Rol. Abr. 514; Dyer, 222, pl. 21.

(d) Yearb. 7 Hen. 7. 9; Mayor, &c., of Norwich v. Swann, 2 W. Bla. 1116; Vin. Abr. Corporations, K. pl. 9; Y. pl. 2; C. a. pl. 9; Grendon v. Bishop of Lincoln, Plowd. Com. 493, 503; Richardson v. Mayor, &c., of Orford, 2 H. Bla. 182.

(e) Vin. Abr. Corporations, K. 3, pl. 5.

(f) Com. Dig. Franchises, F. 19; Bro. Abr. Corporations, 63; Vin. Abr. Corporations, R. pl. 1. They may prosecute criminally for an assault on the mayor, Reg. v. Lichfield, 4 Q. B. 893.

(g) Reg. v. Mayor, &c., of Lichfield, 4 Q. B. 893. The corporation must prosecute in their true corporate name; Rex v. Patrick, 1 Leach, Cr. C. 253. The prosecution, like all other acts, must be entered upon, in consequence of a corporate resolution regularly passed; in the case of municipal corporations, a resolution to pay the expenses of a prosecution of this kind, undertaken without the sanction of a previous corporate resolution, is bad; Reg. v. Mayor, &c., of Lichfield, 4 Q. B. 893; Reg. v. Mayor, &c., of Stamford, 4 Q. B. 900.

the proceedings, by writing under the common seal.^(h) One instance of false imprisonment of the head of a corporation being made the subject of an action of trespass by the corporation would be, if the mayor of a municipal corporation was taken in execution on a judgment on a bond given by the mayor, aldermen, and burgesses; in such case the corporation might bring trespass for the wrong done to their *officer, [*191] for it is done to him as such, and is wholly disconnected from any act of his in his private capacity.⁽ⁱ⁾

A corporation having a grant of a wreck may bring trespass against any one who takes it, even before it were seized to their use for they have, as such grantees, a special property in goods wrecked, and may maintain the action, though the owners claim the goods within a year and a day.^(k)

A municipal or other corporation aggregate may be impropriate rectors of a parish, and as such, may sue on a feigned issue, under the stat. 6 & 7 Will. 4, c. 71, s. 46, to try the existence of a modus in the parish, the corporation claiming all the tithes.^(l)

Municipal, ecclesiastical, and lay eleemosynary corporations were frequently patrons of livings (though the first description of bodies no longer are allowed to be so, as it seems,) and as such may bring quare impedit.^(m)

An action of covenant may be brought by a corporation; and if there be a covenant by the mayor, &c., of B. to the mayor, &c., of A. that the burgesses of the latter corporation should be quit of murage, pointage, custom, and toll in B., and an action be brought by the mayor, &c., of A., and the declaration states for breach, that toll had been taken by certain of the burgesses of B. of certain of the burgesses of A., it seems that this is a good breach, without alleging that the burgesses of B. were empowered to take the toll under the common seal of their corporation;⁽ⁿ⁾ but it seems that this rests on the ground of the privity between them and their corporation; for it is intimated, that it is not so, if the taking is alleged to be by J. S., not stating him to be a burgess, for that then it must be shown he was authorized under the common seal.^(o) But it seems to follow, from the authorities cited

(h) *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 588.

(i) *Vin. Abr. Corporations*, Z. pl. 3.

(k) *Bailiffs of Dunwich v. Sturry*, 1 B. & Ad 831.

(l) *Mayor, &c., of Bridgewater v. Allen*, 14 M. & W. 393; *vid. Municipal Corporations Act*, s. 139.

(m) *Chancellor, &c., of Cambridge v. Bishop of Norwich*, 22 *Vin. Abr.* 5; *S. C. Hob.* 126; *vid. 2 Nev. & Man.* 493; 10 *Rep.* 56 a. Of course they are liable to the same action; *Lord Petre v. Chancellor, &c., of Cambridge*, 3 *Lev.* 332; *S. C. 2 Lutw.* 1100, where see pleadings; *vid. Municipal Corporations Act*, s. 139.

(n) *Yearb.* 48 *Edw.* 3, 17; *Vin. Abr. Corporations*, G. 6, pl. 1; K. pl. 2; *vid. 26 Hen.* 8, 18; *vid. Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 B. & Pul. 487. If the covenants be between the mayors, on behalf of their corporations, the mayors must be presumed to have been duly authorized under seals of their corporations respectively to enter into these covenants, otherwise they would not have bound the corporations; *Bowen v. Morris*, 2 *Taunt.* 374.

(o) *Vin. Abr. Corporations*, K. pl. 2; G. 6, pl. 1. It may hereafter become a question, whether the stat. 6 & 7 Will. 4, c. 109, s. 9, which prevents the abolition of exemptions from tolls contained in stat. 5 & 6 Will. 4, c. 76, s. 2, from extending to exemptions enjoyed in virtue of other than corporate rights, operates to save exemptions under covenants of the above kind; and this solution of the dif-

below, that after verdict such omission would be well enough, if it appeared on the evidence that the taking had been by the servant of the corporation ordinarily employed in the taking of tolls; for it would be held that the taking of the servant was the taking of the corporation. A corporation, therefore, may bring covenant in such case for an injury done to corporator in breach of the covenant.

*An action of account may be brought by a corporation, *(p)* and in the cases of railways, and other trading corporations, [*192] may frequently prove a much more expeditious and cheap mode of remedy than that of a bill or other proceeding in Chancery. Of late, indeed, the action has sometimes been ordered to be brought by the equity courts. *(q)* An assignment of auditors by a corporation need not be under the common seal. *(r)*

Actions on the case and of trover will lie at the suit of a corporation in cases in which natural persons are empowered to maintain them. A corporation may also maintain an action on the case, where, by prescription, charter or custom, any lawful privilege vested in their corporators, is unduly interfered with. Thus, before the abolition of customs in corporate towns, &c., that none but freemen should sell by retail within the corporate jurisdiction, the corporation might, in case of interference with such right, bring an action on the case against the offender. *(s)* And, as has been observed, a corporation may bring this action against any one who disturbs their collector of tolls in collecting the tolls of their market, *(t)* or who injures them by selling out of the market, or who disturbs their market in any other way, or who levies a nuisance against their market by setting up another within seven miles of their's. *(u)* So a corporation may be owners of a ferry by prescription, *(x)* grant, *(y)* or custom, or they may be constituted by act of

fielty will turn on whether the legislature, in the later of the statutes, meant to save all but exemptions enjoyed by corporators, by virtue of prescriptions and royal grants, or to exclude these exemptions under covenants between corporations also.

(p) Bro. Abr. Corporations, 56.

(q) Vid. Eason v. Henderson, 18 Law J. (N. S.) Q. B. 69 (Mich. T. 1848.) This action, although recommended to be abolished by the common law commissioners (vid. 3d Report, p. 12, and again, 2nd Report, pp. 9. 58), on the ground that the suit may be protracted to an inconvenient length, and that other remedies have superseded it in practice, seems to have been gaining ground lately, and even increasing in favour with the profession; vid. 13 M. & W. 17; 5 Bi. N. C. 288; 2 Dowl. N. S. 755; 9 Dowl. 817; 4 Car. & P. 104; 4 M. & Gra. 276.

(r) Yearb. 12 Edw. 4, fol. 10, pl. 24.

(s) Mayor, &c., of York v. Welbank, 4 B. & A. 438. The venue in an action on a corporate custom is local; Mayor, &c., of Berwick v. Ewart, 2 W. Bla. 1068.

Vid. 5 & 6 Will. 4, c. 76, s. 14, abolishing all exclusive rights of trading in corporate towns, excepting the city of London, as to the custom in which vid. Waggoners' case, 8 Rep. 121; Clark v. Denton, 1 B. & Ad. 97; Wood v. Serle, J. Bridgm. 140.

(t) Collecting of tolls by wrongdoers, when the tolls belonged to a corporation, was considered in ancient times a very high offence; Fitz. N. B. 114, C.; Com. Dig. Trustees, G. 3. And any official collector may be indicted for misapplication of the tolls collected, per Coke, C. J., 2 Bulst. 203.

(u) Prior of Dunstable's case, Yearb. 11 Hen. 7, 19, cited 8 Rep. 127; 7 B. & C. 47; 12 M. & W. 20; Mayor, &c., of Macclesfield v. Chapman, 12 M. & W. 18.

(x) Vid. 2 Exch. 139.

(y) What evidence of a right of ferry by grant, 6 M. & W. 234.

parliament for making, establishing and maintaining a ferry, and in either case, may bring this action for the disturbance of it.^(z) On the other hand, the corporation would be indictable if they neglected to keep boats and a station appurtenant to the ferry, or the neglect to do so would be an answer to their action for the invasion^(a) of the franchise. Such invasion *may be either by setting up another ferry, or may consist in the act of taking a person across who would otherwise have gone by it.^(b)

Although, however, it is generally true that a corporation may sue for an interruption of a right vested in them for the benefit of, and to be enjoyed by, their corporators individually, this is not always the case; thus it has been held, that where a corporation has a grant exempting their corporators from being summoned on juries out of the city, the only remedy for a corporator empanelled on a county jury is by action on the case, at his own suit against the sheriff.^(c)

An action on the case at the suit of a corporation, or an indictment on their prosecution, may be maintained against a person who publishes a libel of a mayor or other head of a corporation entrusted with a local jurisdiction, while in the execution of his office.^(d) So to say of a corporation that the mayor and aldermen are villains, is indictable if said of them, and applied to them in the execution of their offices.^(e) The principle seems to be, that in places where a corporation exercises a jurisdiction, the authority to do so is delegated to it by the crown; and therefore, any libel or defamatory speaking of the principal officers, or of the corporation itself, in the execution of such jurisdiction, is constructively an aspersion and contempt of the crown, and indictable accordingly.

An action on the case would lie at common law for counterfeiting the corporation seal affixed to a deed of presentation, &c., purporting to be the presentation, &c., of the corporation.^(f)

Also a corporation having municipal or other local jurisdiction, involving the administration of justice, may indict a corporator, who, being eligible and duly elected or appointed, refuses to undertake and enter upon the duties of a corporate office; but the indictment must show the liability to serve the office, and also by what act the defendant refused

(z) *North and South Shields Ferry Company v. Barker*, 2 Exch. 136. Where vid. precedents of declarations and pleas, and 6 M. & W. 234; 1 Exch. 870; 10 M. & W. 161; *Giles v. Groves*, 17 Law J. (N. S.) Q. B. 323. How to describe in pleading, 2 Exch. 149. As to evidence, 6 M. & W. 234. As to entering verdict distributively, *Giles v. Groves*, 17 Law J. (N. S.) Q. B. 323.

(a) Yearb. 22 Hen. 6, 14; 12 M. & W. 23; *Hardr.* 163; *Huzzey v. Field*, 2 C. M. & R. 436. As to duty of ferryman, 10 M. & W. 168; 1 Vin. Abr. 571, pl. 11.

(b) *North and South Shields Ferry Company v. Barker*, 2 Exch. 149.

(c) Yearb. 19 Hen. 8, fol. 5 B. pl. 21.

(d) *Reg. v. Langley*, 2 Salk. 697; or, if said out of court, such words as tend to a breach of the peace, if spoken of the mayor, &c., in the execution of his office, may be a ground for requiring of the offender security to keep the peace; if in court, may be a ground for committal for contempt; *Rex v. Langley*, Salk. 698; vid. 11 Rep. 95, marg.; *Cro. Eliz.* 78. 689.

(e) *R. v. Cranfield*, 5 Mod. 203; 1 Mod. 35.

(f) *Fitz. N. B.* 96, C.; *Com. Dig. Forgery, B.*; vid. 8 & 9 Vict. c. 113, s. 4.

to accept or perform the duties of the office.(g) An action on the case also lies by a corporation having *retorna brevium*, against a sheriff who enters and executes process.(h)

A corporation may also have an action on the case for an interruption of a right of way vested in them; but if they be created within time of legal memory they must prescribe, it seems, by saying that such an one was seised in fee, &c., and that he and all those whose estate he had, &c., have used time out of mind, &c., and then derive title from such person, *and show the deed of grant to them;(i) and this must always [*194] be done where the thing prescribed for lies in grant, *e. g.*, a rent or right of way; but where they prescribe for a thing which is incident to another thing, as for a way which they have by reason of being seised of certain land, then it is enough in such action to allege that the corporation are seised of such lands, and by reason, thereof, &c., without showing the grant by which the lands came to them; for this being a possessory action, it is not in general necessary to show how the corporation suing comes to the land.(k)

So a corporation, having a grant of *retorna brevium*, and that the sheriff of the county shall not intromit, may maintain an action on the case against the sheriff if he enter and serve process.(l) So they may have an action for taking the profits of liberties granted to them.(m)

An action on the case may also be had by a corporation for the fraudulent breach of a contract, although such contract be not under their seal.(n)

With respect to the tribunal in which corporations bring actions, it may perhaps now be laid down as settled law, though there is considerable conflict among the older decisions, that an action by a municipal corporation, the effect of which is to try the validity of a custom, privilege, right, or exemption, as against a stranger to the corporation, the establishment of which will be for the advantage of the corporation, whether that advantage be enjoyed by individual corporators, (*e. g.*, a right of common vested, as regards the inheritance, in the body politic, but enjoyed by the corporators individually,) or redound to the increase of the borough fund, cannot be tried in the courts of the corporation itself,(o) for that would be making themselves judge and party, which the law will not allow;(p) and the same objection holds against allow-

(g) *Rex v. Sellars*, 3 Mod. 167; *vid. precedent of such indictment*, S. C. 2 Show. 525; *Rex v. Harper*, 5 Mod. 96. (h) *Villa de Derby v. Foxall*, 1 Rol. R. 188.

(i) *Slowman v. West*, Palm. 387; 2 Rol. R. 376; *Cro. Jac.* 673, S. C.; *Vin. Abr. Que Estate*, C. pl. 11. (k) *Slowman v. West*, 2 Rol. R. 376.

(l) 1 Rol. R. 118; *Villa de Derby v. Foxall*; and, *semb.*, they need not show by what title they claim; *Cary v. Bacchus*, 1 Show. 17.

(m) *Com. Dig. Franchises*, F. 19.

(n) *West Middlesex Waterworks Company v. Suwercropp*, Moo. & M. 408.

(o) *Hesketh v. Braddock*, 3 Burr. 1856—1858; per *Hatsell, J.*, *Mayor, &c.*, of *London v. Wool*, 12 Mod. 672; *vid. Mayor, &c.*, of *York v. Pilkington*, 2 Atk. 302.

(p) *Yearb.* 8 Hen. 6, 20; *Case of the Town of Shrewsbury*, *Dyer*, 220, A. pl. 14, *marg.*; *Anon.*, 1 Salk. 396; *Broom's Max.* 84; *Poph.* 29; *Earl of Derby's case*, 12 Rep. 114; 4 Inst. 213; *J. Bridgm.* 11, 12; 7 Q. B. 742; *Hob.* 87; 1 *Stra.* 640; *Vin. Abr. tit. Himself*, A. pl. 2; *Sheffield v. Archbishop of Canterbury*, 2 Show. 146; *Anon.*, 2 Show. 148; *Wood v. Mayor, &c.*, of *London*, Salk. 398; *Com. Dig. tit. Justices*, I. 3; *case of Foxham*, Salk. 607; *Rex v. Justices of Essex*, 5 M. &

ing corporators to act as jurymen in cases in which the question to be tried affects, however remotely, their corporate rights.(g)

These objections however do not apply where the action by the corporation is on a bye-law affecting the corporators only, and, *where, [*195] consequently, the parties on either side are equally corporators;(r) and such actions, it seems, may be brought by the corporation in the courts of the corporation, and may be tried by a jury of corporators. Generally the objection is fatal; and it has even been held that an act of parliament cannot be construed so as to make one judge of his own cause; and therefore, if a statute give a man power to have or to hold cognizance of pleas of all manner of pleas arising before him within his manor of Dale, yet he shall hold no plea of which himself is a party.(s) In all such actions, in which the municipal corporation sues as being the party injured, either directly by some immediate violation of a right vested in them, or indirectly, by the interruption of a right claimed by one of their corporators through the corporation, they must sue in their own name; and there is no instance it has been said, of such action(t) being brought for them (as by an officer,) except in the case of the chamberlain of the city of London,(t) who, in virtue of one of the customs of the city of London, which have been at various times confirmed in the gross by parliament, may bring actions on behalf of the corporation to recover sums due to them for the breach of bye-laws and otherwise.(u) Generally, therefore, the law is, that in such cases the corpo-

Selw. 513; *Bridgman v. Holt*, Show. Parl. Cas. 111; *Great Charte v. Kensington*, Stra. 1173; Co. Litt. 141 a; 1 Q. B. 467; 6 Q. B. 753. So an information cannot be brought before the Court of Mayor and Aldermen of London, where the mayor is the party grieved, because he is also an integral part of the court; 1 Salk. 426. Secus, if he was not bound to sit there; *Reg. v. Rogers*, 2 Ld. Raym. 777.

(g) *Hesketh v. Braddock*, 3 Burr. 1857; *Day v. Savage*, Hob. 87; 3 Bla. Com. 363; *Esdaile v. Lund*, 12 M. & W. 734. So kindred to a corporator cause of challenge to juror, 21 Vin. Abr. 261; Co. Litt. 157 a.

(r) *City of London v. Vanacker*, Carth. 480; S. C. 1 Ld. Raym. 496; vid. per Ld. Mansfield, C. J., 3 Burr. 1857; *Mayor, &c., of London v. Markwith*, 9 Vin. Abr. 486, pl. 38. But even in that case, if the trial were had and verdict returned before a mayor, who was disinterested in the cause, and afterwards a mayor, who was interested, were appointed and gave judgment, that would be ground of error; *Company of Mercers, &c., of Chester v. Bowker*, 1 Stra. 639; vid. *Cro. Eliz.* 320. And though the interested party only has the power of sitting as judge, the court being usually presided over by his appointee, a prohibition will lie; *Sheffield v. Archbishop of Canterbury*, 2 Show. 146. So *Wood v. Mayor, &c., of London*, 1 Salk. 398, 4th Resol., that a man cannot sue either before himself or his deputy; *Hardr.* 503.

(s) *Dr. Bonham's case*, 8 Rep. 118 b. Of course, the crown cannot grant to any one the right of sitting as judge in his own cause; *Davys*, 75. A judge of an inferior court, who does so, is guilty of a misdemeanor, for which he may be punished by attachment, for all misdemeanors in judicial officers of inferior courts are contempt of the Court of Queen's Bench; *Anon.*, Salk. 201; *Wright v. Cramp*, 2 Ld. Raym. 766; *Anon.*, Salk. 396.

(t) *Bodwick v. Fennell*, 1 Wils. 235, 237. The exception appears to extend to the chamberlain of the city of Bristol, where the corporation are empowered by their charter to make bye-laws, and sue for the breach of them by their chamberlain; *Hollings v. Hungerford*, cited 1 Wils. 235; vid. *Graves v. Colby*, 9 A. & E. 367, 368. Also it seems that *Bedford, Mayor, &c., of Bedford v. Fox*, 1 Lutw. 562, and *Chester, Hesketh v. Braddock*, 3 Burr. 1847, are within the exception; vid. 9 A. & E. 368; *The Wardens, &c., of the Weavers' Company v. Brown*, *Cro. Eliz.* 803.

(u) *Chamberlain of London's case*, 5 Rep. 62 b.

ration must be the party on the record; but inasmuch as, in cases where a right enjoyed by a corporator has been interfered with, he may mostly bring an action for the injury to himself,^(x) prescribing or claiming in or through the corporation, when the question decided with respect to the right would be the same as that in an action brought by the corporation *for the same violation of the same right; and as it would be contrary to equity and to principles of law that the corpora- [*196] tion and the corporator should both recover damages for the same injury from the same defendant, it seems that a verdict and judgment with satisfaction in the one case would be an answer to the action in the other, so that both cannot recover.

When an officer of a corporation is made a corporation sole by custom, as the chamberlain of London,^(y) or where the head officers of a corporation, or a select body of the corporation, are made a corporation by themselves, there can be no doubt that they may take a grant in that capacity for the benefit of the general body of the corporation, and may sue for it accordingly; or they may take for their own benefit in such case, and sue as for themselves; because being incorporated, they are capable of taking in succession.^(z) This is the case, it seems of the Master and Wardens of the Merchant Tailors' Company of London,^(z) and of the principal officers in some other companies of the same kind. Some of the professorships in the universities of Oxford and Cambridge have been at times treated as though the several professors were respectively bodies corporate;^(a) at other times, some of the professors have been expressly made corporations for the purpose of taking real property in succession.^(b) But where that is not the case, it is manifest from

(x) 1 Lev. 262; Yearb. 19 Hen. 8, fol. 5, pl. 21; Ashby v. White, Salk. 19; S. C. 2 Chandler's Debates of the House of Lords, 74. 79. Many of the old charters gave the right of returning members to parliament to the corporation, in which case the inheritance in the privilege was in the corporation aggregate; but the benefit, possession, and exercise, was in the corporators or persons designated by the constitution of the corporation to be electors; and therefore the wages of the members were always levied, not on the goods and chattels of the corporation, but on the goods and chattels of the corporators, &c.; 2 Chandler's Debates of the House of Lords. 79. The only corporations, in whom this privilege of sending members to parliament now remains, are those of the universities of Cambridge and Oxford.

(y) 5 Rep. 62 b; Byrd v. Wilford, Cro. Eliz. 464; Fulwood's case, 4 Rep. 64 b.

(z) R. v. Attwood, 4 B. & Ad. 495, 496; vid. Graves v. Colby, 9 A. & E. 356. 374.

(a) By letters-patent James I. annexed to the law professorship, within the university of Oxford, the prebend of Shipton, in the church of Sarum, and made him a corporation sole, and the statute 13 & 14 Car. 2, c. 4, s. 29, admits the validity of the grant; vid. King v. Baylay, 1 B. & Ad. 761. Charles I. granted a prebend in the cathedral church of Oxford to the professor of Hebrew, and his successors in the university of Oxford, to hold while they were respectively professors of Hebrew, though in that case it seems the university was placed in the position of trustees, to convey the freehold of the prebend on each vacancy; 1 B. & Ad. 770.

(b) The Lady Margaret's Reader of Divinity in Oxford is made a body corporate, to take a prebend in Worcester Cathedral; 1 B. & Ad. 770. Many officers may prescribe for fees, without being corporations; e. g., the officers of the superior courts at Westminster; Yearb. 12 Hen. 7, fol. 18 B.; the Lord Chancellor, Chief Justice, Serjeants-at-Law, &c., Com. Dig. Prescription, A.; how sheriffs ought to prescribe, 15 Edw. 4, fol. 29, pl. 7.

the current of decisions that neither a successor in an office in a corporation can sue on a bye-law; ^(c) nor will he be bound by a covenant in a lease by the predecessor; ^(d) nor can he take land in virtue of his succession, ^(e) because the officer is not a corporation.

On this principle it became necessary to have a legislative enactment to enable the treasurers of friendly societies to sue for the goods, &c., belonging to their societies, and to succeed to the possession of them, as though they were each a corporation sole, ^(f) which, without such express provision they could not have done. The same is done by other statutes in the cases of the board of Ordnance, ^(g) and other cases.

[*197] *Here it may also be mentioned that, in general, in a corporation, the same person cannot unite the functions of judge and officer, any more than the same person can be judge and party in a cause; but this position must be taken with this exception, that by the ancient custom and practice of almost all boroughs having a gaol, the mayor or chief officer of the corporation was gaoler, or keeper of the gaol, ^(h) until the changes introduced by the Municipal Corporations Act and other statutes, which will be fully stated hereafter. And where a man would have to be subjected in his ministerial capacity to his own control in his judicial, that in general is considered by the law to be so unreasonable, that it is not permitted. ⁽ⁱ⁾ The principle on which these decisions rest ultimately seems to be this, that "a man cannot do an act to himself." ^(k) However, it has been laid down, that by custom where the bailiffs, or mayor and bailiffs, of a borough are judges of the borough court, the bailiffs may also be officers to execute the process of the same court; ^(l) but the principle laid down in subsequent decisions seems to be incompatible with such a junction of offices, for it has been stated that the same person cannot be a magistrate and also the officer who has to act ministerially under such magistrate. ^(m)

A corporation may cause to be instituted an indictment against individuals, and especially against such as assault or interrupt their officers

(c) *Graves v. Colby*, 9 A. & E. 356. 374; *vid. tam.* 4 Com. Dig. 428, that officers may prescribe or allege a custom, *vid. Tims v. Williams*, 3 Q. B. 413.

(d) *Clements v. Waller*, 4 Burr. 2154.

(e) *Doe v. Woodman*, 2 East, 830; *Johnson v. Hodgson*, 8 East, 38.

(f) 33 Geo. 3, c. 54, s. 11; *vid. Cartridge v. Griffiths*, 1 B. & Ald. 57; *Rex v. Catharine Docks' Company*, 4 B. & Ad. 360.

(g) *Doe d. Legh v. Roe*, 8 M. & W. 579.

(h) "The course of all corporations is that the mayor which is the judge is gaoler also;" *Smith v. Hillier*, Cro. Eliz. 168; *Dunne v. Palies*, 2 Rol. Abr. 806; *Widow v. Clerke*, Cro. Eliz. 76; Com. Dig. Officer, B. 6; 1 Rol. Abr. 99, l. 15. The mayor in such case would be the proper party to sue for an escape; 3 Com. Dig. 179; 2 Inst. 382; *vid. Charter*, 13 Car. 2, making Mayor of Leeds and his successors gaolers of the gaol there, *Reg. v. Lancaster*, 16 L. J. (N. S.) Mag. Case, 140; *Hammond v. Peacock*, 1 Exch. 41.

(i) *Milward v. Thatcher*, 2 T. R. 84; *per. Ld. Mansfield, C. J., R. v. Trelawney*, 3 Burr. 1616; *Rex v. Pateman*, 2 T. R. 779; *Rex v. Gayer*, 1 Burr. 245; *Rex v. Patteson*, 4 B. & Ad. 28, 29; *Rex v. Tizzard*, 9 B. & C. 421.

(k) *Finch, Law*, b. 1, c. 3, pl. 20.

(l) *Crane v. Holland*, Cro. Car. 138; Com. Dig. Officer, B. 6. So a bailiff, it has been held, may also be steward of a manor; *Gybson v. Searle*, Cro. Jac. 178.

(m) *Rex v. Pateman*, 2 T. R. 779; *Staniland v. Hopkins*, 9 M. & W. 178.

in the discharge of the functions and duties of their offices, if of a public nature,⁽ⁿ⁾ and such as slander their officers, if the slander be spoken of them in the execution of their offices,^(o) as to call them felons, if the words be applied to them in the execution of their offices.

Every corporation aggregate, whether constituted by charter or act of parliament, may prove debts before commissioners of bankruptcy, by an agent, provided such agent shall, in his deposition, swear that he is such agent as is aforesaid, and that he is authorised to make such proof.^(p) Before this was laid down by legislative enactment, it had been decided in a court of law that the power "to sue and be sued by their secretary," given in a private act of parliament to an insurance company, did not extend to enable them to petition, by their secretary, *for a commission in bankruptcy.^(q) But the principles on which that [*198] decision was founded cannot be considered as applicable to a similar case with respect to a corporation; nor, it is presumed (there being no decisions on the point), could there be any objection to a corporation (being a creditor of an insolvent) moving to rescind the final order, &c., under the Insolvent Debtors Act,^(r) by an agent duly authorised thereto. A general power of attorney would be sufficient authorisation for this purpose.^(s) Therefore we may conclude that every corporation aggregate may petition for a commission in bankruptcy, or prove debts under a commission as above pointed out, or move in insolvency, under similar circumstances, and on similar grounds, to those which entitle private individuals to act respectively. So a corporation may act in the choice of assignees by a person authorised, by a special power of attorney, to represent them on that occasion.^(t)

A corporation aggregate cannot, in general, sue as a common informer,^(u) but they may bring an action in debt *qui tam*, &c., as the party grieved,^(x) and in such action shall have costs on recovering.^(y)

(n) *Reg. v. Lichfield*, 4 Q. B. 893, 895; or an action, e. g. for imprisoning the mayor, *Yearb. 21 Edw. 4*, fol. 70.

(o) *R. v. Cranfield*, 5 Mod. 203.

(p) 6 Geo. 4, c. 16, s. 46; *vid. Ex parte the Governor, &c., of the Bank of England*, 1 Swanst. 10. By 5 & 6 Vict. c. 122, s. 93, (the interpretation clause) it seems the legislature meant to give to corporations all the powers, rights, &c., given to individuals; *Flath. Archb. Bank*. 182; *vid. 12 & 13 Vict. c. 106*, s. 164.

(q) *Guthrie v. Fisk*, 3 B. & C. 178; *vid. 2 C. & J.* 108.

(r) 5 & 6 Vict. c. 116, s. 12; *vid. 7 & 8 Vict. c. 96*, s. 28. Corporate bodies are within the purview of the latter act, as appears from the interpretation clause. 7 & 8 Vict. c. 96, s. 73.

(s) *Ex parte Sneyds*, 1 Molloy, 261.

(t) *Ex parte Governor, &c., of Bank of England*, 1 Swanst. 10.

(u) By 18 Eliz. c. 5, s. 1, "every informer upon any penal statute shall exhibit his suit in proper person," which excludes such corporations; and this is made quite apparent from s. 6; *Com. Dig. Information*, A. 3; *vid. Weavers' Company. q. t. v. Forrest*, *Str.* 1241, where the objection does not appear to have been taken, though from the margin it appears that it had been held in C. B. that corporations were precluded from suing, as the statute used the words "*any person or persons*" only; *vid. 2 Inst.* 736; 1 Mod. 164.

(x) *Corporation of Plymouth v. Collings*, *Carth.* 230; *vid. 31 Eliz. c. 5*, and 18 Eliz. c. 5, s. 6; *College of Physicians v. Needham*, 3 Keb. 672; 1 Vin. Abr. 199, pl. 18; *Com. Dig. Dett.* A. 1. The venue in such action is transitory; *Fife v. Bousfield*, 2 D. & L. 481; S. C. 6 Q. B. 100.

(y) *Carth.* 230; *Corporation of Cutlers of Yorkshire v. Ruslin*, *Skin.* 368; *vid. 1 H. Bla.* 11.

by virtue of the statute of Gloucester, and that, though the statute giving the penalty sued for were passed subsequent to the statute of Gloucester;^(z) for in such case, either the penalty is given by the statute, not to any one who likes to sue, but to the party grieved, or the statute mentions no one who is to sue for it, and the withholding it is in either case an injury, for which the corporation, being the party grieved, may sue and recover damages, and if damages may be recovered, then costs will follow; that is the foundation of the doctrine with respect to costs in these cases.^(a)

A corporation aggregate may, it seems, take and act upon a faculty giving them the right to use and occupy by their members, during divine service, and on other occasions, a part of a parish church within the district with which they are locally connected as a corporation,^(b) although they are not parishioners.

With respect to suits in equity, it seems that corporations may maintain *such proceedings in equity as individuals are entitled to [*199] for the recovery or preservation of their rights. But there are some points of importance enough to require a particular notice here, inasmuch as they arise out of the peculiar character of corporations as aggregate bodies.

A corporation, then, may institute a suit in equity to set aside transactions fraudulent against it, although carried into effect in its name by members of the governing body, and that right is not affected by the circumstance that the attorney-general has power also to call in question such transactions.^(c) This rests on a very important principle, viz. that in equity the members of the governing body of a corporation are looked upon as the agents of the corporation; and if they exercise their functions for the purpose of injuring its interests, and alienating its property, they are held personally liable for any loss occasioned thereby;^(d) and the mode in which they are to be held liable is this, that where the liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party.^(e)

Another point which it is of some importance to notice is, that in equity a suit may be instituted either in the names of all the members, or in the name of the corporation; but the latter is the more convenient course to adopt, because in that case the suit does not become defective

(z) *Mayor, &c., of Plymouth v. Werring*, Willes, 440.

(a) *The College of Physicians v. Harrison*, 9 B. & C. 527. If the defendant succeeds, of course he has costs; *id. ibid.*; *vid. Com. Dig. Dett. A. 1.*

(b) *Hallack v. Chancellor, &c., of Univ. of Cambridge*, 1 Q. B. 593.

(c) *Att.-Gen. v. Wilson*, 1 Ph. & Cra. 1, recognising *The Charitable Corporation v. Sutton*, 2 Atk. 504. But it does not follow that an injunction will be granted at the prayer of the shareholders to restrain the governing body from entering into an agreement to amalgamate with another company; *Barker v. Dunn River Navigation Company*, 1 De G. & Sm. 192; *vid. Coleman v. Eastern Counties Railway Company*, 16 Law J. (N. S.) *Chanc.* 76.

(d) *Att.-Gen. v. Wilson*, 1 Ph. & Cra. 1.

(e) *Att.-Gen. v. Wilson*, 1 Ph. & Cra. 1. Therefore it is not always necessary to make parties all who may, more or less, have joined in the act complained of; *id. ibid.* 28; *the Society for the Illustration of Practical Science v. Abbott*, 2 Beav. 571.

on the death of a member, as it does in the former.(f) Again a body of corporators, or the majority of a corporation, will not be allowed to obtain relief by means of a suit instituted on behalf of themselves and all the other corporators, except the directors who have diverted the funds of the corporation, and by their mismanagement brought losses on the corporation, if the corporation have the means of obtaining redress in its own hands, and may obtain it by means which its incorporation places at its disposal. In such case the Court of Chancery will not interfere, but will leave the corporation to the exercise *of its own powers ;(g) [200] otherwise individual members may sue to obtain restitution of their rights, or recompense for the injury done to the interests of the general body by the directors.(h) Also a bill will be sustained where it is brought by some of the corporators, in order to decide the rights or liabilities of one class of members against another, in respect of a matter in which the corporation itself has no power to vary the situation of either.(i) And two corporations may sue jointly in a matter in which they are jointly interested.(k) Further, a corporation may join in a suit to establish a claim of exemption on behalf of its individual members.(l) But a similar position is not true at common law ; for it has been held at common law that where it has been granted to a corporation that the corporators shall not be summoned on juries out of the city, the only remedy of a corporator, who was placed on the county jury panel, contrary to the terms of their charter, was by action on the case at his own suit against the sheriff.(m) And although by the Municipal Corporations Act all chartered exemptions of burgesses, &c., from serving on juries are abolished,(n) yet the above still applies to exemptions granted by charter to other corporations, and to the exemptions granted by the same statute to members of the council, justices, treasurers, and town clerks of boroughs.(o)

(f) *Blackburne v. Jepson*, 3 Swanst. 138. Where the corporation sued in its corporate capacity only, and the names of the members had been improperly and unnecessarily inserted, they having no individual interest in the subject-matter, the death of one member does not abate the suit ; Mitf. Plead. 60, note, 5th edit. But where all the corporators filed a bill in their individual names, but stating their corporate character, and on abatement of the suit filed a bill of revivor, which was in their corporate name only, and was demurred to for want of privity between the plaintiffs in the original bill and the bill of revivor, the demurrer was overruled ; *Walker v. Warden, &c.*, of Christ College, Oxford, 1 Bli. N. S. 9.

(g) *Foss v. Harbottle*, 2 Hare, 461. The rule applies equally, whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of the majority of shareholders, or absolutely illegal, and incapable of being confirmed by the majority ; *Mozley v. Alston*, 1 Phill. 790 ; vid. 7 Hare, 114.

(h) *Foss v. Harbottle*, 2 Hare 491 ; vid. *Wallworth v. Holt*, 4 M. & Cra. 635 ; 17 Ves. 320.

(i) *Preston v. Grand Collier Dock Company*, 11 Sim. 327 ; explained in *Foss v. Harbottle*, 2 Hare, 502.

(k) *Universities of Oxford and Cambridge v. Richardson*, 8 Ves. 706.

(l) *Corporation of London v. Corporation of Liverpool*, 3 Anstr. 738.

(m) Yearb. 19 Hen. 8, fol. 5, pl. 21 ; vid. Yearb. 21 Edw. 4, fol. 55, pl. 28, where the jurymen demanded the right, showing the charter, on being called to be sworn, which is correct ; Yearb. 4 Hen. 6, fol. 6, pl. 19 ; vid. a similar grant to the governors and commonalty of the Mystery of Cooks in the city of London, exempting them from serving on juries within the city or suburbs ; *Croft v. Howel*, Plowd. Com. 532.

(n) 5 & 6 Will. 4, c. 76, s. 123.

(o) Id. s. 122.

There is authority to show that a foreign-made corporation may sue in this country in like manner as a corporation domiciled here, although it do not appear that a name had ever been given to them, or that they had ever sued before in the name in which they brought their action here. (*p*) It will be necessary, however, to prove at the trial, by the proper instruments, that they were legally constituted a corporation capable of suing in their own country. (*q*) Actions of this kind lie by the comity of nations, although the corporation was created in a manner quite different from that which the law of this country requires; (*r*) in fact, the law of [201] this country, in all the cases on this *subject, gives way to and is ruled by the law of the foreign country. (*s*) A corporation is deemed to be domiciled in the country from which it derives its act or charter of incorporation; (*t*) and if it be incorporated under letters-patent from the crown here, it is deemed a subject of the crown, so as to be entitled to hold and register ships or vessels under the stat. 8 & 9 Vict. c. 89, ss. 5, 12 and 13, although the individual members of the corporation be aliens; (*u*) though foreign-made corporations may sue here. On the other hand, it is useless to make a corporation, that is domiciled beyond the reach of the process of the court, a party to a suit, as defendant, in an English court of equity; (*x*) and the same reason, of course, applies against suing a foreign corporation in a court of law here. There appears to be no objection to creating a corporation of aliens resident in this country, and bodies of such persons have been often incorporated. (*y*)

The above privilege of suing here seems to have been granted, and the courts have consented to recognize, to a certain extent, foreign corporations, rather out of regard to the exigencies of the extended dealings of our traders, than out of deference to the early authorities, which seem to recognize no corporate body that was not named of some place in England. Of late, however, the general principle has been laid down, that a corporation suing or being sued in the courts of this country, need not show how it became, or that it is a corporation; (*z*) and one of the

(*p*) *Dutch West India Co. v. Henriques*, Stra. 612, affirmed in B. R. and Dom. Proc.; S. C. Ld. Raym. 1535. The action was *assumpsit* for money lent; Ld. Raym. 1535.

(*q*) Ld. Raym. 1535; *National Bank of St. Charles v. De Bernales*, Ry. & M. 190. In the last case the incorporation was proved by producing an examined copy of the company's charter from the proper public office at Madrid; id. 190.

(*r*) *Alivon v. Furnival*, 1 C. M. & R. 296. A certificate of matrimony and cohabitation of British subjects, under the seal of a foreign municipal corporation, has been received in evidence in the courts here; *Alsop v. Bowtrell*, Cro. Jac. 542; *Omychund v. Barker*, 1 Atk. 45.

(*s*) 11 M. & W. 890; vid. *Robinson v. Bland*, 1 W. Bla. 258. As to pleading, vid. *General Steam Navigation Co. v. Guillon*, 11 M. & W. 886—896.

(*t*) 3 Burge, Col. and For. Law, 881, 882; Story, Conf. of Laws, 836, 2d edit.

(*u*) *Reg. v. Arnaud*, 16 L. J. (N. S.) Q. B. 55.

(*v*) *Att.-Gen. v. Baliol College, Oxford*, Mitf. Plead. 32.

(*y*) *Madox, Firm*, B. 91, 214, 215, 218.

(*z*) *Woolf v. City Steamboat Co.*, 18 L. J. (N. S.) C. B. 125; vid. *Norris v. Staps*, Hob. 211, acc.; et vid. 2 Ld. Raym. 1535. "A corporation need not show how incorporated, for that ought to come from the other side;" per Coke, C. J., in *Coll. of Physicians v. Tenant*, 2 Bulst. 185. In some cases, ex. gra. in suing on a bye-law, it is often indispensable to set out the constitution of the corporation; *Felt-makers' Co. v. Davis*, 1 B. & P. 102; *Mayor, &c., of Colchester v. Goodwin, Carter*,

Learned judges is reported to have said on one occasion of this decision—
 “The rules of pleading are either positive or derived from precedents. There is no positive rule, nor is there any authority for requiring such a description.” Now the fact is, a very great authority, viz. Littleton, has laid down,^(a) with the sanction of the Court of Common Pleas of his time, a positive rule, extending to all such corporations as are not of a prescriptive origin, that such description ought to be given in declaring, and there are other authorities to the same effect. And certainly the constant and almost invariable form in the old precedents is to state, in declaring, how the plaintiffs became a corporation, as thus, that the plaintiffs, from time whereof, &c., were a corporation in, &c.;^(b) or thus, that from time whereof, &c., they *were a corporation by such a [*202] name, and that in such year such a king, by his charter, &c.,^(c) incorporated them by the name, &c. So in a plea by one who justifies under a corporation, it is the most usual course to state how the body became incorporate, and even to trace the changes made in its name, &c., by charters.^(d) And there is also some authority that a private corporation, (not being one of which the courts take judicial notice, in consequence of its being mentioned as a corporation in statutes (e. g. Stationers’ Company), or for other reasons, ought to show how it was incorporated, whether by prescription, patent, or statute.^(e)

It had been decided before the case quoted from above, that the courts will, after verdict, take notice of a corporation erected by statute.^(f)

As a corporation may commence and prosecute a cause in the Arches Court, in order to obtain a license or faculty enabling them to hold and use seats or pews in a parish church within the limits of the district with which they are locally connected,^(g) although they are not parishioners of that parish; so a corporation may prescribe that time out of mind they have repaired the aisle, &c., of the church, by virtue whereof the mayor and aldermen have sat there, &c.;^(h) and payments for such repairs, made out of the borough fund, have been adjudged to be legal.⁽ⁱ⁾ We have before seen that a corporation may have a franchise vested in them, to be beneficially enjoyed by individual corporators, and the same

68. In making consuance, the bailiff of a corporation need not show how incorporate, or that he has a precept in writing; *Manby v. Long*, 3 Lev. 107.

(a) Vid. 20 Edw. 4, fol. 2, pl. 7; et vid. 1 Edw. 4, fol. 6, pl. 15, acc.; 18 Hen. 6, fol. 21, pl. 6, per Markham.

(b) *Wardens, &c., of Weavers v. Brown*, Cro. Eliz. 803; vid. 2 Wils. 266; 1 Wentw. 156; *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bla. 210; 10 Rep. 29 b; 2 H. Bla. 1068.

(c) *Guston v. Shittington*, Benl. 21, pl. 36. (d) *Mellor v. Spateman*, 1 Saund. 340; *Kerby v. Whichelow*, Lutw. 1498; *Pitts v. Gaince*, 1 Ld. Raym. 558; *Yearb.* 32 Hen. 6, fol. 7, pl. 11.

(e) 20 Edw. 4, fol. 2; 10 Rep. 29 b; 1 Wms. Saund. 340, n. (1). In general the courts will not take notice of a private corporation; 15 Vin. Abr. 198, pl. 14. They took notice of corporations of towns, because the names of all towns were of record in the Exchequer; *Finch, Law*, p. 92; 1 Mod. 13.

(f) *Church v. Imperial Gas, &c., Co.*, 6 A. & E. 857.

(g) *Hallack v. Chancellor, &c., of Univ. of Cambr.*, 9 Dowl. 583.

(h) *Jacob v. Dallow*, 6 Mod. 231; 17 Vin. Abr. 573; *S. C. Salk.* 551; vid. *Hutton’s case*, Latch, 116; or they might prescribe in a que estate, *Slackman v. West*, Cro. Jac. 673; 18 Vin. Abr. 137; vid. *Bugby v. Hull*, 3 Keb. 532, cont.

(i) *Reg. v. Mayor, &c., of Warwick*, 8 Q. B. 926.

of exemptions, rights of common, and other matters,^(k) precisely in the same manner as this right of easement in a seat at church is vested.

There have been doubts entertained, and even positive denials advanced, that a corporation aggregate can be executor, chiefly on the ground that a corporation aggregate cannot take the oath for the due execution of the office;^(l) but it appears to be law that it can be so named in a will, and on being so, may appoint syndics to receive administration with the will annexed, who are sworn like other administrators.^(m)

There appears never to have been any doubt that a sole corporation may be executor.⁽ⁿ⁾

With respect to limitations of actions by corporations, since 31st of [203] *December, 1833, no corporation can make an entry or distress, or bring an action to recover land or rent, but within twenty years next after the time at which the right to make such entry has first accrued to some person through whom the corporation claims, or to the corporation itself.^(o)

Perhaps, of all the acts and proceedings of corporations, the most important is that of election, whether the power or duty be applied to filling up vacancies in the body of members, or in appointing the officers or agents necessary for carrying into effect the object of the constitution. Every corporation aggregate has necessarily, at common law, an implied power of electing new members to provide for the maintenance of the perpetual succession, which is the attribute of every corporation, and such power the aggregate of the members of every corporation may and must exercise as occasions occur, except where the succession is otherwise provided for by the constitution of the body politic.^(p) In the absence of any special restriction, the right to demand a poll is by the common law an incident to the popular election of a person to an office.^(q) In all cases of corporate elections it

(k) *Ld. Raym.* 952; 1 *Mod.* 832; 1 *Saund.* 343; *R. v. Mayor, &c., of York*, 6 A. & E. 419; *vid.* 4 B. & C. 750. 755; 1 B. & C. 389.

(l) 1 *Bla. Com.* 477; *Com. Dig.* Administration, B. 2.

(m) *Kerwil's case*, *Yearb.* 12 *Edw.* 4, fol. 9, pl. 24; 1 *Wms. Exors.*, 186, 187, 4th edit.

(n) 1 *Wms. Exors.* 187.

(o) *Vid.* 3 & 4 *Will.* 4, c. 27, ss. 1, 2.

(p) 1 *Rol. Abr.* 514; *id.* 513, pl. 5; *Town of Launceston's case*, per *Holt, C. J.*, *Phillips v. Bury*, reported 2 *T. R.* 352; *Glover, Corporations*, 220; 3 B. & C. 685. 587; 12 *Mod.* 225. Though a charter incorporates the inhabitants of a district, after the original grantees, every inhabitant must be admitted before he can become a corporator, and, consequently, a corporate elector; 2 *Burr.* 2200; 8 *M. & W.* 36; 2 *Peckw. El. Cas.* 311; 4 *East*, 337.

(q) *Campbell v. Maund*, 5 A. & E. 865. 880. And where a poll is demanded, the show of hands becomes null; *Anthony v. Seger*, 1 *Hagg. Cas. Consist.* 913. The president of the meeting is the proper party to grant a poll, and also to adjourn the meeting, *Reg. v. Hedger*, 12 A. & E. 159, and to decide upon the validity of votes, *R. v. Gaborian*, 11 *East*, 77, subject to an action on the case if he refuses a vote maliciously, *Cullen v. Morris*, *Corb. & Dan. El. Cas.* 168. He has the power of proposing the business to be done, and of regulating the proceedings, *Machell v. Nevinson*, 11 *East*, 85. 87, n.; and of dissolving the assembly, *vid. per Ld. Ellenborough*, 11 *East*, 89, 90; *R. v. Parkyns*, 3 B. & Ald. 677. An action will lie against the presiding officer for refusing a poll, *Hunt v. Dowman*, 2 *Rol. R.* 21; and, generally, where an officer does anything against the duty of his place and office, and damage thereby accrues to any party, he has an action against the officer; *Turner v. Sterling*, 2 *Ventr.* 26; 1 *Vin. Abr.* 572, pl. 33; *Ferguson v. Earl*

is indispensable that an actual vacancy shall have occurred before the election is made; there cannot be a valid election until a vacancy in the office, *to be* elected to, has actually occurred;(r) and an election to an office or place A., which is supposed to be vacant, cannot be referred to another office or place B., which is really vacant, though both offices or both places be of the same nature.(s)

*Where the presiding officer at an electoral assembly, who by the constitution of the corporation is an integral part of such [*204] assembly, secedes after the meeting has been duly constituted and the election entered upon, but before it is completed, an election made after his departure is void,(t) and it makes no difference that he improperly or even criminally absents himself.(u) The election is also void if held before a person who was not the proper officer to preside.(x) Also every election is void that is made by part of the electors by way of surprise or fraud upon the rest.(y)

Where there is one or more vacancies in a definite integral body in the corporation, the court will always grant a mandamus to proceed to the election, but not to supply vacancies in an indefinite body which there is no pressing necessity to fill up.(z)

The question necessary to be treated, in order to give a clear view of the law of majorities in corporations aggregate, and the mode of ascertaining them, having been already discussed, it will suffice here to state that when an elective assembly in a corporation is duly covenanted and assembled in the proper place, and duly constituted, and proceeds to an election for a single place or office, the candidate who has the majority of votes, if there be more than one candidate, is the party elected; if there be only one person nominated for the vacant place or office, then, if he has a majority of those who vote on the occasion, he is duly elected, although a majority of the entire assembly altogether abstain from voting,(a) and though the latter body protest against the

of Kinnoul, 9 Cl. & F. 280. On the other hand, the presiding officer may have an action on the case against any persons who interrupt and prevent him from taking the poll; Shaw v. Colchester, 2 Mod. 228. Again, if he makes default in the performance of any part of his duty as presiding officer, he may be compelled to perform it by mandamus; R. v. Everett, Cas. Temp. Hardw. 261; R. v. Williams, 2 M. & Selw. 144. One part of his duty is to exclude all irrelevant motions, and to admit voting only upon such as are within the purpose and competency of the meeting; Gosling v. Veley, 7 Q. B. 46. As to municipal elections, *vid. infra*.

(r) Owen v. Stainhoe, T. Jones, Rep.; Skin. 45, S. C. The reason seems to be, that the king has no reversion of an office, nor can he grant it by that name; much less, therefore, can a corporation, who are only grantees of a part of the powers of the crown, viz. such as relate to the local government of the district over which they have jurisdiction, assume such a power; *vid. R. v. Kempe*, 1 Ld. Raym. 49.

(s) *Rex v. Smith*, 2 M. & Selw. 407.

(t) *R. v. Buller*, 8 East, 389; *Machell v. Nevinston*, 11 East, 84, 87, n. If the office giving the presidency is filled by two persons they must both preside; *R. v. Smart*, 4 Burr. 2243.

(u) *R. v. Williams*, 2 M. & Selw. 141.

(x) *R. v. White*, 5 A. & E. 613; *R. v. Poole*, Cas. Temp. Hardw. 26, 27.

(y) *Vid. R. v. Gaborian*, 11 East, 77; *vid. 1 T. R.* 149.

(z) *Bull. N. P.* 201; *R. v. Fowey*, 2 B. & C. 596.

(a) *Oldknow v. Wainwright*, 2 Burr. 1020. Generally, before an election, any one is a candidate for whom a vote is asked; but the poll-books are the only evidence of who was a candidate at the election; 1 W. Bla. 524.

election; for it is a general rule, that whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do.^(b) The same would have been the case had the recusants gone away after the business was begun,^(c) although such body constituted a majority of the entire assembly. And so it is with reference to those who stay away altogether from a properly constituted meeting (having the right to act and vote there;) their votes must be considered as added to the majority of votes given at the meeting or assembly, at least in all cases where the object of the election is to supply a single vacancy, and there are not more than two candidates.^(d)

[*205] *Therefore the votes of persons who stay away from an elective assembly cannot be said, in the case specified, to be altogether lost; but if persons attend an elective assembly, and, being electors, either vote wrongly with respect to the object and character of the election, or to the character of the candidate, as regards eligibility to the candidature, or the office, in either of these cases the votes of such persons will be absolutely thrown away, having no more operation or effect than if the parties giving them had not been in existence at the time of the election. Thus instances occur of votes perversely given in regard to the object of the election, where the election being for a person to fill a single vacancy, six persons vote for A., and six others for B. and C. jointly; the joint votes are absolutely thrown away.^(e) Another case of this kind occurs where electors knowingly vote for a disqualified candidate; there also the votes given for such candidate are wholly thrown away.^(f) In fact, several varieties of this description of case occur; but instead of detailing them, and marking the several incidents in which different circumstances have lent different aspects to particular instances, it perhaps will be more useful to give the result which has been judicially deduced from the previous decisions, in a case which was solemnly argued at great length, and determined after much deliberation, and on a very important and interesting occasion. That result is this:—"Where the majority of electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable; or, in the latter case, may be capable of being made good, according to the nature of the disqualification; the objection may require ulterior proceedings to be taken before some

(b) *R. v. Foxcroft*, 2 Burr. 1021; *Gosling v. Veley*, 7 Q. B. 439.

(c) *Rex v. Norris*, 1 Barnard. B. R. 385.

(d) Case of *St. Saviour's*, Southwark, Lane, R. 21; *vid. Merew. & Steph. Hist. Boroughs*, 2249; *et vid. per Lord Hardwicke, C., Charitable Corporation v. Sutton*, 2 Atk. 405, that this is so in other instances of wilful non-attendance besides non-attendance at *electoral* meetings. The principle in the text also follows immediately from the doctrine of the court in *Gosling v. Veley*, 7 Q. B. 457, *et seq.*; *et vid. per Tindal, C. J., Rutter v. Chapman*, 8 M. & W. 99.

(e) *Rex v. Withers*, cited 2 Burr. 1020, *marg.*; *vid. Cowp.* 357; *Reg. v. Mayor of Leeds*, 7 A. & E. 963.

(f) *R. v. Parry*, 14 East, 459; *R. v. Hawkins*, 10 East, 211, affirmed in *Dom. Proc.* 2 Dow, 124; *Taylor v. Mayor of Bath*, cited *Cowp.* 537; *S. C.* 3 *Luders' Elect. Cas.* 324, note (H.); *Claridge v. Evelyn*, 5 B. & A. 86. It is not material whether the candidate be legally or physically incapacitated from executing the office; *R. v. Courtenay*, 9 East, 261.

competent tribunal in order to be made available: or it may be such as to place the elected candidate on the same footing as if he had never existed, and the votes for him were a nullity. But in no such case are the electors who vote for him deprived of their votes, if the fact become known and is declared while the election is still incomplete. They may instantly proceed to another nomination, and vote for another candidate: if it be disclosed afterwards, the party elected may be ousted, and the election declared void; but the candidate in the minority will not be declared ipso facto elected. But where an elector, before voting, receives notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate; for he will not take *the only course by which it can be resisted; that is, by helping to the election of some other person. He is present as an elector; [*206] his presence counts as such to make up the requisite number of electors, where a certain number is necessary; but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as elector; he can speak only in a particular language; he can only do certain acts; any other language means nothing; any other act is merely null; his duty is to assist in making an election. If he dissents from the choice of A., who is qualified, he must say so by voting for some other also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend the elective assembly of the corporation. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only; and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors who may seek some unfair advantage by postponement. If then the elector will not oppose the election of A. in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing he voluntarily leaves unopposed, that is, assents to, the voices of the other electors. Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice, for without that the inference of assent could not be fairly drawn. But if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given; no one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact.”(g)

(g) *Gosling v. Veley*, 7 Q. B. 437—439; S. C. 16 Law J. (N. S.) Q. B. 201. So if under a charter incorporating the inhabitants of a district, the corporation were to pretend to elect a person not an inhabitant. N. B. that in such case inhabitancy is only a qualification; it does not give even an inchoate right; *R. v. Mayor, &c., of West Looe*, 3 B. & C. 686.

So, where the disqualification is specified in a statute; but where there is such specification no one is at liberty to infer that any thing analogous to such specification also constitutes a disqualification.^(h)

Probably it will be found to hold good, that where the fact which the law considers to disqualify for the candidature is patent, as in the case of a woman nominated for civil or municipal offices, which women are disabled from holding by the operation of the municipal Corporations Act;⁽ⁱ⁾ or where the candidate already held a corporate office [*207] ^{*considered in law incompatible,}^(j) with the office sought; or if he had been convicted in the courts of the corporation, or found guilty and had judgment, in a superior court, of a crime rendering him incapable of holding the office sought, in any of these cases the law, whether arising out of the general law, or the constitution of the corporation, would be presumed to be known to the electors, and parties voting for such candidate would throw away their votes.^(k) But if the disqualification of the candidate was such as arose out of a non-compliance with some condition precedent to his holding the office, as for, example, if he had not taken certain oaths, or was not possessed of a certain amount of property in money or land, or was not born in a certain district, or any other circumstances were in operation to disqualify him, with which the

(h) *R. v. Chitty*, 5 A. & E. 609. 613. A disqualification wholly deprives the party of all right to be elected whilst it lasts; a qualification, on the other hand, does not in general give any right to be elected, *R. v. Mayor, &c., of West Looe*, 3 B. & C. 677; even where it has been ascertained and reported by a body of corporators appointed for that purpose, *R. v. Askew*, 4 Burr. 2190.

(i) 5 & 6 Will. 4, c. 76, s. 9, excludes all but males of full age, &c., from the burgesship. A man's being a Jew seems to disqualify for the candidature for an office, on admission to which, oaths, which a Jew cannot take, are required. *Vid. Reg. v. Humphery*, 10 A. & E. 369.

(j) It seems that to a criminal information against a party duly elected, for not serving the office, it would be a good plea to state a judgment which rendered him incapable of the office, for that is not his own incapacity, for *judicium redditur in invitum*; and so of a statutory disqualification, which he could not remove by something done by himself; but he shall not be heard to disqualify himself, as to plead that he is non compos; if a man non compos be indicted, the judges ex officio shall discharge him, because the king takes care of all such persons; *R. v. Larwood*, 1 Lord Raym. 33; *vid. 2 Bla. Com.* 291, 292; 6 & 7 Will. 4, c. 104, s. 8; *Harrison v. Evans*, 6 Bro. P. C. 157. Nor can he plead that to take upon him the office would be inconvenient; *R. v. Leyland*, 3 M. & Selw. 188.

(k) Whether or not it be to all intents and purposes correct to say that the subject is bound and presumed to know the law of the land, which has been strongly questioned, *per Maule, J., in Martindale v. Falkner*, 2 Com. B. 719, 720, at any rate the decisions appear clearly to go to this extent, that every one who exercises a public duty or franchise is bound to know the general law of the land relative to that duty or franchise, *Ferguson v. E. of Rinnoul*, 9 Cla. & F. 251; *vid. 11 A. & E.* 223; 4 Burr. 2004; and besides this, every member of a corporation is presumed to be aware of the particular constitution and bye-laws of his own corporation, and of the rights and liabilities arising thereon, *R. v. Trevenen*, 2 B. & A. 339. Also it is presumed that every person is attentive to what passes in a sovereign court of justice, and must therefore know of such prosecution and the event of it; *vid. Worsley v. Earl of Scarborough*, 3 Atk. 392. Hence it follows that a fact relative to a corporate election being known to a corporator, he is bound to know the operation, on that fact, both of the law of the land and of the constitution or bye-laws of the corporation; so that if a person be disqualified by reason of a judgment having passed against him, and the fact of the judgment is notorious, the judgment need not be produced at the election; *Corb. & D. El. Cas.* 186. 187; *vid. 7 Q.* 439.

electors, not having means of knowledge, could not fairly be presumed to be acquainted, there the maxim, *ignorantia facti excusat*, would apply; the votes given to him, if given without express notice, could not be considered to have been absolutely thrown away and exhausted for that election, but upon the fact becoming known in time, they might be used over again^(l) for some other candidate, who was duly qualified, and the votes in such case would be as effectual as if they had not already been given in a way that turned out to be nugatory. To ascertain the law with respect to throwing away votes is the more important in the case of corporations; because it is held that the rules on that subject are not confined to votes in elections.^(m) We shall therefore proceed to state such other points relative to the question as seem of sufficient importance to deserve *notice. As has been stated, a disqualification, patent or notorious, at once causes the votes given for the candidate [*208] labouring under it to be thrown away;⁽ⁿ⁾ the same would probably be held to be the case where the electors had the means of knowledge of the candidate's qualification, or the contrary, and might have ascertained the fact if they had pleased;^(o) the same is undoubtedly the case where the electors had express notice of the incapacity,^(p) and nevertheless perversely gave their votes for the ineligible person. If there be one candidate only for the vacant office or place, and he is in this predicament, a mandamus will go to proceed to a fresh election; and the court will not insist on an information in the nature of a *quo warranto* being first brought, and the party removed on judgment of ouster, &c.^(q) The mandamus must be directed to the corporation by their corporate name, as mayor and burgesses, although the office to which the election is considered null be that of head of the corporation, and consequently there is no mayor, or other head of the corporation, at the time of issuing the writ.^(r) It is to be observed, however, that a mandamus will not be granted to a relator who knew of the disqualification of the candidate at the time of his election, and nevertheless afterwards assisted at the admission of the candidate to the office.^(s)

(l) *Gosling v. Veley*, 7 Q. B. 437; but it is not the duty of the presiding officer to call on parties who have thus misvoted to claim to vote anew; 7 Q. B. 148.

(m) Per Coleridge, J., in *Gosling v. Veley*, 7 Q. B. 433; et vid. 2 Atk. 405.

(n) *Corbet & Dan. El. Cas.* 186, 187; vid. 4 Burr. 2011; *Gosling v. Veley*, 7 Q. B. 437—439; *Claridge v. Evelyn*, 5 B. & A. 86; *Reg. v. Hiorns*, 7 A. & E. 960; *Reg. v. Boscawen*, Cowp. 537. The votes are equally thrown away if given after notice of disqualification, whether the notice was given before or after the election commenced; *R. v. Hawkins*, 10 East, 211; vid. *Corb. & Dan. El. Cas.* 8, note.

(o) Such case would seem to fall within the rule, and far within it, that where-soever no man is bound to give notice, every man is bound to take notice; *Verdon v. Deacle*, 2 Show. 300; vid. 1 Mod. 87. 300.

(p) *R. v. Hawkins*, 10 East, 211, affirmed 2 Dow, 124. The presiding officer is bound to take notice of the disqualification where there has been a judgment of a court of law, or where the party does not dispute the fact; *Corb. & Dan. El. Cas.* 13. And an action on the case will lie against him if he maliciously refuse a vote; *Cullen v. Morris*, *Corb. & Dan. El. Cas.* 168. Otherwise his decision against the validity of the vote is final; *R. v. Gaborian*, 11 East, 77.

(q) *R. v. Courtenay*, 9 East, 261; *R. v. Mayor, &c., of Cambridge*, 4 Burr. 2010; *R. v. Mayor, &c., of Bedford*, 1 East, 79; *Reg. v. Mayor, &c., of Pembroke*, 8 Dowl. 302.

(r) *Reg. v. Mayor, &c., of Pembroke*, 8 Dowl. 302.

(s) *Reg. v. Greene*, 2 Q. B. 463; vid. 4 B. & A. 339.

A corporate election, it was held, could not be made by putting up a list of names and taking the vote on the whole list collectively instead of individually; as if there be seven places vacant in a definite body, and a list of seven candidates is thus voted on,^(t) or if the names be put forward for the purpose of being added to an indefinite body, in either case, whether the vote be unanimous or contested, all votes given for the list collectively will be thrown away, and the election will be wholly void;^(u) and the ground on which this decision rests is, that this mode of putting the question to the electoral assembly is calculated to produce, not a real, but an apparent unanimity, each voter being by this means tempted to compromise his own opinion in order to induce others to do the same.^(x) But it has been since held that the *rule only [*209] applies where an addition to an indefinite body is to be elected;^(y) for there, it is said, the claim of each person in the list is essentially distinct, and his individual fitness or unfitness is alone to be determined. "This cannot be done when electors are required to vote for or against many candidates at once. They may think it so desirable that A. should be a member of the corporation, from respect and confidence in him, that his election would be cheaply purchased by receiving B. and C., both of whom they may deem wholly unfit for the office; or, on the other hand, may think him so highly objectionable, that it is better to exclude a long list of well qualified persons, than permit him to come among them. Everything, therefore, would unavoidably run into bargain and compromise, where they would be obviously unnecessary and improper, and even inconsistent with the direct purpose of such an election, which need not take place at all, and which calls on the electors to exercise no other judgment than on the competency of each individual proposed."^(z) On these grounds, therefore, it has been considered that though to put forward a list of candidates' names, and take the vote upon them in a batch, is not good, where the object is merely to add numbers to an indefinite body, and where the election is not obligatory, yet where a certain number are to be elected on a given day, under a statute, to an official situation, that very mode of proceeding is the only one that can reasonably be acted on,^(a) provided that each elector have the opportunity afforded him of proposing a list of his own.^(b) In the case in question the contention was, that to propose and vote upon a list of seven persons to supply seven vacancies in the office of alderman

(t) R. v. Monday, Cowp. 530.

(u) R. v. Player, 2 B. & A. 707; vid. Reg. v. Hedger, 12 A. & E. 156.

(x) R. v. Player, 2 B. & A. 708, 709.

(y) Accordingly it has been laid down, that where by charter or prescription the corporate body ought to consist of a definite number, and the corporation neglects to fill up vacancies as they occur, a mandamus will issue to compel them to proceed to an election; Bull. N. P. 201. But where the number is indefinite, the court will not in general interfere to compel an election; Rex v. Corporation of Grampound, 6 T. R. 302. The right of election to corporate offices being incident to the whole body at common law, if the election by custom, or bye-law founded upon a custom, be conducted otherwise, it should be so stated in pleading, and the manner how explained; 1 Rol. Abr. 513; Hicks v. Corporation of Launceston.

(z) Reg. v. Brightwell, 10 A. & E. 176.

(a) Ibid.

(b) 10 A. & E. 176.

was a bad mode of proceeding to the election, but the court decided as above mentioned, explaining that the point on which in such a case the voter must exercise his judgment, was not whether any particular person on the list would make a good alderman, but whether that person and the others on the list would form a good board of aldermen, and that the proposer of the list must be considered as laying it before the assembly as the board which he recommended.(c) And since the decision of that case, the same mode of proceeding to the election of aldermen in a municipal corporation has been prescribed by statute.(d) If, however, the candidate be *eligible, capable of the office, and duly elected to it, then he has a right of admission to the office; and on applica- [*210] tion and refusal or neglect to admit him, a mandamus lies to the proper officer or body to admit him.(e) Admission to the office, and swearing in (where that is required), together form the consummation of the title of the elected person to the office.(f)

An oath may be, by statute, or immemorial custom,(g) part of the form of admission to the office, and the authorities in whom resides the duty and power of admission may prescribe the order in which the ceremonies forming parts of the admission shall take place;(h) and there may be circumstances in which the neglect to present himself for admission will be a waiver of the election on the part of the person elected.(i) Where an oath or declaration is imposed by the legislature as an incident or indispensable part of the ceremony of admission, the party must take or subscribe them at his peril;(k) it is not the duty in general of the officers or body before whom the oaths, &c., are to be taken, to tender them; the party must present himself and demand that the oath, &c., be administered, and if the proper parties refuse, a mandamus will lie to compel them.(l) The peril under which, in such case, the party acts in the office is, that of being ousted on an information in the nature of a quo warranto, for that is the only judgment that can be given, if it be

(c) 10 A. & E. 177.

(d) 7 Will. 4 & 1 Vict. c. 78, s. 14; 10 A. & E. 178; vid. inf. ALDERMEN. The case of Reg. v. Brightwell, 10 A. & E. 176, is still an authority where a given number are to be elected on a certain day in corporations other than municipal, though as to the latter the above statute has prescribed the course laid down therein, thus placing the principle above dispute as to such corporations; vid. per Lord Denman, C. J., 12 A. & E. 157.

(e) Townsend's case, T. Raym. 69. Rule absolute in first instance to an arch-deacon to swear in a churchwarden, on affidavit of due election, demand and refusal; Ex parte Winfield, 3 A. & E. 614. From the principles laid down in Henley v. Mayor, &c., of Lynn, 5 Bi. 91; S. C. 3 B. & Ad. 77; in Dom. Proc. 1 Bi. N. C. 222, it seems an action on case would lie.

(f) 2 East, 84; R. v. Bosworth, 2 Stra. 1112; Reg. v. Humphery, 10 A. & E. 370.

(g) 1 Rol. 5; 1 Mod. 27; 2 Inst. 479. 719; 3 Inst. 165. Anciently, no one had power to direct the administration of an oath but the king, and he only for public purposes; Mer. & Steph. Hist. Boroughs, 2038; R. v. Dean, &c., of Dublin, Stra. 537. 539; Com. Dig. Serement, A.; Clothworkers of Ipswich case, Godb. 254.

(h) R. v. Bosworth, 2 Stra. 1113; Reg. v. Humphery, 10 A. & E. 371.

(i) Humphrey v. Reg. 10 A. & E. 335.

(k) R. v. Jordan, Cas. Temp. Hardw. 257.

(l) R. v. Mayor, &c., of Oxford, Salk. 429; and it seems he might bring an action on the case against them for such neglect of duty; vid. Cane v. Chapman, 5 A. & E. 652.

found against him, that, although duly elected, he was not duly sworn; (*m*) for an elected candidate becomes a corporate officer when he is sworn, and not when he is elected. (*n*) A person holding an office or place in the corporation which is incompatible with the office that is vacant, is ineligible to that office so long as he holds the first, and votes given for him at an election to the vacant office will be absolutely thrown away; he must vacate the one in order to be elected to the other; but where elections to one class of officers in a corporation were to be made out of another and inferior class, the effect of the election of A. from one of the latter to one of the former, and his acceptance thereof, is to vacate the latter; and it makes no difference should the election for any [*211] reason be void; and upon being ousted on quo warranto information from the higher office, he cannot return to the inferior one. (*o*) But it is said that if A. be illegally removed from an office, and B. be elected in his place, then, upon A.'s being restored, B. must return to his former situation, for the validity of his election wholly depended upon the effect of the removal of A., for if that removal was illegal and therefore null, A.'s office was never vacant. (*p*) Upon a *prima facie* case being made out upon affidavit to show that A. had been improperly removed in such case, the Court of Queen's Bench, it seems, will grant simultaneously a mandamus to restore A., and an information in the nature of quo warranto against B. (*q*) The validity of an election of a corporate officer is a question to be decided by that court; but they will not in general decide it, if the question is new or doubtful, on a rule to show cause why an information in the nature of quo warranto should not issue. (*r*) If, however, the facts are clear, and it is evident to the court that the election is merely colourable, and not a due election, they will so interfere. (*s*)

In all that has been said, it must be taken to be implied that the election took place in an electoral assembly duly convened, that is, where

(*m*) R. v. Courtenay, 9 East, 246.

(*n*) R. v. Swyer, 10 B. & C. 486. No deed under the common seal is requisite to perfect the title of a corporate officer to his office, election to offices being one of those matters of internal arrangement which a corporation may complete without the common seal, Owen v. Saunders, 1 Ld. Raym. 166; and neither in a custom nor statute does *nominatio* import a grant by deed, *id.* But if the office be freehold, in practice, the appointment is frequently made under seal, and, as it appears, must be so; *vid. inf.*

(*o*) R. v. Hughes, 5 B. & C. 586. Quo warranto information is the proper course of proceeding where the party holds two incompatible offices; R. v. Bond, 6 Dowl. & R. 333. Infancy renders a candidate ineligible to an office of public and pecuniary trust; Claridge v. Evelyn, 5 B. & A. 86; *et vid.* further as to the eligibility of infants to corporate offices, R. v. Courtenay, 9 East, 261; R. v. White, Cas. Temp. Hardw. 8; R. v. Carter, Cowp. 59. From 8 Vict. c. 16, it appears that the legislature contemplated infants becoming corporators in such companies, at least by devolution or devise; Leeds and Thirsk Railway Co. v. Fearnley, 5 Railway Cas. 644; *vid.* 10 Q. B. 935.

(*p*) Shuttleworth v. Lincoln, 2 Bulst. 122, *qu. tam*; R. v. Godwin, Dougl. 383, *note*.

(*q*) Per Lawrence, J. 6 East, 360. Who may be relator of such information, *vid.* R. v. Trevenen, 2 B. & A. 339; *id.* 344, *n.*; per Lord Kenyon, C. J., 1 East, 46; *vid.* 2 Q. B. 562.

(*r*) R. v. Godwin, Dougl. 382; R. v. Clarke, 1 East, 45, 47.

(*s*) R. v. Mayor, &c., of Cambridge, 4 Burr. 2010; R. v. Bankes, 3 Burr. 1454; R. v. Mayor, &c., of Bedford, 1 East, 79.

notice to the members is requisite, the assembly must have been convened by the usual notice, without which it will not suffice to summon the electors by notice, specifying the object and purpose of the assembly, served upon, or sent to the usual residence of, each resident elector entitled to vote at that assembly; (t) and notice will be requisite in all cases where the times of meeting for electoral assemblies are not pointed out by the constitution of the corporation, or by its bye-laws, or by custom; for in such last-mentioned cases, each member will be held to be cognizant of such meeting, and of his duty to attend thereat (u) Again, the assembly must meet in the usual, (x) or at *least properly appointed, place for such assemblies to take place. (y) A meeting, though of the majority of the whole body of electors, not in the usual place, unless such meeting is holden out of the usual place in consequence of a previous notice for it to be held in another place, issued by competent authority, (z) or in consequence of a legal adjournment to such fresh place, (a) is not a legal meeting for the purpose of an election; and an election made there will be invalid on that account, though it have been in other respects legally conducted. (b) That all the members of the electoral assembly must in general be summoned, is so far from being a flexible rule, that a custom to hold extraordinary meetings upon summons of all, subject to a provision that the accidental omission of summons to one should not vitiate the meeting, is bad. (c)

(t) *R. v. May*, 5 Burr. 2681. The personal summons ought to allow a reasonable time for the elector to get to the place of assembly; *id.* 2682. Where summons is necessary it cannot be dispensed with, unless each elector is present at the meeting and consents to waive it; *id.* 2682; *R. v. Chetwynd*, 7 B. & C. 695; *R. v. Langhorne*, 4 A. & E. 538.

(u) *R. v. Trevenen*, 2 B. & Ald. 339. For this reason, in a return to a mandamus, no time or place for holding such assemblies need be set out, the corporators being all bound to be aware of both; *vid.* 2 Stra. 1112, 1113; *Vintners' Co. v. Passey*, 1 Burr. 239; *et vid.* *R. v. Hill*, 4 B. & C. 426.

(x) *Musgrove v. Nevinston*, Stra. 584; *R. v. May*, 5 Burr. 2681. It is an old and probably general rule of law, that a meeting for public purposes of any kind must be held in the usual place, *e. g.* a sheriff's tourn; *Crocker v. Dormer*, Poph. 28.

(y) On the day appointed for the election, no other business can have precedence of the election; nor, if the election be once begun, can the assembly proceed to any other business till it is finished; *R. v. Parkyns*, 3 B. & A. 677; *vid.* 1 Burr. 2020. In municipal corporations, where an election is appointed by statute to be on a particular day, and does not take place on that day, it may be legally made afterwards; 7 Will. 4 & 1 Vict. c. 78, s. 25; *vid.* *Cas. T. Hardw.* 23.

(z) *Ex. gr.* the legal president of such meetings, who may for sufficient cause appoint the meeting to take place out of the usual place, for he may adjourn a meeting in the proper place, *Reg. v. Hedger*, 12 A. & E. 159, and, as incident to the power of adjournment, may, in the first instance, under circumstances, as if the usual place was burnt down, appoint a fresh one, *vid.* *R. v. Mayor, &c., of Carmarthen*, 1 M. & Selw. 704.

(a) The president of the meeting has the authority to adjourn it, *R. v. Fish*, 1 Wils. 19; *Reg. v. D'Oyley*, 12 A. & E. 159; but subject to responsibility to the Court of Queen's Bench if he acts so as to disturb the proceedings, *id.* 160; *Machell v. Nevinston*, 11 East, 85. 87.

(b) *R. v. May*, 5 Burr. 2681; *Musgrove v. Nevinston*, Stra. 584. No fresh notice is requisite of the adjourned meeting where the business has been entered on at the regular meeting; *R. v. Harris*, 1 B. & Ad. 936.

(c) *R. v. Langhorne*, 4 A. & E. 538. An elector cannot dispense generally with service of summons upon him, *id.*; and a meeting taking place without his being summoned is bad, and the proceedings void, *id.* If there is business to be done

If an electoral assembly be summoned, and meet for one particular purpose, they cannot proceed to any other matter without the unanimous consent of the whole body of corporators, who have a right to be present there; but if every member be present and consent, then an election made under such circumstances will be good, though they were not originally assembled for that purpose.^(d)

If the object of a meeting of an electoral assembly is to appoint an officer to succeed the one who, by the constitution of the corporation, presides at such assemblies, in virtue of his office, and before whom the election ought to take place, and the election ought to be made by a certain day, and such officer adjourns the meeting over that day, and over the day on which his office expires, it seems that an election made or completed at such adjourned meeting is bad, as being made before [*213] *one who was not qualified to act as president of the assembly (especially if the adjournment was made without cause), and also as being made after the appointed day.^(e) This, however, can only happen where the officer ceases to be officer *de facto* and *de jure* at the same time. In some cases of annual officers, the law gives a power of holding over until the successor is elected,^(f) so that an election before such an officer would be good, although after his year of office had expired, if circumstances render it impossible, or highly inconvenient, to conclude the election sooner. In cases where by statute, or the constitution of the body, the election was required to be made on a Sunday, or on a day which happens to be a Sunday, the election is now required to be made on the Saturday previous or the Monday following; and where it is not made on the Saturday, and the office would expire on the Sunday, the officer is enabled to hold over until the Monday following.^(g)

Election means due election; a merely colourable and elusive election, as, for example, the election to an annual office of a person who was absent beyond seas, and who, it was known, would not return in

by a select body, they must have a separate summons in their distinct capacity; they cannot act on a general summons to the whole body of the corporation; *R. v. Mayor, &c., of Carlisle*, *Str.* 385.

^(d) *Machell v. Nevins*, 11 East, 85, 87, note. They have a right to complete freedom of action during the period of election; any attempt to disturb them in the lawful exercise of this franchise is unlawful; and if made by more than two persons coming to the assembly for the purpose of interruption by noise and clamour, that is a riot, for which an indictment or a criminal information may be had; *Reg. v. Soley*, *Salk*. 594. But there is a distinction between a riot and a disturbance under a claim of right; *R. v. Atkins*, 3 Mod. 22; *R. v. Parkyns*, 3 B. & A. 677. Any elector who is excluded, may have an action on the case; *Phillibrown v. Ryland*, *Str.* 624; *S. C.* 8 Mod. 351.

^(e) *R. v. Poole*, *Cas. Temp. Hardw.* 26, 27; *vid.* 5 A. & E. 613. Where the constitution of the corporation appoints a day for the election to an annual office, it seems there cannot be, at common law, an election to the office on any other day: *R. v. Robbison*, *Str.* 555. However now every meeting, or adjourned meeting of a corporation, whether for the nomination, election, appointment, or swearing in, or admission of any officer, or for the transaction of any other secular affair of such corporation, which is required either by statute or the constitution of the body to be held on Sunday, or any day happening to be a Sunday, is to be held either on the Saturday next preceding, or the Monday next following; 3 & 4 Will. 4, c. 31.

^(f) *Foot v. Rouse*, *Str.* 625; *vid.* 4 B. & C. 376.

^(g) 3 & 4 Will. 4, c. 31, s. 1; to meet on any other day and proceed to an election, would be an indictable offence, *R. v. Atkins*, 2 Show. 236.

time to discharge the duties of the office, is absolutely null and void ; and upon such facts appearing to the court, they will declare it to be so, and issue a mandamus to the corporation to proceed to a fresh election.(h) If the officer be already sworn in, or if the facts be questioned or doubtful, they perhaps may, in their discretion, leave the party to bring an information in the nature of quo warranto, and try the facts upon the issues thereon.(i) On the other hand, if the candidate has been duly elected, and swearing in or subscribing a declaration constitutes, by immemorial custom or statute, part of the form of admission to the office, the court, upon refusal of the proper parties to admit the person elected, will grant a mandamus to compel them to administer the oath or receive the declaration, and do whatever else is necessary to *complete the form of admission.(k) With respect to all public [*214] corporations, as it seems, but certainly in all cases of municipal corporations, a motion for a mandamus to swear in a corporator, upon refusal of the proper parties, is a motion of course,(l) and upon the return to the writ, the whole question may be brought before the court by argument founded on affidavits. But this does not include any question respecting the rights of the electors ; as, for example, whether they or some of them were duly qualified to vote : for such questions, can neither be entered upon by the court, nor tried collaterally by a jury, upon the question of the election of any person ;(m) in other words, the titles of corporate electors cannot be impeached through the medium of the elected, at least where there are other means by which the titles of the electors can be tried ;(n) if, however, there do not exist any other means by which the right to elect at all can be ascertained, then the court will allow that to be done by impeaching the election of the party returned ;(o) but this seems only to be allowed from the absolute necessity of the case, for if this mode of inquiring into the right of any corporate electoral body, against whom, from the nature of the body, a

(h) *R. v. Mayor, &c., of Cambridge*, 4 Burr. 2010 ; *vid. R. v. Mayor, &c., of Lyme*, (Mitchell's case, Dougl. 85. Every writ of mandamus must be tested in term time ; *Reg. v. Colyers*, 8 Q. B. 981.

(i) 4 Burr. 2010 ; 1 East, 79 ; 8 Dowl. 302 ; *vid. R. v. Corporation of the Bedford Level*, 6 East, 356, a case, where one elected by means of illegal votes had been sworn in, and the court granted a mandamus to swear in the candidate with the majority of legal votes. However, an information quo warranto, in such case, may sometimes be the proper remedy ; *R. v. Mayor, &c., of Colchester*, 2 T. R. 259 ; *infra* ; *vid. 1 & 7 Vict. c. 89, s. 5*. Mandamus cannot go to one integral part of a corporation to elect the whole of another integral part which has become extinct, for the corporation is thereby dissolved ; *R. v. Mayor, &c., of Colchester*. 2 Dougl. Elect. Case, 59 ; S. C. cited 3 T. R. 234.

(k) *Townsend's case*, T. Raym. 69. An attachment will issue on refusal ; *R. v. Stephens*, T. Jones 177. There must first be an application to, and refusal by, the proper parties to admit ; *per Ashhurst, J.*, Cowp. 510 ; *R. v. Brecon Canal Company*, 3 A. & E. 21.

(l) *R. v. Mayor, &c., of York*, 4 T. R. 699.

(m) *Symmers v. Ing. Cowp.*, 507 ; *vid. per Lord Ellenborough, C. J.*, *R. v. Smith*. 5 M. & Selw. 271 ; *Foot v. Prowse*, 1 Stra. 625 ; *R. v. Hughes*, 4 B. & C. 377.

(n) *R. v. Mein*, 3 T. R. 598. Perhaps, also, where electors had been in unquestioned possession of the right for several years, the court would not allow their title to be questioned through the medium of the party elected ; *vid. per Lord Kenyon, C. J.*, in 3 T. R. 598, commenting upon *Symmers v. Reg.* ; *per Bayley, J.*, in *R. v. Hughes*, 4 B. & C. 377.

(o) *R. v. Mein*, 3 T. R. 597.

quo warranto information would not lie, were refused, the members of that body would be wholly beyond the surveillance of the Queen's Bench, and in fact exempt from the control which that court exercises over corporate bodies, and the parts, and individual members of such bodies.(p) Perhaps, however, the rule is more accurately and precisely stated as follows: that where the qualification of the electors depends on the tenure of a corporate office or place, that qualification cannot be questioned through the medium of proceedings impeaching the title of a person elected by them to any office; but where the qualification depends upon inhabitancy, or any other circumstance, which cannot be directly challenged by a legal proceeding, then, from necessity, it may be questioned and tried through such medium.(q) But, as in corporations, there is almost always some other available mode *of trying the right of electors, the court it seems will not, in general, [*215] suffer it to be done by the above mode. Thus far, however, the court will go, where the electors' title has, in a previous proceeding, been shown to be bad, as if they had been ousted from office on a judgment on quo warranto; there that may be shown in a proceeding against an elected party;(r) the distinction apparently being, that where a person is in possession of the office, which he must hold to be qualified to elect, his title shall not be brought into question in this way, but that the judgment of ouster, showing that he never was possessed, may be given in evidence. Also it is competent to a party opposing the elected candidate's reception and recognition as an officer of the corporation, to show, in a proceeding against him, that the presiding officer at the meeting at which he was elected, was not de jure entitled to preside, and that consequently the assembly was not duly constituted, and the election null.(s) With reference to this question, it may be material to notice, that the stat. 1 Rich. 2, c. 11, which enacts, "that none that hath been sheriff of any county by one whole year shall be within three years next ensuing elected again," does not extend to exclude sheriffs of counties of cities, and counties of towns, from being

(p) *R. v. Mein*, 3 T. R. 597; *vid. R. v. Hall*, 1 B. & C. 123. Personating an elector at a municipal election is a grave offence; in one case the Queen's Bench fined the defendant 200*l.*, with imprisonment until it was paid; *vid. form of the indictment, Rex. v. Marsh*, 6 A. & E. 250; *Reg. v. Blut*, 2 Car. & K. 179. Disturbance of a corporate election, though without violence, is indictable; *Case of Bewdley, Holt*, R. 353; *R. v. Parkyns*, 3 B. & A. 668; *vid. Salk*. 594.

(q) *R. v. Hughes*, 4 B. & C. 377; *R. v. Hall*, 1 B. & C. 123; *R. v. Smith*, 5 M. & Selw. 271. The rule was laid down more positively in *R. v. Hughes* than it ever had been before that case. Both Lord Mansfield, C. J., in *R. v. Latlam*, 3 Burr. 1485, and Lord Ellenborough, C. J., in *R. v. Smith*, 5 M. & Selw. 271 speak as if their minds were not satisfied of the precise extent of the rule.

(r) *R. v. Hebden*, 2 Stra. 1110; S. C. Andr. 389; explained 4 B. & C. 377. It would be evidence under an issue on non debito modo electus, 4 B. & C. 376, 377; *vid. R. v. Mayor, &c., of York*, 5 T. R. 66; 4 B. & C. 379; *R. v. Corporation of Maidstone*, 1 Keb. 733.

(s) *R. v. Smith*, 5 M. & Selw. 271; explained per Bayley, J. 4 B. & C. 378. By 7 Will. 4 & 1 Vict. c. 78, s. 1, no election of any one corporate officer in any municipal borough shall be liable to be questioned by reason of any defect or want of title in the presiding officer, if he were at the time de facto in possession of the office giving the right to preside; 7 A. & E. 430.

re-elected within that time.(*t*) So that there can be no objection on that ground to a sheriff of a county of a city, or town, presiding at a corporate meeting, where it is his duty as sheriff so to do, although he have been re-elected within three years.

If a corporator be ousted from a place or office in the corporation, and another be elected in his stead by an election which is merely colourable, a mandamus will go to permit the ousted corporator to exercise his office, but not to restore him to the office. If, however, it be made to appear to the satisfaction of the court that the ouster and election were bona fide, then a mandamus in favour of the party displaced is not the proper mode of remedy, but an information in nature of quo warranto against the party holding the office de facto.(*u*) We may observe here, that in the case before cited,(*x*) in which two persons claimed to be legally elected, and the corporation had considered one to be the duly elected party, and the court thought it a proper case for a mandamus to the corporation to admit the other, the object was, that the title of the contending parties might be tried on the return.(*y*) At *first sight it will perhaps appear that there is some difficulty in [*216] determining from these decisions when a mandamus and when a quo warranto information is the proper remedy. But the law seems to be this; where one of two candidates had been admitted (upon some form of election at least) and sworn into, and is acting in, the office, so that there is an officer de facto, and the disappointed candidate has open to him, from the nature of the case, the remedy by information in the nature of a quo warranto, that is the proper remedy for him to apply for, and not a mandamus to admit him also.(*z*) If, however, the election be merely colourable, and therefore void, so that in point of law the office is vacant, and yet there is a wrongful exclusion of the disappointed candidate, then the disappointed candidate is entitled to a mandamus, not to admit him, but to proceed to an election de novo, the former pretended election being a mere nullity.(*a*) And it will be found on examination of the cases in which a mandamus was granted to admit the disappointed candidate, (there being no imputation against the election as not being bona fide,) that something remained to be done, so that the office was not full de facto, and therefore that quo warranto was not, in those circumstances an applicable remedy.(*b*) So that whenever there

(*t*) *R. v. Haythorne*, 5 B. & C. 429, note.

(*u*) *R. v. Mayor, &c., of Oxford*, 6 A. & E. 349.

(*x*) *R. v. Mayor, &c., of York*, 4 T. R. 699.

(*y*) Per Coleridge, J., 6 A. & E. 353, 354. By consent a feigned issue might have been directed, as this was a case within 9 Ann. c. 20. If it had been the case of an office not in a municipal corporation, the same might have been done without consent, by 1 Will. 4, c. 21, s. 4, and 1 & 2 Will. 4, c. 58, s. 8.

(*z*) *R. v. Mayor, &c., of Colchester*, 2 T. R. 260; *vid.* 6 A. & E. 353. A quo warranto information can only be had in cases of public corporations; at least that is the general rule, *vid. infra*.

(*a*) *R. v. Bankes*, 3 Burr. 1454; *R. v. Mayor, &c., of Cambridge*, 4 Burr. 2008. There must at least be the form of an election, otherwise the party, though admitted and acting, is a mere usurper; *R. v. Lisle*, Stra. 1090, *vid.* 4 Burr. 2140.

(*b*) *R. v. Mayor, &c., of York*, 4 T. R. 699; *vid.* 6 A. & E. 353. Or that from the nature of the corporation and the office, there was no other remedy; *R. v. Corporation of Bedford Level*, 6 East, 356.

has been a bona fide, but (as it appears nevertheless) a disputable election, then the party questioning it ought, if the party elected has been actually admitted into and acts in the office, to apply for an information quo warranto against him, that being the appropriate remedy in such case.(c) The distinction turns ultimately on the question whether the office is full de facto. Accordingly where a disqualified person is elected, (being the only person who came forward as a candidate,) the court orders a mandamus to issue for a fresh election, and not a quo warranto information, for the office is vacant.(d) If, however, there were more candidates polled for, the mandamus would be to admit the candidate with the next greatest number of votes.

It is material to observe, that the question which furnishes the test in these cases is not whether the party acting in the office be duly elected, for he may be duly elected and yet only officer de facto, as for example, where, notwithstanding a due election, he has not been duly [*217] sworn in, where swearing in forms part of the ceremony of admission,(e) *but the question is simply whether there is any one in fact exercising the office. On the other hand a bare swearing in and acting does not make an officer de facto; there must be some form of election, or he is a mere usurper.(f)

A swearing in before a person who is a mere usurper of the office, before the holder of which the elected party ought to be sworn in, is null.(g) So it seems unquestionable, that swearing before an officer against whom judgment of ouster had been had, would render the election fruitless,(h) and the party so admitted would have no valid title to the office. The question whether a person can be sworn in before himself has been decided in the negative,(i) and the decision may be easily referred to a principle; for on the general principle that a man cannot do an act to himself,(k) it follows, that an officer cannot administer an oath to himself as a candidate, so as to authenticate and complete his own election.

(c) *R. v. Mayor, &c., of Oxford*, 6 A. & E. 353; *R. v. Beedle*, 3 A. & E. 352; *R. v. Attwood*, 4 B. & Ad. 483.

(d) *R. v. Courtenay*, 9 East, 261; *R. v. Mayor, &c., of Bedford*, 1 East, 79; *R. v. Mayor, &c., of Cambridge*, 4 Burr. 2010; *Reg. v. Mayor, &c., of Pembroke*, 8 Dowl. 302, where the election was of a person to be mayor, who had been mayor the preceding year, which was then a void election by stat. 9 Ann. c. 20, s. 8, since repealed by 3 & 4 Vict. c. 47, s. 1; *vid. per Patteson, J.*, 5 A. & E. 589; *et vid.* 2 Stra. 1003. 1157.

(e) *R. v. Courtenay*, 9 East, 206. As to pleading a swearing in before the proper officer, *R. v. Malden*, 4 Burr. 2135. 2130. As to evidence, 4 Burr. 2135; *R. v. Phillips*, 1 Burr. 292.

(f) *R. v. Lisle*, Stra. 1090. Probably the form of an election must have a colour of legality, or it would not suffice to save the party from being an usurper, *ex. gra.* if it was made at an assembly of persons riotously meeting without due summons, contrary to the charter, which is an indictable offence (2 Show. 236), such election would not suffice.

(g) *R. v. Lisle*, Stra. 1090, explained 4 Burr. 2140.

(h) *R. v. Lisle*, Stra. 1091.

(i) *Vid. R. v. Nance*, cited 4 Burr. 2132; *R. v. Harper*, 5 East, 219.

(k) *Finch*, Law, 19; *vid. Done v. Smethier*, Cro. Car. 415; *Rowlett's case*, Dyer. 188. A.; *Bacon's case*, Dyer, 220, B.; *Jenk. Cent.* 90.

As regards the duration of offices in corporations there is no certain rule; it is determined in each case by custom or the constitution of the body; and where either has fixed the term during which a corporator may hold an office on being elected to it, the corporation cannot elect him to the office for any other term either less or more; for the custom, or the charter, as the case may be, must be pursued in this as in all other corporate acts and proceedings.^(l) And it is therefore a good return to a mandamus to restore an amoved officer, to explain that the corporation, having a power by custom or charter to elect such officers during pleasure, had elected him so, and amoved him accordingly, without adding any reasons for so doing,^(m) and though he was not summoned or heard in his defence.⁽ⁿ⁾ A corporator elected to an office in the corporation is bound to take notice of his election, whether made by the whole corporation or by a select body;^(o) and the corporation (having previously made a bye-law inflicting a penalty on all who do not serve offices when duly elected to them) may proceed upon such bye-law, of which also the corporator is presumed to be aware, or by indebitatus assumpsit, for the penalty therein limited,^(p) although the *recusant party might be indicted, or proceeded against criminally by information in the Queen's Bench. Where, however, it [*218] appeared that the corporation might have exacted a penalty for the refusal, and it did not appear that the party had obstinately refused, and he did not usually reside within the borough, the court refused to grant an information.^(q)

With respect to the question of who may be electors in corporations, it appears to have been in early times laid down by the judges, that a corporation may delegate by a bye-law their general power of election, either of members or officers, to a select body;^(r) but this has been deservedly questioned, and is no longer the law with respect to municipal corporations by the Municipal Corporations Amendment Act, and since that intimation of the sense of the legislature, there can be little doubt that the courts would look narrowly into any such bye-law that might be set up by any other corporation. A bye-law so restricting the power and right of election would only be allowed upon proof that it was consistent with the spirit of the corporate constitution, and besides was not unreasonable, unless there were an immemorial custom to support it, and such custom might plainly stand with the charters of

(l) *B. v. Mayor, &c., of Coventry*, 1 *Ld. Raym.* 391; *S. C. Salk.* 430; *R. v. Mayor, &c., of Cambridge*, 2 *Show.* 69.

(m) *R. v. Mayor, &c., of Andover*, 1 *Ld. Raym.* 710; *Com. Dig. Franchises*, F. 32. In municipal corporations the Court of Queen's Bench will control the discretion of the corporation in this respect since the Municipal Corporations Act.

(n) *Com. Dig. Franchises*, F. 32.

(o) *Vanacker's case*, 1 *Ld. Raym.* 496; *S. C. Salk.* 142.

(p) *Id. Ibid.*; *Mayor, &c., of York v. Toune*, 1 *Ld. Raym.* 502.

(q) *R. v. Denison*, 2 *Lord Ken.* 259.

(r) *Case of Corporations*, 4 *Rep.* 77; *R. v. Spencer*, 3 *Burr.* 1827; *Case of Corporation of Colchester*, 3 *Bulst.* 71. Where the constitution of the corporation declares by whom certain officers are to be elected, the other officers must be elected by the whole body; 1 *Rol. Abr.* 513.

the body politic.(s) In one case the decision went somewhat further, for it was held that, where there was an ancient usage, though there had been two instances of elections varying from it, the court ought not to interfere upon the words of a charter which were in some degree doubtful.(t) It will be remembered, that we found it to be a principle in the interpretation of charters, to take usage as a guide where the words were doubtful;(u) and in fact the decisions which seem to contain the law as to corporations of a public nature, other than municipal, do hold, that by a bye-law founded on ancient custom, or if not, a reasonable and convenient bye-law in unison with the constitution, such bodies may delegate the power of election to a select body.(x) But it will not be allowed that an integral part of the corporation should be excluded from a right of election which they had by charter;(y) and moreover, when an integral part, composed of a definite number, is required to vote at an election, a majority of such integral part must [*219] *attend the election and a majority of those present will bind the rest of the integral part.(z)

But though so much has been allowed to custom and convenience, yet it has always been held, that no bye-law could narrow the number of the parties who were declared eligible for office by the constitution, or who necessarily were so from the operation of its provisions.(a) On the other hand, a bye-law cannot extend the number of the eligible as fixed by the constitution,(b) nor appoint the election to be made in a particular mode not prescribed or sanctioned by the constitution of the body.(c) So where by the charter an election is to be made by the majority of a particular body, a casting voice, in case the votes are equal, cannot be given by

(s) *R. v. Attwood*, 4 B. & Ad. 481, where the custom was of 340 years standing, and might be considered to have been confirmed by one of the charters, *id.* 486; *R. v. Spencer*, 3 Burr. 1827; *Newling v. Francis*, 3 T. R. 196. The necessity for a bye-law founded on such usage does not appear obvious, but it has been strongly asserted; *R. v. Tomlyn*, Cas. Temp. Hardw. 316; this case, however, has not been adhered to.

(t) *R. v. Mayor, &c., of Chester*, 1 M. & Selw. 101. Where it is contested between two bodies in the corporation which has the right to elect, the court, on their consenting respectively, may perhaps grant a feigned issue to try the right; *R. v. Mayor, &c., of Norwich*, Stra. 55; *R. v. Mayor, &c., of Rye*, 2 Burr. 798; *R. v. Harris*, 3 Burr. 1420.

(u) *Gape v. Handley*, 3 T. R. 288, n.; *R. v. Grosvenor*, 7 Mod. 128.

(x) *R. v. Attwood*, 4 B. & Ad. 502; *R. v. Westwood*, 2 Dow. & C. 21.

(y) *R. v. Head*, 4 Burr. 2515. Vid. judgment more fully reported from MS. notes of Yates, J., in 3 Merew & Steph. Hist. Boroughs, 2241. 2242; *R. v. Spencer*, 3 Burr. 1833; *Newling v. Francis*, 3 T. R. 196.

(z) *R. v. Miller*, 6 T. R. 268.

(a) *R. v. Spencer*, 3 Burr. 1827; *vid.* 4 B. & Ad. 502, 503, 504. A custom that no person shall ever be eligible to an annual office, after serving two years successively, may be a good custom; *R. v. Mayor, &c., of London*, 1 T. R. 423.

(b) *R. v. Bumstead*, 2 B. & Ad. 699.

(c) *Per Parke, J., in R. v. Bumstead*, 2 B. & Ad. 704. Nor will any degree of laches in the whole body in abstaining from the exercise of their vested right of election, suffice to give it to a select body; the right of election being a franchise which they cannot surrender or transfer by mere non user; *R. v. Tomlyn*, Cas. Temp. Hardw. 316; *R. v. Grosvenor*, 7 Mod. 198; *R. v. Castle*, Andr. 124. The court will direct a feigned issue where the right of appointment to a corporate office is contested between strangers to the corporation; *Sandys v. Sandys*, 1 Q. B. 316, note.

bye-law to the presiding officer, for such alteration is not sanctioned by the charter, although it may be extremely convenient.(d) The principle seems to be here applicable, that no one can transfer a larger right than he himself is possessed of;(e) but in the case just mentioned, the corporation possessing only the power of election, through the medium of the particular body, specifically granted by the charter, attempted to convey out of themselves an addition to that right, which they could not do, because it had never been vested in them.(f) So a corporation has no power, in the absence of words conveying it in their constitution, to appoint that an election shall be made by a specific majority, ex. gr. two-thirds of the whole body of electors, instead of by a simple majority, which alone is the kind of majority known to the common law.

But by statute, charter, or ancient custom not inconsistent with the charter, elections to offices may be made by one body, and the right of approbation vested in another body;(g) and if the latter body refuse their approbation without due cause, a mandamus to compel them to admit will issue.(g) Subject to these restrictions, however, all corporations, not being municipal (elections in which are now regulated *by [*220] statute), have the power of settling the manner of their elections by bye-law.(i)

An important principle in corporate elections, from which spring many nice questions,(k) which however it would not be useful to enter upon at present, is the following. Wherever a power of election is vested in a definite number, and *quorum* A. and B. are to be two, the presence only of A. and B., and not their assent, is requisite to make a valid election;(l) otherwise such a provision would operate to confer a *veto* on the proceedings upon A. and B., and a *veto* is never construed to be conferred upon

(d) *R. v. Ginever*, 6 T. R. 732; *R. v. Bumstead*, 2 B. & Ad. 699. No officer of a corporation has a casting voice of common right; 15 Vin. Abr. 184, pl. 8; *Reg. v. Chapman*, 15 Vin. Abr. 214, pl. 4; but a casting voice may be given by charter or prescription; *id.*, per Holt, C. J., *vid. Anon.*, 7 Mod. 12; *Anon.*, 12 Mod. 232. Instance of casting voice given by charter, 3 T. R. 201.

(e) *Broom's Max.* 352. If there be an equality of votes, there is no election, and a mandamus may be had to compel an election; if it is disobeyed, the whole of the meeting may be brought up as in contempt; *Reg. v. Mayor, &c., of Bath*, Holt, R. 443.

(f) *Vid. per Parke, J.*, 2 B. & Ad. 704.

(g) *Reg. v. Mayor, &c., of Norwich*, 2 Salk. 436; *vid. Salk.* 190, 191; *Barber v. Boulton*, 1 Stra. 314; *R. v. Tucker*, 3 Burr. 1835; *vid. 4 T. R.* 486; *vid. 3 B. & Ad.* 263. The right of approval may be in a stranger to the corporation; *Wright v. Fawcett*, 4 Burr. 2041.

(i) *Newling v. Francis*, 3 T. R. 189.

(k) *Vid. sup. MAJORITY.*

(l) *Reg. v. Bailiffs, &c., of the Town of Ipswich*, 2 Ld. Raym. 1232; *Cotton v. Davies*, 1 Stra. 53. Of course, in such case, the forcible exclusion of A. or B., or both, would vitiate the election; but it may be a question whether it would amount to a riot; it rather seems only to have the character of an affray; at least if it took place during the election, and not before the election were begun; for that which would be a riot if the assembly were not lawfully met upon a lawful occasion, is only a common affray, in the case of a corporate assembly duly convened and met for the lawful purpose of an election; *Corporation of Grampound case*, Ld. Raym. 965; 1 Hawk. P. C. cap. 65, s. 2; 19 Vin. Abr. 236. But the disturbance of an elective assembly by more than two persons, who came with clamour and noise, in order to interrupt the proceedings, is a riot in those persons; *Reg. v. Soley*, 11 Mod. 115. An affray arising among the members of a corporate assembly is to be visited on the parties guilty; 19 Vin. Abr. 237.

any body in, or any particular member or members of, a corporation without the clearest words to show the intention of the charter or constitution to be so, and even then it might be very doubtful whether such an express opinion in a charter would not be bad, as being contrary to the general law of the realm, which, it seems, knows nothing of any other mode of election than by a simple majority.^(m) We may add here, that where the number of electors is indefinite, and some unqualified persons vote, on the want of qualification being discovered, it would seem that the bad votes ought to be cast out, and the election decided according to the reckoning of the majority of good votes.⁽ⁿ⁾ But where by the constitution the number of electors is limited, and there are some who vote without being qualified, it would seem that the election is void for the whole.^(o) In the first case, if the disqualification had been discovered before the votes were given, there is no doubt that, in other than municipal elections, they might have been rejected by the presiding officer; in the second case, the election would be void, because it cannot be known which way the votes of those who ought to have been on the list instead of the unqualified parties who actually voted, would have gone had they been present, and exercised the right, nor can it be told how far the bad votes might have influenced the rest, and so affected the result of the election; and if their disqualification had been discovered before their votes were given, and their votes had been rejected, there could not have been an election at all, until their places had been properly filled up, so that this case is not like the former in this respect.

We have seen that generally where a corporator, being eligible, is duly elected to a corporate office, the Court of Queen's Bench will interfere, if necessary, by mandamus, to compel the corporation to admit and give him complete seisin of the office.^(p) On the other hand, when, not being exempt or disqualified, a man is duly elected to an office, the court, if the corporation is a public one, and the office of a sufficiently important nature to justify its interference, and in all cases where the office is connected with the administration of local jurisdiction vested in the corporation, or the administration of justice, will interfere by mandamus, in case of his refusal, to compel him to take upon him and serve the office.^(q)

^(m) Vid. Rol. Abr. Corporations, G. pl. 6.

⁽ⁿ⁾ Vid. 8 Mod. 34.

^(o) R. v. Mayor, &c., of Bedford, 8 Mod. 34, qu. tam. So where a certain number are to be nominated by one body, and one is to be elected out of them by another body, all the nominees must be qualified in every respect; R. v. Peacock, 4 T. R. 686. Where there is a dispute between two parts or bodies of officers of a corporation as to which has the right of nomination to an advowson belonging to the corporation, the court may direct a feigned issue to try the right; Gape v. Handley, cited 3 T. R. 288; et vid. 1 Will. 4, c. 21, s. 4.

^(p) The Courts of Chancery disclaim all jurisdiction either as to the election or amotion of corporators of any description; Att.-Gen. v. Earl of Clarendon, 17 Ves. 491; vid. per Dodderidge, J., Dyer, 332, B. marg. As to elections of fellows of colleges, Att.-Gen. v. Talbot, 3 Atk. 662; 1 Ves. Sen. 474; Mitf. Plead. 225.

In the Queen's Bench the application is of course; R. v. Rye, 2 Keny. 48.

^(q) R. v. Leyland, 3 M. & Selw. 186; R. v. Wodrow, 2 T. R. 731. The corporation may pass a bye-law for the purpose of compelling persons elected to take offices upon them; Vanacker's case, 1 Lord Raym. 496; 4th edit.; S. C. Salk. 142; Hollings v. Hungerford, cited 1 Wils. 235.

This seems to be the result of the cases, and it is remarkable, because, in most of the instances designated above, to refuse the office is a common law offence and punishable by indictment,^(r) or criminal information,^(s) and therefore to grant a mandamus in such case might seem contrary to the principle on which the court professes to act, namely, that the writ will be refused where there is another specific and adequate legal or equitable remedy; but in fact the punishment of the corporator by fine or imprisonment is no remedy to the corporation, who are nevertheless deprived of his services in the office to which they have appointed him, unless he may be obliged to take upon him the discharge of its duties, notwithstanding his recusancy. The corporation have, probably, the remedy of an action on the case for the breach of duty; for every corporator, upon entering the corporation, is bound to perform all the duties that may be cast upon him by his position as a corporator; he takes the burden and the benefit together.^(t) Such is the general rule; but in the case of municipal boroughs it is now provided,^(u) "that every person, duly qualified, who shall be elected to the office of alderman, councillor, auditor or *assessor, and every councillor who [*222] shall be elected to the office of mayor for any borough, shall accept such office to which he shall have been elected, or shall in lieu thereof pay to the mayor, aldermen and burgesses of such borough, such fine not exceeding fifty pounds in case of aldermen, councillors, auditors, or assessors, and such fine not exceeding one hundred pounds in case of mayor, as the council of such borough, by a bye-law to be made as hereinafter provided,^(x) shall declare in that behalf; and such fine, if not duly paid, shall be levied by the warrant of any justice having jurisdiction within the borough, who is hereby required, on the application of the council, to issue the same, by distress and sale of the goods and chattels of the person so refusing to accept office, with the reasonable charges of such distress; and every such person so elected shall accept such office by making and subscribing the declaration hereinbefore^(y) mentioned, within five days after notice of his election, otherwise such person shall be liable to pay the said fine as for his non-acceptance of such office, and such office shall thereupon be deemed to be vacant, and shall be filled up by a fresh election to be made in the manner hereinbefore men-

(r) Vanacre's case, Carth. 480; S. C. 1 Lord Raym. 499; R. v. Mayor, &c., of Bedford, 1 East, 77. It must clearly appear to the court that the refusal is an offence in the circumstances of the party charged; R. v. Grosvenor, Stra. 1193; S. C. 1 Wils. 18; and the granting a criminal information in such cases is discretionary with the court; Reg. v. Hungerford, 11 Mod. 142.

(s) R. v. Wodrow, 2 T. R. 731; per Buller, J., in R. v. Whitwell, 5 T. R. 86; R. v. Larwood, 1 Lord Raym. 29; S. C. Salk. 167; vid. R. v. Denison, 2 Lord Keny. 250.

(t) Vid. the reasoning in Mayor, &c., of Lyme v. Henley, 1 Bing. N. C. 222. It makes no difference that the duty is only imposed by charter, and not by statute; id. So if he accepts the office, but omits to perform the duties of it, an action lies at the suit of a party injured, though no fees are payable to him.

(u) 5 & 6 Will. 4, c. 76, s. 51. For the details of elections of these officers as prescribed by that statute, vid. the heads, MAYOR, ALDERMEN, &c., respectively, *infra*.

(x) Vid. 5 & 6 Will. 4, c. 76, s. 90, and *infra*, note (z).

(y) Vid. 5 & 6 Will. 4, c. 76, s. 50; 7 A. & E. 221; 10 A. & E. 365.

tioned:(z) provided always, that no person disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body, shall be liable to such fine as aforesaid: provided also, that every person so elected to any such office, who shall be above the age of sixty-five years, or who shall have already served such office respectively, or paid the fine for not accepting such office respectively, within five years from the day on which he shall be so elected, shall be exempted from accepting or serving the same office, if he shall claim such exemption within five days after notice of his election: provided always, that nothing in this act contained shall extend to compel the acceptance of any office or duty whatever in any borough by any military, naval, or marine officer in his majesty's service on full pay, or by any officer or other person employed and residing within any of his majesty's dockyards, victualling establishments, arsenals, or barracks."

This enactment supersedes, in municipal corporations, the ancient mode of compelling by mandamus the service of any corporator duly elected into a corporate office, for it gives the means to the corporation of compensating themselves by exacting a fine, fixed by a previous bye-law passed with that object, from the recusant party, and declares that the office shall thereupon be considered as vacant, and a fresh election proceeded with in order to fill it. In all other corporations, however, of a public character, and entrusted with any description of local jurisdiction by the crown, and in respect of all offices in municipal corporations not within the above list, it appears that the method of mandamus to [*223] compel the party to serve is available; and the principle upon which *such compulsory process issues is this, that it is the prerogative of the sovereign to command(a) the services of all his subjects, at least, in all offices relating to the administration of the government of the realm; and when any portion of the realm is confided, by the crown, to the local jurisdiction of a corporation, the powers of the crown will also be extended to aid them in compelling the performance of such duties as may be necessary for exercising and preserving the jurisdiction entrusted to them.

In confirmation of the view above taken of the effect of the provision just stated in superseding the process by mandamus, we may observe, that before the date of that statute it was held that the payment of a fine, under a bye-law, did not discharge a corporator, when duly elected, from the obligation of performing the office, where the fine was not payable by the bye-law in lieu of such service.(b) Here, however, the fine

(z) Vid. the titles MAYOR, ALDERMEN, COUNCILLORS, AUDITORS, ASSESSORS, respectively, *infra*.

(a) Knowles v. Luce, Moor. 109. 111; R. v. Larwood, 1 Lord Raym. 32.

(b) R. v. Bower, 1 B. & C. 585, which case also decided that it was an offence at common law to refuse an office when duly elected; et vid. Com. Indictment, D.: R. v. Burder, 4 T. R. 778. It is very doubtful whether a bye-law thus commuting the services for a payment would be good, unless under a special provision in a charter or statute; for it would be unjust and unequal in its operation, being calculated to favour the rich; it would in most cases be an alteration in the constitution of the body; and it would be selling an exemption, which there seems to be no reason why a corporation should be entitled to do any more than to sell a franchise; R. v. Breton, 4 Burr. 2260. Vid. tam. R. v. Wodrow, 2 T. R. 731.

is declared to be in lieu of the acceptance of the office, and on payment or levy of it the office is declared to be vacant, &c., as before stated. Even if a bye-law were passed by any public corporation of the description before referred to, not being a municipal corporation, imposing a penalty for not accepting a corporate office, and expressly stating that the penalty should stand in lieu of service of such office, it does not appear quite clear that such bye-law would be valid to take away the common law power of compelling service in such cases; for though it is universally true that *quique potest renunciare juri pro se introducto*, yet that maxim does not extend to enable a body invested with public functions to waive the rights which have been given them for the public purpose of securing the proper execution of such functions.

The above view is also fully borne out by a subsequent provision for the resignation of officers in municipal corporations, and for refusals to take office on conscientious grounds, as follows: (c) "And whereas no provision is made in the said act (5 & 6 Will. 4, c. 76) for resigning any corporate office on payment of a fine or otherwise, be it enacted, that every person elected into any corporate office in any of the said boroughs, (d) may at any time resign such office on payment of the fine which he would have been liable to pay for non-acceptance of the same *office: [224] provided that no person enabled by law to make an affirmation, (e) instead of taking an oath, shall be liable to any fine for non-acceptance of office in any borough, by reason of his refusal, on conscientious grounds, to take any oath or make any declaration required by the said act, or to take upon himself the duties of such office." These provisions seem to tend strongly to show that the payment of the fine was intended, by the legislature, to have the effect of completely purging the offence of refusing the office. With respect to the fine, as it is called, in the above enactments, (f) it must be fixed previously to the case arising in which it is to be exacted, or the bye-law affixing it will be bad; for every bye-law

(c) 6 & 7 Will. 4, c. 104, s. 8.

(d) This refers to s. 1, where we find that the boroughs intended are those named in schedules A. and B. annexed to the stat. 5 & 6 Will. 4, c. 76. Hence it may hereafter become a question whether this provision extends to enable officers in municipal corporations, created since the passing of that act, to resign on payment of a fine, which in fact is the same doubt which caused the above enactment, 6 & 7 Will. 4, c. 104, s. 8. Vid. *infra*, RESIGNATION.

(e) 5 & 6 Will. 4, c. 76, s. 21; vid. 1 & 2 Vict. cc. 14, 15. Generally refusing to take the oath is refusing to take the office; Langham's case, March, 179. 189, 190. The words "any declaration required by the said act" include the declaration under 9 Geo. 4, c. 17, s. 2; vid. per Patteson, J., in *R. v. Winchester*, 7 A. & E. 221. Form of mandamus to administer the declaration. Corner's Cro. Pract. Q. B. App. 136.

(f) It would seem that this payment is not correctly termed a fine, according to the legal definition of the word, which is a penalty imposed by a court of record, *Groenvelt v. Burwell*, 1 Lord Raym. 454. 467, and having imprisonment for its correlative, so that wherever a man may be fined he may be imprisoned; Yearb. 34 Hen. 6, fol. 24; vid. 4 Black. Com. 380; *Callis, Sewers*, 175, 176. Also all fines for offences belong to the king; *Groenvelt's case*, 3 Salk. 265; vid. acc. per Lord Hardwicke, C. J., *Cas. Temp. Hardw.* 353. It is curious to observe the antiquity of this principle, and of that of a *qui tam* action: *Sed et levioribus delictis pro modo penarum equorum pecorumque numero convicti mulctantur; pars mulctæ regi vel civitati, pars ipsi qui vindicatur vel propinquis ejus exsolvitur*; Tacit. De Mor. German. XII.

must be prospective and also general in its operation, not being good if made *pro hac vice*, although it may be intended to stand for future occasions also. (*g*) Also there is nothing to prevent the corporation, provided they keep within the statutory limits as to the sums in each class of cases, from repealing such bye-law, and making a fresh one altering the amount of the fine, and repeating the same process from time to time (*h*) (subject to the above-mentioned requisites), until they arrive at such an amount as may suffice to secure the performance of the service, or otherwise, as they may find convenient. In case the corporation should altogether omit to make these bye-laws, it is probable that, as directory provisions in a statute which concern the public interest are to be construed as obligatory, the Court of Queen's Bench would think proper to compel them to perform this duty by mandamus. (*i*) But whether, if they failed to make them, that court would grant a mandamus to compel a corporator elected to an office to serve, and so remit them to their common law right, may be doubtful, for they would make the application with but a bad grace, as the necessity for it would be caused [*225] by their own laches. Another *question would arise, as to resignations, in case no fines were fixed, and perhaps, in such case, an officer would be allowed to resign without waiting for the acceptance of the corporation, without which at common law his resignation would be invalid. The application to the justice for a warrant to distrain for the amount of the fine, must be made, as all acts of the council are to be performed, in pursuance of a resolution, and ought probably to be in writing, reciting such resolution, with the parties' names and other particulars necessary for the guidance of justice in making out his warrant.

Reverting to the term (*k*) used by the legislature respecting the fines, &c., just mentioned, it will be observed, that "every councillor who shall be elected to the office of mayor" is made liable to the fine upon refusal; and it would seem, from the broad distinction, which is preserved throughout the statute, (*l*) between aldermen, and councillors, that the omission of the word alderman in this part of the section was designed, and that the effect is, that an alderman elected mayor is not exempted from serving by paying a fine, for in that case the section gives no exemption; and though the corporation, notwithstanding, might, by their common law authority, pass a bye-law imposing a penalty on every alderman refusing to serve, on being duly elected and

(*g*) Vid. *supra*, BYE-LAWS, p. 76. 7 Q. B. 451; vid. *City of York v. Town*, 5 Mod. 444.

(*h*) Per Ashhurst, J., 3 T. R. 198; vid. 12 East, 22.

(*i*) Vid. *Vanacre's case*, 1 Lord Raym. 499; S. C. 5 Mod. 440; *R. v. Mayor, &c., of Norwich*, 1 B. & Ad. 310; *Pearce v. Morris*, 2 A. & E. 84; 2 Dwar. Stats. 713, et seq.; 5 T. R. 538. 636; *Steward v. Greaves*, 10 M. & W. 719; *Cane v. Chapman*, 5 A. & E. 652; *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 531. It is to be observed, that s. 90, to which the above s. 51 refers, apparently, when speaking of bye-laws to be made "as hereinafter provided," does not contain any reference to such bye-laws, but only gives power by the words "it shall be lawfull" to make bye-laws for the "good rule and government of the borough," with fines not exceeding five pounds. Therefore there may be a doubt whether power is given to make these bye-laws, and, if not, whether the corporation can make them at common law.

(*k*) Vid. *sup.* p. 222; 5 & 6 Will. 4, c. 76, s. 51.

(*l*) Vid. sections 25 and 49 especially.

not being exempted, &c., for such bye-law would not be at variance with the other laws of the realm in general, or inconsistent with, or repugnant to, this statute in particular, and therefore would be valid; yet that would not in general operate to exempt him from serving, not even, as it appears from what we have said above, if the bye-law should state that the payment of the penalty should stand in lieu of such service; and, therefore, as it seems, an *alderman* so refusing would be compellable by mandamus to serve as at common law, for there is no other remedy; and the rule is, that in general the court will grant a mandamus in support of charters, customs, and statutes, where there is no specific adequate remedy at law, as by quo warranto information, or by quare impedit,^(m) or in equity; ⁽ⁿ⁾ and, in respect to officers in corporations, they will issue the writ to compel them to do the duty of their offices, though they may be under penalties for refusal, by bye-law or otherwise, so that the corporation might, to that extent, enforce by action the performance of the duties.^(o)

The exemptions of lunatics and persons of imbecile mind seem to *have been introduced into the statute from a needless excess of caution, because "fools and madmen are tacitly excepted out of [*226] all laws whatsoever, and therefore it would have been ridiculous to have made an express exception of them."^(p) It is quite evident, therefore, that lunatics and persons of imbecile minds are in all cases ineligible as members or officers of corporations.

The clergy also appear to be exempt at common law from the obligation of serving corporate offices^(q) of every kind; and it is enacted by the Municipal Corporations Act, that no person in holy orders, or the regular minister of any dissenting congregation, shall be qualified to be elected, or to be a councillor or alderman of any borough mentioned in the act;^(r) the disqualification appears to be needless as regards persons in holy orders.

Attorneys are exempt, as such, from serving offices in municipal corporations;^(s) but they shall not be so if they have left off practice for a year.^(s)

The next point to which we may direct attention is a statement of the principles and modes in which the Court of Queen's Bench interferes to rectify mistakes or frauds in corporate elections by means of mandamus and quo warranto information. First, by a late enactment,

(m) *R. v. Chapter of Exeter*, 12 A. & E. 534. It is the peculiar province of the Queen's Bench to exercise jurisdiction over corporations, in order to see that they act agreeably to the end of their institution; *R. v. Askew*, 4 Burr. 2188.

(n) *Reg. v. Pitt*, 10 A. & E. 272.

(o) *R. v. Everett*, Cas. Temp. Hardw. 261. In cases of corporations the writ will sometimes go, though an indictment would enforce the doing the act; *Ex parte Robins*, 7 Dowl. 568; *vid.* 2 B. & A. 646; 2 Q. B. 64. Such mandamus must show that the thing required to be done by it is within the range of the official duties of the defendant, *Reg. v. Hopkins*, 1 Q. B. 161; and, in most cases, that there has been a demand and refusal to do it. It will issue to an inferior officer where there is no other remedy; *Reg. v. Kendall*, 1 Q. B. 366.

(p) *Per cur.* *London City v. Vanacker*, Carth. 483.

(q) *Dr. Lee's case*, 1 Ventr. 105; S. C. 1 Lev. 303; 2 Inst. 3.

(r) 5 & 6 Will. 4, c. 76, s. 28.

(s) *Mayor, &c., of Norwich v. Berry*, 1 W. Bla. 636.

the established modes of interference, which are writ of mandamus and information in the nature of quo warranto, are materially expedited in cases of elections to offices in corporate cities and towns, as follows: (t) —“ And whereas it is expedient to render certain proceedings by way of quo warranto and mandamus, so far as they affect corporate offices in boroughs, more summary and expeditious, be it therefore, enacted, that from and after the passing of this act, in all cases of intended application to the Court of Queen’s Bench, either for a mandamus to proceed to an election of any corporate officer or officers in any of the aforesaid boroughs,(u) or for an information in the nature of a quo [*227] *warranto against any person claiming to be a corporate officer of and in any of the said boroughs, it shall be lawful for the party intending to make such application to give notice in writing thereof to the party to be affected thereby at any time not less than ten days before the day in the said notice specified for making such application, in which notice shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavits whereby the application will be supported; and thereupon it shall be lawful for the said last-mentioned party to show cause in the first instance against such application; and if no sufficient cause be shown, it shall be lawful for the said Court of Queen’s Bench, on proof of the due service of such notice and statement, and of the delivery of

(t) 6 & 7 Vict. c. 89, s. 5; form of mandamus to proceed to election, *Corn. Cro. Pract. Q. B. App.* 134; of notice pursuant thereto, *id.* 135; requisites of affidavits in support of an application for a mandamus, *id.* 220.

(u) It appears by sect. 1, that these words mean the boroughs mentioned in Schedules A. and B. of the Municipal Corporations Act (5 & 6 Will. 4, c. 76). Hence it may be doubted whether the above enactment will be applicable to cases of elections in municipal corporations created since the passing of the Municipal Corporations Act. Any person who has an interest in the matter of the writ may be prosecutor of a mandamus; poverty is no ground of objection to him by itself; a writ may be sued in form *pauperis*; nor is it a ground for exacting security for costs; *Reg. v. Mayor, &c., of Malmesbury*, 9 Dowl. 361. By the common law, where there was a vacancy in a definite body of officers, which it was the duty of the corporation to keep full, the court would grant a mandamus to the corporation to proceed to an election to a vacancy, though no one was particularly injured by their neglect to do so; but in the case of an indefinite body, which, from the nature of it, the corporation might add to by fresh elections as they see fit, or where there is a discretion in a part of the corporation to approve the party elected, the court would not interfere unless the party applying could show that some legal injury was caused to him personally by reason of the omission; *R. v. Mayor, &c., of London*, 3 B. & Ad. 255; *Case of Nottingham*, Bull. N. P. 201; *S. C. Sayer*, 36. The general principle is that the court will not interfere with the discretion vested in a corporation unless it is exercised so as to injure some one: but a duty imposed on the corporation, either by charter, statute, or perhaps immemorial custom, they will oblige them to perform generally; 1 B. & C. 86; 3 B. & Ad. 266; 2 B. & Ad. 158. A single writ of mandamus may go to proceed to the election of more than one officer if there be more than one vacancy; *R. v. Mayor, &c., of Nottingham*, *Sayer*, 36. But in no case can a mandamus to a corporation, complicated with various independent matters, be allowed; *R. v. Mayor, &c., of Kingston-on-Hull*, Stra. 578; *Case of Andover*, Salk. 433; *Anon.* Salk. 436. In case of disobedience to a mandamus to proceed to an election, the parties who ought to execute the order will be liable as for a contempt. In one case a disobedient mayor was imprisoned for three months and ordered to pay all costs; *R. v. Mayor of Truro*, cited 1 H. Bla. 209.

a copy of such affidavit as may be used for the purpose of supporting such application, to make the rule for such mandamus or information absolute, if the said court shall so think fit, in the first instance; and also, if they shall so think fit, to direct that any writ of mandamus thereby ordered to be issued, shall be peremptory in the first instance; and also that the venue in any information thereby ordered to be filed, shall be laid in the county of Middlesex or in the city of London, and that the issue or issues of fact thereon, if any, shall be tried at the sittings at nisi prius of the said court at Westminster or in London, by a jury of the same county or city respectively." (x)

*Most questions respecting the writ of mandamus arise on [*228] returns thereto.

The first point to be remarked, with respect to the return to a writ of mandamus in case of a corporation, is that the return to it need not be under the common seal of the corporation; for the return is always to be filed of record, and matter of record done by a corporation need not be sealed; (y) nor need it be signed by the head or other officer of the

(x) It has been settled that a burgess is not a corporate officer within this act; *In re Milner*, 5 Q. B. 589. But it does not appear that a burgess may not still have a writ of mandamus to restore him to his place when improperly removed; *Clerk's case*, Cro. Jac. 506; *R. v. Mayor, &c., of Wilton*, 5 Mod. 257. It seems to be questionable whether a borough coroner is within it; *Reg. v. Grimshaw*, Q. B., T. T. 1847, 16 L. J. (N. S.) Q. B. 385; S. C. 5 D. & L. 249. Where strong grounds are shown to the court for concluding that there has been such misconduct as to render an election void, they will grant a mandamus to proceed to a fresh election, although there be an actual plenary of the office, where the question cannot be determined (from the nature of the office) by quo warranto information, or action at law, *R. v. Rector, &c., of Birmingham*, 7 A. & E. 254; or if the election was void, as being an election of a disqualified person. *Reg. v. Corporation of Pembroke*, 8 Dowl. 302. It is not necessary that the office should be freehold (which is now considered to mean an office for life at least), nor one of considerable permanency; the writ has been granted to compel the election to an office which was not necessarily more than annual, *R. v. St. Martin*, 1 T. R. 146; and even in the case of ministerial officers it has been granted where they were necessary to the due execution of the powers confided to the corporation for the administration of justice, *R. v. Mayor, &c., of Liverpool*, 1 Barnard. B. R. 83; *vid.* cases cited 3 Q. B. 556—559; *vid. inf.* p. 238. An office granted *quam diu se bene gesserit* is an office for life, and the grantee has a freehold interest; *Cruise, Digest, Offices*, s. 27; *Davis v. Waddington*, 7 M. & Gra. 42. The above enactment will probably be so construed as to supersede the practice of issuing cross or concurrent writs to elect, which was sometimes adopted on special grounds; *R. v. Mayor, &c., of Oxford*, Cas. Temp. Hardw. 179; *R. v. Mayor, &c., of Wigan*, 2 Burr. 784. But the enactment will not interfere with the rule, that where there has been an ouster of the officer on quo warranto information, the party applying for a mandamus to proceed to election must wait until judgment be signed before he moves; *R. v. West Looe*, 3 Burr. 1386; *R. v. Mears*, 4 B. & C. 659. In such case the relator has the priority of right to the writ before any one else; *R. v. West, Looe*, 3 Burr. 1387; *R. v. McKay*, 4 B. & C. 658. As to costs, and the proper form of the rule for the payment of them, *Reg. v. Mayor, &c., of Cambridge*, 4 Q. B. 801; *vid.* as to requisites of affidavits, *Corn. Cro. P.*, Q. B. 221; 1 Q. B. 314.

(y) *R. v. Mayor, &c., of Exeter*, 1 Ld. Raym. 223, 4th edit.; 15 Vin. Abr. 214; *R. v. Mayor, &c., of Thetford*, 2 Ld. Raym. 848; per Tindal, C. J., *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 588. The return appears to be ambulatory and revocable until it is filed; 3 Burr. 1644. As to the time between teste and return of the writ, 7 A. & E. 284. Form of return to a writ of mandamus, *Corn. Cro. Pr. App.* 144; *teste*, *id.* App. 2. If the prosecutor omits to proceed to trial on traverse of the return and issue thereon, defendant may have judgment as in case of non-suit; 4 T. R. 689; 3 Q. B. 577. If the prosecutor objects to the legal validity of

corporation; (z) for at common law no officers were obliged to sign their returns, and if the head of the corporation procure a false return to be made to the mandamus, it will be sufficient evidence against him that the writ was delivered to him, and that it has such a return made to it, and that will be presumptive evidence that he made the return until he shows the contrary; also the head, or any other officer, making a false return, makes it at his peril, for he is liable, in his private capacity, (a) to any one whose rights are affected with a possible damage by the falsehood of the return. (b) However, it is not enough on a return, that the party may be able to falsify it in an action; but the matter must be so alleged that the court may be able to judge of it and determine whether it be a sufficient cause or not; (c) for, in general, a return must be certain to every intent. (c)

The old rule of law has been asserted to be, that after a return made, [*229] *no objection could be taken to the writ; but it is otherwise now; and an objection has been held fatal, after a return made to a peremptory mandamus, though such return cannot be heard. (d)

Every return to a mandamus, as has been said, must be certain to every intent, (e) that is, it must have the utmost possible certainty. Thus, to a mandamus to restore to an office, the return was, that he consented to be turned out; it ought to have been more certain, as that he had, at such a court, or meeting, of the corporation or proper body, resigned, and that the corporation has accepted his resigna-

the return, he may demur by 6 & 7 Vict. c. 67, s. 1; if not, he pleads to or traverses all or any of the material facts in the return, to which the defendant may reply, take issue or demur, &c., as if in an action on the case for a false return, by 9 Ann. c. 20, s. 2, and 1 Will. 4, c. 21, s. 3. Amendments before trial, 9 Ann. c. 20, s. 7; at trial, 3 & 4 Will. 4, c. 42, s. 23. As to damages and costs, vid. 9 Ann. c. 20, s. 2; R. v. Mayor, &c., of Glamorgan, 2 Smith, R. 8; Reg. v. Fall, 1 Q. B. 644; vid. 1 Q. B. 751; 2 Q. B. 578; writ of error, 6 & 7 Vict. c. 67, s. 2; 3 Q. B. 528.

(z) R. v. Mayor, &c., of Exeter, 1 Ld. Raym. 223; Reg. v. Mayor, &c., of Thetford, 2 Ld. Raym. 848; R. v. Mayor, &c., of Wigan, 3 Burr. 1644. The bringing of the writ admits the body to be a corporation; R. v. Halse, 1 Keb. 20.

(a) Reg. v. Mayor, &c., of Thetford, 2 Ld. Raym. 849; vid. 1 Q. B. 644. If he were to die between the making and filing, the court might direct an issue to try the authenticity of the return; R. v. Mayor, &c., of Wigan, 3 Burr. 1645.

(b) Generally a possibility of damage, where a right is infringed, gives a ground of action; per Powell, J., Ashby v. White, 2 Ld. Raym. 948; vid. Hunt v. Dorman, Cro. Jac. 478; Wilson v. Mackreth, 3 Burr. 1825; Holford v. Bailey, 18 L. J. (N. S.) Q. B. 110; Sterling v. Turner, 2 Vent. 206; Ferguson v. Earl of Kinnoul, 9 Cl. & F. 280. Where several join in the application for the mandamus, they must join in the action for the false return; Bull. N. P. 202. The stat. 1 Will. 4, c. 21, seems to have nearly superseded the action on the case for a false return, for it gives the prosecutor a right to damages and costs on a traverse to the return; Reg. v. Fall, 1 Q. B. 644.

(c) R. v. Mayor, &c., of Abingdon, Salk. 432.

(d) Reg. v. Ledgard, 1 Q. B. 624; vid. 5 Burr. 2742; Carth. 501; Stra. 896; Cas. Temp. Hardw. 362. But after a return has been made by the proper body in a regular manner, dissident individuals cannot be heard to dispute its propriety; R. v. Governors of St. Andrew's, &c., 7 A. & E. 284. Also the court has a discretion to amend improperly tested writs, which it may exercise after the return; R. v. Conyers, 15 L. J. (N. S.) Q. B. 300; vid. 4 T. R. 499; inf. p. 230.

(e) R. v. Mayor, &c., of Abingdon, 1 Ld. Raym. 559; R. v. Mayor, &c., of Lyme (Mitchell's case), Doug. 80; R. v. Mayor, &c., of Carlisle, 8 Mod. 99. 101. Even a return to a mandamus to elect must be certain to every intent; Salk. 432.

tion;(f) for a resignation of an office is nothing until it is accepted by the corporation, who are entitled to the service of each member in any corporate office to which he may be appointed, and, therefore, have the option whether they will accept of a resignation or not. And a corporation appears to enjoy a completely uncontrolled discretion in this respect; nor is there any injustice or hardship in this; for as no man can be made a corporator against his will,(g) he must be understood, upon entering the corporation, to take the benefits and burdens of membership together. However, the above rule does not make a return bad which relies upon several independent causes;(h) though if any of those causes be contradictory, the return is wholly void.(i) That A. was not a burgess, that he was ineligible to the office of councillor, and that he was not elected, have been held not to be inconsistent averments in a return.(k) And though it expressly appear that the election could not have been good; yet, because the return was inconsistent, the court will avoid it, and put the corporation to their quo warranto, if they wish to get rid of the officer.(l)

*So a return, that a person was not duly elected; that there was a custom to remove; and that he was removed pursuant to [*230] such custom, does not state inconsistent causes(m) why they could not restore the party. With respect to the question of evidence on the issue of not duly elected, it was formerly held that a person who had only one of two qualifications to be elected, might be called as a witness to prove that the exclusive right to be elected resided with persons who had both qualifications, but that a person who possessed both qualifica-

(f) Reg. v. Lane, 2 Ld. Raym. 1304; R. v. Mayor, &c., of Abingdon, 1 Ld. Raym. 559; Com. Dig. Mandamus, D. 5.

(g) Per Yates, J., R. v. Askew, 4 Burr. 2200.

(h) Reg. v. Mayor, &c., of Norwich, 2 Ld. Raym. 1244, 4th edit.; S. C. Salk. 436; vid. 4 Burr. 2044. Where such independent matters are part good and part bad in law, the court may quash the return as to the bad part, and put the prosecutor to plead or traverse the rest; R. v. Mayor, &c., of Cambridge, 2 T. R. 456; but as the party has now the power of demurring to the return, it is doubtful if the court would do so at present, vid. Reg. v. North Midland Railway Company, 11 A. & E. 955, note; 6 & 7 Vict. c. 67, s. 1.

(i) Reg. v. Mayor, &c., of Norwich, 2 Ld. Raym. 1244, 4th edit.; R. v. Mayor, &c., of Cambridge, 2 T. R. 456; R. v. Mayor, &c., of York, 5 T. R. 66. It had been held that the court may reject the bad part and admit that which is valid in a return; R. v. Archbishop of York, 6 T. R. 490; qu. tam. since the party has the power to demur.

(k) R. v. Mayor, &c., of Cambridge, 2 T. R. 456. Where some issues are found for prosecutor, and others for defendant, vid. as to judgment, Reg. v. Trustees of Luton Roads, 1 Q. B. 860, et vid. 3 Q. B. 577.

(l) Vid. Reg. v. Mayor, &c., of Norwich, 2 Ld. Raym. 1244; 2 T. R. 460. Where a return was bad in part and good for the rest, the law used to be, that the bad part might be quashed, and the prosecutor put to plead to the rest; 11 A. & E. 955, note; vid. tam. 6 & 7 Vict. c. 67, s. 1; sup. n. (h).

(m) R. v. Churchwardens, &c., of St. James, Cowp. 413; vid. 2 T. R. 461, 462; et per Buller, J., in R. v. Mayor, &c., Lyme, Doug. 83. A mandamus to admit, stating the party to be duly elected: a return of never duly elected is good; Lambert's case, Carth. 170. In case of a freehold office a return of a custom to amove ad libitum is bad, Warren's case, Cro. Jac. 540; but aliter of a return that they amoved for bribery, R. v. Mayor, &c., of Carlisle, Fortesc. 200; vid. Andr. 105.

tions could not be so called.⁽ⁿ⁾ But since the late enactments which remove the objection of interest to the admissibility of witnesses, the witness would be equally admissible in the last case as in the first.^(o)

Upon a return to a mandamus to swear into an office, that he was not duly elected, the party must prove, on an issue thereon, that he has performed a statutory requisite to be elected, although to do so were not required of him at the election.^(p)

In no case will the court *hear* a return to a peremptory mandamus, not even if it state an attempt made to comply with the exigency of the writ, and the causes which frustrated it;^(q) the proper course is to file a return, showing that the writ has been obeyed in omnibus, and stating how. If the writ is disobeyed, the course is to issue an attachment against those members of the corporation who are responsible for the disobedience;^(r) a rule having been previously obtained (founded on affidavit of the service of the peremptory writ on the proper parties,^(s)) calling on them to show cause why the return should not be taken off the file, and why an attachment should not issue against them for their contempt in not obeying the peremptory mandamus, on notice of the rule to be given them in the meantime.^(t) Who are the proper parties depends partly upon the question to whom the peremptory writ ought to be directed.

[*231] ^{*}Where the corporation at large have the power and *duty* to perform the act which will satisfy the exigency of the writ, there can be no question; the corporation by its name of incorporation, is the proper party for the writ to be directed to.^(u) But on diso-

(n) *Stephenson v. Nevinston*, 2 Ld. Raym. 1353; S. C. Stra. 583; *Hockley v. Lamb*, 1 Ld. Raym. 731; vid. per Buller, J., *Walton v. Shelley*, 1 T. R. 302, 303.

(o) 3 & 4 Will. 4, c. 42, s. 26, and 5 & 6 Vict. c. 85, s. 1.

(p) *Tufton v. Nevinston*, 2 Ld. Raym. 1354; and where he has not been admitted to the office it makes no difference that he had no notice that such proof would be required of him at the trial; S. C. Stra. 585; 2 Ld. Raym. 1354. In case, however, the party had been long in the possession of the office, so that there appeared to be an acquiescence in his right, then it has been held that notice that such proof would be required at the trial must be given him; *R. v. Muskett*, cited in *Tufton v. Nevinston*, 2 Ld. Raym. 1355.

(q) *Reg. v. Ledgard*, 1 Q. B. 616. 622; *R. v. Stephens*, T. Jones, 177. As to writ of error on award of peremptory mandamus, vid. *R. v. Dean, &c.*, of Trinity Chapel, Dublin, 8 Mod. 29; *Mayor, &c.*, of *Sandwich v. Reg.*, 16 Law J. (N. S.) Q. B. 433.

(r) Bull. N. P. 201. However the attachment will not issue if it turns out, even on the motion, that the writ of mandamus is vicious; 1 Q. B. 622.

(s) 1 Q. B. 618. A mandamus ought always to be directed to those, and to those only, who are to obey the writ; *Reg. v. Mayor, &c.*, of Hereford, Salk. 701; *R. v. Mayor, &c.*, of Abingdon, Salk. 699; *R. v. Mayor, &c.*, of Norwich, Stra. 55; *Com. Dig. Mandamus*, C. 1; 15 Vin. Abr. 209; 2 M. & Selw. 599.

(t) 1 Q. B. 618. Form of peremptory mandamus, *Corn. Cro. P. App.* 143.

(u) The corporation must be called upon by the writ in such case, though by its constitution the duty may be actually performed through the intervention, *ministerially*, of a section of the general body; *Reg. v. Ledgard*, 1 Q. B. 623; vid. acc. *Mayor, &c.*, of *Sandwich v. Reg.*, 16 Law J. (N. S.) Q. B. 433; per *Wilmot, J.*, 3 Burr. 1643. The name, style, &c., of the corporation, or of the officers, must be correctly given; *Witherington's case*, 1 Keb. 61. Where the corporation have only the power of doing an act or not at their discretion, and exercise it by refusing to act, a mandamus will not go to compel them to act, the court never interfering with the lawful exercise of a discretion reposed in a body. Vid. instance, *It.*

bedience, in such case the motion must not be for an attachment of the "mayor, aldermen, and burgesses," or against the corporation, by whatever name it may be called; for a corporation cannot be attached;(x) but against the parties who voted against rendering obedience to the peremptory writ at the corporate meeting(y) on the subject, and who carried the question for disobedience, with the addition, it should seem, of those members of the meeting who, being duly summoned, stayed away without adequate excuse; for in such case, as we have seen,(z), the absentees are considered in law to have voted with the majority; and it ought not to be tolerated that a party, by shrinking from his duty, should thus relieve himself from liability, as that would be a species of profiting by his own wrong. Therefore the majority of the corporate meeting, whether of the whole or of a section, who voted for disobedience, plus those members who unduly stayed away, are the proper parties to be attached in case of disobedience to a peremptory mandamus, ordering something to be done which it is in the province of the corporation at large to do in the performance of their corporate functions.

When the thing required is *solely* the duty, not of the corporation, but of an officer or officers, the writ ought to be directed accordingly, but the result of disobedience is not perhaps quite the same as before, for the whole of such body (if not itself a corporation), (or the officer,) would be equally liable to attachment for disobedience, though some of them might have been desirous to obey, inasmuch as the law appears *to know [*232] nothing of any right of voting in such cases, and therefore calls upon all to act;(a) and *their* meeting is not a corporate meeting.

v. Mayor of Liverpool, 1 Barnard. B. R. 82; vid. 1 Burr. 131; R. v. Surrey Justices, 2 Show. 74; R. v. Mills, 2 B. & Ad. 581; R. v. Mayor, &c., of London, 3 B. & Ad. 255. How to return discretion, &c., 3 A. & E. 544; 15 East, 117; 3 B. & Ad. 255. 268; 1 Stra. 115.

(x) Per Keeling, C. J., in *Approved Men of Guildford v. Mills*, 2 Keb. 1; per Littledale, J., 1 Q. B. 619; Anon., T. Raym. 152; 19 Vin. Abr. 152, pl. 12; R. v. Mayor, &c., of Rye, 2 Burr. 798; *Morgan v. Mayor, &c., of Carmarthen*, 3 Keb. 350; vid. *Tyndal's case*, Cro. Car. 253; cont. Cowp. 85; Fitz. N. B. 185, D. These authorities refer to an attachment of contempt, which only issues against the guilty corporators; but an attachment in the nature of a pone may issue against the corporation to compel an appearance; *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bla. 209. It is not sufficient to return to a mandamus, enjoining the corporation to do that which they were constituted, and authorized and empowered to do, that the thing is impossible; *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 531.

(y) Vid. sup. p. 3. It makes no difference whether the business falls within the functions of a meeting of the general body, or of a section, to whom, as *agents merely*, by the constitution, the performance of it may be delegated; 1 Q. B. 623.

(z) Vid. sup. p. 204; per Lord Hardwicke, C., in *Charitable Corporation v. Tutton*, 2 Atk. 405.

(a) R. v. Chancellor, &c., of University of Cambridge, 1 W. Bla. 549, 550. The case of such bodies seems to be very similar to that of trustees under a power, where all must act, and the doctrine of majority does not apply; *Brown v. Andrew*, 18 Law J. (N. S.) Q. B. 153; *Earl Granville v. McNeile*, 18 Law J. (N. S.) Chanc. 164. The party injured by the misconduct of the body or officers mentioned in the text, might maintain an action to recover compensation for such injury against all, or one or more of them, according to the principles recognised and laid down in the judgment of the House of Lords in *Ferguson v. Earl of Kinnoul*, 9 Cla. & F. 280. For such body or officers are merely ministerial as to the writ; and where several persons are jointly bound to perform a duty of a merely ministerial

Whether to state that the party procured his election by bribery is a good return to a mandamus to admit to an office, in all cases, was formerly made a question, (b) it being doubted whether bribery would make the election void, unless the office were an office within the 5 & 6 Edw. 6, c. 19; for though (it was said) elections ought to be free, yet an elector might use his liberty to vote for him that had given him money; and a decision (c) was relied on, in which it was resolved, that a bond conditioned for the payment of a part of the profits of the office of provost martial in the Island of Jamaica was a good bond, though it would have been void under the above-named statute if it had concerned such an office in England. But from subsequent authorities it seems that such a bond would be void at common law, and a court of equity would grant a perpetual injunction against proceeding upon it. (d) And it has been held an offence at common law, the subject of a criminal information, to promise to pay a corporate elector a sum of money to induce him to vote for a particular person to be mayor. (e)

But the statute certainly includes all offices and places concerning the administration of justice, (f) and wholly disables the party bribing, &c., from holding such office; and consequently an election in the corporation to any office of that nature, in which bribery of the electors had been practised, on the part, or on behalf, of the person elected, would be [*233] void by the operation of the statute. Also, it appears, that the party would be disabled, and therefore the election void, although it were not brought about by, and did not ultimately turn on, the effect produced by the bribery of the candidate; one or more instances of bribery, not numerous enough to sway the election, would suffice to incur

character, they are jointly and severally liable for the failure or refusal, to the party thereby injured; per Lord Brougham, S. C., 9 Cl. & F. 289. A disobedient officer was in one case imprisoned three months for the contempt, and ordered to pay all costs; *R. v. Mayor, &c., of Truro*, cited 1 H. Bla. 209. So a return to a mandamus to elect being made, that the votes were equal, it was held that this was a return which the corporation was incompetent to make, and that they must agree to elect some one, and if not, they must all be brought up as in contempt; *Reg. v. Mayor, &c., of Bath*, Holt's R. 443; *vid. Reg. v. Chapman*, 5 Mod. 152; sup. p. 231, n. (x).

(b) Per Holt, C. J., in *Reg. v. Mayor, &c., of Norwich*, 2 Ld. Raym. 1245. Lord Mansfield, C. J., speaks of bribery at elections, generally, as a common law offence. 1 W. Bla. 383.

(c) *Blankard v. Galdy*, Salk. 411. But the offence is punishable at common law; *R. v. Vaughan*, 4 Burr. 2494; ex gra. by criminal information; *R. v. Cripland*, 11 Mod. 387; *Spinage's case*, cited 1 W. Bla. 380. 383. What are offices within the above statute, *vid. 2 Evans's Stats.* 326; et *vid.* 49. Geo. 3, c. 126, which makes the offences of taking money, &c., promising, &c., and soliciting, misdemeanors, ss. 3, 4, et seq. In *R. v. Mayor, &c., of Carlisle*, Fortesc. 200, it was held a good return to say that the party was amoved for bribery.

(d) *Hanington v. Duchatel*, 1 Bro. Cha. C. 124, where the office was not within 5 & 6 Edw. 6, c. 16, and the decision was prior to the stat. 49 Geo. 3, c. 126.

(e) *R. v. Criplane*, 11 Mod. 387; *vid. R. v. Steward*, 2 B. & Ad. 12.

(f) 5 & 6 Edw. 6, c. 16, s. 1. The services of trust, mentioned in the statute as being within the purview of it, appear to be confined to cases where the pecuniary interests of the crown and the public revenue are concerned, and would not, therefore, be applicable to cases of corporate offices, except perhaps in one or two instances; *vid. Hopkins v. Prescott*, 16 Law J. (N. S.) C. B. 259; and that the statute intended to restrain corrupt agreements between grantor and grantee of the office, *vid. per Maule, J., S. C. id.* 262.

the disabilities of the statute.(g) Also the statute makes good acts done by the officer before his removal;(h) he is therefore officer de facto; and the proper course of proceeding has been already stated.(i) It is now, however, settled, that, to promise money for his vote to any one who has a vote for members of a municipal corporation, or for an office in it, is an offence punishable by criminal information;(k) and that in such information it is not necessary to set out the clauses of the charters, which enable the party to whom the promise was made to vote, but that it is sufficient to state that he had the right to vote.(l) The judgment of the court, however, was restricted to the case of a corporation "created for the sake of public government,"(m) and therefore is applicable only to municipal corporations, and such other corporations as may be constituted for the purpose of exercising a local jurisdiction.

As to elections in municipal corporations, regulated by the Municipal Corporations Act, the law of bribery now stands thus:(n)

"And be it enacted, that if any person, who shall have or claim to have, any right to vote in any election of mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passage of this act, ask or take any money, or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward(o) whatsoever, to give,(p) or forbear to give, his vote(q) in

(g) 5 & 6 Edw. 6, c. 16, s. 2.

(h) Ibid. s. 5.

(i) Vid. sup. p. 216.

(k) R. v. Plympton, 2 Ld. Raym. 1377, recognised 4 Burr. 2501; R. v. Mayor, &c., of Tiverton, 8 Mod. 186. When the court will not grant an information, R. v. Robinson, 1 W. Bla. 541.

(l) R. v. Plympton, 2 Ld. Raym. 1377.

(m) Ibid. 1379.

(n) 5 & 6 Will. 4, c. 76, s. 54. The provisions of this section are very similar to those against bribery in parliamentary elections contained in 2 Geo. 2, c. 24, s. 7, the principal difference being that here there is a new offence created, viz., *offering to corrupt*, &c. Therefore, the decisions on the Parliamentary Bribery Act will be applicable to questions arising on this statute so far as they go.

(o) The declaration ought to specify which of these it was, and what it was, that the defendant took, &c.; to state that he took a gift or reward is bad for uncertainty; Davy v. Baker, 4 Burr. 2471. The corrupt employment of a voter in hauling stones at a certain hire is a reward within this section; Harding v. Stokes, 1 M & W. 354; vid. S. C. as to form of declaration.

(p) Where the declaration charged with endeavouring to bribe to vote for A. and B., and the proof was of offering a bribe to vote for A. and his friend, held sufficient; Combe v. Pitt, 3 Burr. 1587.

(q) The penalty is incurred, though the elector actually votes against the party on whose behalf the bribe, &c., was given, the offence being completely committed by the corrupter, whether the voter kept his promise or broke it, Sulston v. Norton, 3 Burr. 1235; but where the bribe was offered, but not accepted, the offence is that of *offering to corrupt*; and it is for the jury to say whether the agreement was complete or not, Harding v. Stokes, 2 M. & W. 233. So the offence is complete, although the voter, having promised to forbear to give his vote, does not forbear, and the declaration need not allege that he did forbear; Bush v. Rawlins, 3 Burr. 1236, marg.; S. C. Sayer, 289. So the offence is complete, though the voter never intended to fulfil his promise, the money having been given and accepted; Henslow v. Fawcett, 3 A. & E. 51. So the bribe is a bribe, although there be an attempt to colour it, by giving and taking a note and counter note, &c.; Sulston v. Norton, 3 Burr. 1237; and such note may be given in evidence, though not stamped, to prove the fact of bribery; Dover v. Maester, 5 Espin. 92. Whether in an information for offering a country bank note as a bribe, it be necessary to state the value, is an undecided question; Reg. v. Gamble, 16 M. & W. 386. In an action against

[*234] any *such election ; or if any person, by himself, or by any person employed by him, shall, by any gift, or reward, or by any promise, agreement, or security for any gift, or reward, corrupt, or procure or offer to corrupt, or procure any person to give or forbear to give his vote, in any such election, such person, so offending in any of the cases aforesaid, shall for every such offence forfeit the sum of 50*l.* of lawful money of Great Britain, to be recovered with full costs of suit, by any one who shall sue for the same, by action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster ; and any person offending in any of the cases aforesaid, being lawfully convicted thereof,*(r)* shall for ever be disabled to vote in any election in such borough, or in any municipal or parliamentary election whatever, in any part of the united kingdom, and also shall be for ever disabled to hold, exercise, or enjoy, any office or franchise to which he then shall, or at any time afterwards may, be entitled as a burgess of such borough, as if such person was naturally dead."

The effect, therefore, of an adverse judgment, in a prosecution under this enactment, is to strip the burgess ipso facto of his corporate character and rights ; and it does not seem necessary, under the peculiarly

the candidate, the voter bribed may be a witness ; *Dover v. Maester*, 5 *Espin.* 92 ; *vid. Heward v. Shipley*, 4 *East*, 189.

(*r*) On the Bribery Act, 2 *Geo.* 2, c. 24, it was held that bribery at parliamentary elections, being an offence at common law, the penalties there imposed were cumulative to the common law punishment ; the court, therefore, in general refused an information, as at common law, until the time (which was two years as in this statute) of commencing an action on the statute had expired ; and one ground on which they acted was, that in an information at common law by a private prosecutor, the costs stood on a very different footing from the case of those who sued under the statute, which gave (as this does) full costs of suit ; *R. v. Pitt*, 3 *Burr.* 1339. Accordingly, the court in one case adjourned passing sentence on an information until the time for bringing the *qui tam* action should have elapsed ; *R. Heydon*, 3 *Burr.* 1387 ; *vid. 1 Wms. Saund.* 135, note (4) ; *Hawk. P. C.* 178 ; *Salk.* 460. And as bribery at the election of an officer in a municipal election was a common law offence, and punishable as such by information, *Spinage's case*, cited 3 *Burr.* 1339, it seems that the above cases exactly apply to the interpretation of the above enactment ; *vid. pleadings in debt for bribery. Combe v. Pitt*, 3 *Burr.* 1423. If two informations be exhibited, each by common informers, on the same day, the law appears to be that the defendant need not answer either ; *Pye v. Cooke*, *Hob.* 128, commented on, 3 *Burr.* 1434. As to prosecuting several parties, jointly guilty of an act of bribery, in a joint information, *R. v. Heydon*, 3 *Burr.* 1270, which, it seems, may be done ; 2 *Burr.* 984, 985 ; 3 *T. R.* 98 ; *Stra.* 921. It is immaterial whether the party bribed had a vote or not, if he claimed one ; *Combe v. Pitt*, 1 *W. Bla.* 523 ; *Lilley v. Corne*, 1 *Selw. N. P.* 650, note ; *vid. 2 Wils.* 395. As to the nature of bribery by loan, 1 *W. Bla.* 317 ; 2 *Dougl.* 415 ; the *Coventry case*, 1 *Peck* 97. A wager with a voter that he will not vote for a particular candidate at the coming election is within the statute ; *Anon. Loftt.* 552. As to what is proof of the allegation in the declaration that the defendant gave the money, &c., to the voter, *vid. Webb v. Smith*, 4 *Bing. N. C.* 373. A voter who had taken the bribery oath, was held a competent witness to prove that he himself had been bribed ; *Bush v. Rawling, Sayer*, 289, cited *Cowp.* 199 ; *vid. Phill. Evid.* 41, 131, 8th edit. The judgment will be erroneous in an action of debt for the penalty, if it be signed for either damages or costs of increase ; it ought to be for the penal sum merely, *Cuming v. Sibley*, 4 *Burr.* 2489 ; for the common informer has no right vested in him until he brings the offence home to the defendant, and therefore cannot have damages for the detention of the debt, *College of Physicians v. Harrison*, 9 *B. & C.* 530. The verdict, after finding the debt, ought to assess the costs under the statute ; *Chit. Archb. Pract.* 445, 8th edit.

strong terms used, that the corporation should go through the ceremony *of amoving him, but that they may fill up his place by a fresh election, as though he had terminated his natural life. But the [*235] proper course for the corporation to take, in case such person should persist in acting as a corporator, notwithstanding such judgment, is not to disfranchise, for that is not the correct course in cases of defective title, but to obtain an information in the nature of quo warranto to oust him.(s) He might also, it is probable, be indicted, as for a misdemeanor, in acting in his place or office in contempt of an act of parliament.(t) Nor can he regain his capacity in any of the above mentioned respects by license or dispensation from the crown;(u) but a pardon would operate to capacitate him again.(x) The above enactment is enforced by the following further provision.(y) "And be it enacted, that if any person offending in any of the cases aforesaid, shall, within the space of twelve months next after such election as aforesaid, discover any other person(z) offending in any of the cases aforesaid, so that such other person be thereon convicted, such person so discovering, and not having been before that time convicted of any such offence, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any such offence."

The mere bringing of an action against the briber does not make a man the discoverer within the meaning of this section; the man who *tells* it is the discoverer of the bribery; nor is he, who advises or persuades another to discover, the person designated in the statute.(a) In fact, it is obvious, upon a little consideration, that in many cases, if no one but the prosecutor could be treated as the discoverer, the clause would be ineffectual; it seems, therefore, that the person, without whose evidence the thing would probably have remained unknown, is the proper discoverer, and that there can only be one discoverer,(b) the original discovery being the true merit, which indemnifies; and that the true construction is that the discoverer shall not have been convicted *before the time of making the discovery*.(c)

(s) R. v. Lyme, Doug. 80; R. v. Whitwell, 5 T. R. 86.

(t) Crouther's case, Cro. Eliz. 655.

(u) R. v. Bishop of Norwich, Hob. 75; S. C. Cro. Jac. 385; Co. Litt. 234.

(x) Cuddington v. Wilkins, Hob. 82; R. v. Crosby, 5 Mod. 16.

(y) 5 & 6 Will. 4, c. 76, s. 55; s. 56 provides that no person shall be made liable to any incapacity, disability, forfeiture, or penalty, by this act imposed, in any of the cases aforesaid, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, or penalty, shall be incurred, any thing herein contained to the contrary notwithstanding.

(z) Vid. Pugh v. Curzenven, 3 Wils. 35; "The Cricklade case," 8vo. A. D. 1783.

(a) Sibley v. Cuming, 4 Burr. 2464. Still it is not to be understood that the plaintiff or prosecutor cannot be the discoverer; Curzenven v. Cuming, 4 Burr. 2504.

(b) Sutton v. Bishop, 4 Burr. 2286. Making a declaration before a magistrate would now be a sufficient discovery, id.; because making an affidavit was held there to be so, the decision being previous to the abolition of voluntary oaths.

(c) Sutton v. Bishop, 4 Burr. 2286. A verdict without a judgment is not a conviction within the meaning of the clause, whether in civil action, Sutton v. Bishop, 4 Burr. 2286. or indictment, Burgess v. Boutifleur, 7 M. & Gra. 781. Whether the judgment ought to be pleaded or might be given in evidence under the general issue was much disputed formerly by the judges; but since the new rules of plead-

[*236] *Having thus seen what are offences within the provisions of the Municipal Corporations Act, against bribery at municipal elections, we may state, that to give money after such an election to a person for having voted for a particular candidate, without any express agreement or understanding before or during the election, is not an offence within the statute.(d)

It may be collected, that if a member of the corporation were to say to his brethren of the corporation, on occasion of a competition for an office in the corporation, that such a candidate had been guilty of bribery, or even that he was ignorant (if ignorance be a disqualification for the office in question,) an action on the case would lie at the suit of the party named, if the declaration averred that by means of the speaking of the words the plaintiff lost his election.(e)

With respect to the requisites of an application for a mandamus to admit a duly elected party into the office, it may be useful to bear in mind that although according to the old decisions, it was necessary in all cases to show to the court, on affidavit, the mode of election, it seems that with respect to such corporate offices in municipal boroughs as are mentioned and regulated in the Municipal Corporations Act, this can no longer be necessary; for the mode of election being defined in each case in the statute, the court must take judicial notice thereof, without any statement by affidavit or otherwise; and the same will be true with respect to all corporations constituted by public statutes regulating the mode of election to offices specified in the statutes. But with respect to all other corporations the affidavit must contain this information; for such corporations fall within the principle on which the court originally required that the information should be furnished, which is, that the court must be enabled to judge whether the election was conducted according to the requirements of the charter, &c., and so whether the election was a due election or not; because the decision of that question lies at the root of the party's right to succeed on the application for a mandamus to admit to the office. The court must also be enabled to see what the office is for which the writ is asked; and in all cases of offices not statutory, or of which on other grounds the court does not take judicial notice, the nature of it must be shown.(f) So on application for a mandamus to admit a person to be

ing, it is clear that the conviction under a judgment or by justices ought to be pleaded; and perhaps that there was an action pending with the object of obtaining a conviction for the same bribery, might be in some way taken advantage of, even though a conviction had not been actually obtained; probably the court would stay proceedings until the event of the other action were declared; vid. 4 Burr. 2287; 3 T. R. 5.

(d) Lord Huntingtower v. Gardiner, 1 B. & C. 297.

(e) *Saunderson v. Rudd*, March, 146.

(f) Bull. N. P. 199. Where the corporation is by prescription, the constitution of it, as well as the applicant's right, must be verified by affidavit; where it is by charter, a copy of the charter or charters must be produced at the time of making the motion; Bull. N. P. 200. Every mandamus must be duly directed; it is the duty of the applicant to see that it is so; the court in general will not point out the proper mode, though the practice is not uniform; 4 Burr. 2011; 2 Burr. 783; vid. 8 Dougl. 304. The mode of taking objection to the direction may be by returning "no such officer;" "no such corporation," &c., &c., as the case may be; *R. v. Bailiffs of Ipswich*, Salk. 434; vid. Bull. N. P. 205. Or the direction may be sometimes excepted to after the return; vid. Index.

member of a corporation, the affidavit must show that all requisite preliminaries^(g) have been performed and observed by the party; for *example, if it is necessary that there should first be made a payment of admission money (sometimes called a fine, but improperly),^(h) a tender of a proper sum must be averred.⁽ⁱ⁾ [*237]

It may be useful to mention some of the cases in which writs of *mandamus to admit* have been granted on due election or appointment of duly qualified members to offices of corporations, in addition to those of mayor, aldermen, councillor, &c., for which we shall see this remedy will lie.^(k) It must be remembered that this form of the writ gives no title to the office, and that it is only a mode of enabling the party to try his right to the office when there is no other specific legal remedy.^(l) "This is the language of all the cases; the writ is the consummation of the party's title, if he have one, but it gives him none."^(m) Where the holding of a certain office in a corporation is by the constitution a necessary preliminary to eligibility to the headship of the corporation, with which are or may be connected important state duties with respect to matters external to the corporation, perhaps it may be inferred that a *mandamus to admit* will go in respect to the first office, although such first office be not connected with the administration of justice, nor in itself of such importance as would authorize an application to the writ in ordinary circumstances; but it must be confessed that there exists but very slight authority for the inference suggested.⁽ⁿ⁾ Where a person is duly entitled to the freedom of an incorporated company in a corporation, the admission to which depends for its completion on certain acts to be done by the corporation of the borough, or a certain body or part of them, a *mandamus to admit* will issue to the municipal corporation, or to the said body or part, commanding them to do the acts neces-

(g) Vid. *Tufton v. Nevinson*, 2 Lord Raym. 1354; *Marten v. Jenkin*, cited 2 Burr. 1015.

(h) Vid. per Lord Hardwicke, C. J., in *Moore v. Mayor of Hastings*, Cas. Temp. Hardw. 353. Also it must show that there was an application to and distinct refusal by the proper parties to perform the duty of admission; vid. *R. v. Brecon Canal Company*, 3 A. & E. 217; Bull. N. P. 199.

(i) Vid. *Moore v. Mayor of Hastings*, Cas. Temp. Hardw. 362, 363. The reason appears to be that in many cases the non performance of the preliminaries would be a ground of removing the officers, for it would be a forfeiture of the office, and in others it would show that the party had never been officer *de jure*; as it is held that causes of depriving a clerk would be good causes for the bishop to refuse a presentee, *Specot's case*, 5 Rep. 58; and therefore that the applicant must make out a *prima facie* case, or the court will not interfere, vid. 1 Stra. 59.

(k) Vid. titles, MAYOR, ALDERMEN, &c. Generally the writ must not be complicated by requiring the corporation to do anything beyond what is necessary for the admission of the party, and must not order the admission of more than one claimant; *R. v. Mayor, &c., of Kingston-on-Hull*, Stra. 578. But a writ to the mayor, &c., to elect and swear in has been held good, though the mayor alone was the proper party to swear in, *reddendo singula singulis*; *R. v. Tregony*, 8 Mod. 128, 129.

(l) *R. v. Jotham*, 3 T. R. 577; per Buller, J., vid. 1 T. R. 404.
(m) *R. v. Clarke*, 2 East, 83. Therefore the rule may be absolute in the first instance; *Anon.*, 2 Chit. R. 254; *Ex parte Lowe*, 4 Dowl. 15; vid. 7 Dowl. 707; Bull. N. P. 199.

(n) Vid. *Ravenhill's case*, Stra. 608; *Anon.*, 1 Barnard. B. R. 279.

[*238] sary to complete the admission.(o) The writ issues as of course, *unless the court can see, from the affidavits, that the party in whose favour it is asked has not been duly elected.(p) The general rule is, that where the office is full, and is one of such a nature that a quo warranto information lies for it, the court will not grant a mandamus to admit the party who contends he was the duly elected party; but although another party has been admitted to the office as duly elected, yet, upon a proper case being made out to the satisfaction of the court, they will *in one case* grant a mandamus to admit the worsted party in the election, that one case being where there is no other specific legal remedy by quo warranto or otherwise,(q) the object being to give the parties the only opportunity that they can have of trying the right to the office, which may be done upon the issues taken on the return to the writ; for the writ originated in the necessity for having some means at the disposal of the court for the prevention of disorder from the failure of justice, and defect of police; and with that view the value of the matter in question, or the degree of its importance to the public police, are not scrupulously weighed. In fact the writ has been granted to admit a scavenger.(r) The result of the cases seems to be that wherever it is made manifest to the court, either that the office affects the administration of justice, or local government, or generally that it will be for the benefit of the subject that it should be duly filled, or that it is created by letters-patent, or that it is connected with pecuniary payments to be required from the public, or a sufficiently numerous portion of them, the court will interfere in the election by issuing a mandamus to admit, and that (as stated above) wherever there is no other specific remedy at law, as by quo warranto, or action for the fees, &c., belonging to the office,

(o) *Green v. Mayor of Durham*, 1 Burr. 127, 131. The principle of the decision seems to apply equally, whether the act to be done by the municipal corporation is previous or subsequent to the election of the party by the company; but the question is of little importance since the passing of the Municipal Corporations Act. For the same reason it has been thought to be useless to discuss the cases where it has been held that a *mandamus* would issue to compel an incorporated company in a borough to admit where the freedom of a company was essential to eligibility to the freedom of the municipal corporation; *vid. Wannell v. Mayor, &c., of London*, Stra. 675; *R. v. Harrison*, 3 Burr. 1328; S. C. 1 W. Bla. 372; 6 Bro. P. C.

(p) *R. v. Mayor, &c., of Rye*, 2 Lord Keny. 418.

(q) *R. v. Barker*, 3 Burr. 1265; *R. v. Bedford Level Corporation*, 6 East, 356; *Reg. v. Derby*, 7 A. & E. 419. On the parties consenting, the court would probably direct a feigned issue to try the right; *vid. 3 Burr. 1268*; 4 T. R. 381; T. Jones, 215; 3 Burr. 1422.

(r) 3 Burr. 1267, 1268; 1 Stra. 59; 1 Vent. 143; Styl. 346. So to admit an ale-taster, *Ravenhill's case*, Stra. 608; an usher of a free grammar school, *R. v. Bishop of Lichfield*, Stra. 1023; *vid. R. v. Bailiffs of Morpeth*, Stra. 58; a sexton, *Com. Dig. Mandamus, A.*; a constable, *Bac. Abr. Mandamus, C. 1*; a deputy registrar, *R. v. Ward*, Stra. 893; a registrar of an archdeacon, *Lambert's case*, Carth. 170; an auditor of the accounts of the corporation, *vid. R. v. Mayor, &c., of London*, 1 T. R. 423; one of the assistants of the Vintners' Company, *Bull. N. P. 200*; clerk to land-tax commissioners, *R. v. St. Martin's Commissioners*, 1 T. R. 146; a high bailiff of Westminster, 15 Vin. Abr. 208; an apprentice to his freedom, *R. v. Selbye*, 2 Show. 154; *Townsend v. Mayor, &c., of Oxford*, 1 Lev. 91; S. C. T. Raym. 69, 92; liveryman of Vintners' Company, *Taverner's case*, T. Raym. 446; fellow of College of Physicians, *per Holt, C. J.*, case of Andover, Holt, R. 442; free-man of Turkey Company, 2 Burr. 999.

they will allow the writ to go, although the office be de facto full by the admission of the opposing party at the election.(s)

When an officer is duly elected and admitted to his office, he is to *act in all things appertaining to the office that are obligatory [x239] upon him, and part of the duty of his office, at his peril; that is to say, for anything which he omits or refuses to do, the corporation may have a mandamus to compel him to do it;(t) or an individual, showing that he is injured by the laches of the officer, or that upon being required, such officer refused to perform his duty for or to the complainant contrary to his duty, may have a mandamus to compel him to do the act;(u) but where a discretion is legally vested in an officer to do or not to do an act, and he (not refusing to entertain the question and exercise his discretion upon it, but) actually exercises his discretion by refusing to do it, neither a mandamus(x) nor an action(y) can be applied to the case, however erroneous the judgment of the officer may be, and though individuals be never so much inconvenienced in consequence.(y) Discretion, however, is to be understood here of sound discretion according to law; and if the officer travels out of the limits of his discretion, and acts so as to injure any one, he may be compelled to correct such misconduct in some cases by mandamus,(z) or he may be liable to an action at the suit of the injured party. A mandamus may be had where the act is of such a nature as can be rectified by the officer himself, and where that is the most expeditious and proper remedy; and where it is the duty of an office to do a thing which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures.(a)

With respect to the quality of the officers, for which a mandamus of this nature issues, there appears to be no limitation known to the law; a mandamus has issued to compel a surveyor elected by a parish to do the duty of his office.(b) On this subject it may be fit to observe, that ancient customs may well extend to newly created offices, and therefore that where an immemorial privilege is claimed for all officers of a certain description, other officers of a similar description, though constituted within the time of legal memory, may fall within the privilege.(c)

With respect to returns to writs of mandamus, it is the general rule

(s) *R. v. Mayor, &c., of Colchester*, 2 T. R. 259; per Patteson, J., 5 A. & E. 590; *R. v. Beedle*, 3 A. & E. 467; *R. v. Thatcher*, 1 Dowl. & R. 426; per Buller, J., 1 T. R. 404. In *R. v. Mayor, &c., of York*, 4 T. R. 699, there was no penalty, and therefore a mandamus went, although the remedy by quo warranto was applicable to the nature of the office; vid. 6 A. & E. 354. It seems that a quo warranto information for offices will only lie where the offices are of the nature of those grantable by the crown; the remedy by action, in general, only lies where the office has fees attached to it; *Darley v. Reg.*, 12 Cl. & F. 520.

(t) Sup. p. 225. As to refusal of the oaths being evidence of refusal of the office, *R. v. Brain*, 3 B. & Ad. 514. 623. 629. (u) Vid. supra, pp. 56, 225.

(x) Ex parte Garrett, 3 B. & Ad. 252; *R. v. Hughes*, 3 A. & E. 429; per Williams, J., 4 A. & E. 297.

(y) *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 439, Lord Brougham's judgment.

(z) *Estwick v. City of London*, Styl. 43.

(a) *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251. (b) Anon., Styl. 346.

(c) *Wilkes v. Williams* 8 T. R. 631, recognized 3 B. & Ad. 634.

NOVEMBER, 1853.—17

that the return must answer the suggestion of the writ; but the rule is less strictly observed in returns to writs of mandamus to admit than in writs to restore. However, according to one authority, such a return is good, if it answer any material suggestion of the writ;(d) and in another case it was held to be a good return to deny an immaterial allegation of the writ, even though the answer should amount to a negative [*240] *pregnant,(e) and the decision was rested on the ground that the answer pursued the suggestion of the writ. It is a good return to a mandamus to admit, to show that the party has not complied with a lawful preliminary to his admission. As where a city company returned to a writ to admit to the livery, that the company had by a bye-law imposed the fee of 3*l.* 13*s.* 4*d.* for admission, and that the party had not paid it, and refused to do so, and therefore, &c., but that when he paid it, they would admit him.(f) But where the writ states all the proceedings of an election, it is a bad return to say "that he was not duly elected;" for that is putting in issue a legal inference from the facts stated in the writ, which such return admits; the proper course is to traverse some of the facts.(g)

Where an actual return is made by a mayor, but there is a suggestion that it was made by him and the minor part of the corporation, and that the majority would have obeyed the writ, and therefore they pray that they may disclaim and put in another; the court refused, saying they could not examine upon affidavits whether the majority consented to the return, but should leave them to punish the mayor, if he were guilty; and they gave leave to file an information against him.(h)

The next in importance of the acts of a corporation appears to be amotion, or the depriving of office an officer of the corporation.

The power of amotion is incident to every corporation at common law, "for it is necessary to the good order and government of corporate bodies that there should be such power as much as the power of

(d) Per Lee, C. J., in *R. v. Mayor, &c., of Lynn*, cited in *R. v. Mayor of Lyme* (Mitchell's case,) Dougl. 82, per Buller, J.

(e) *R. v. Price*, Stra. 1235. Vid. return bad for argumentativeness. *R. v. Stephens, T. Jones*, 177; for inconsistency and negative pregnant *R. v. Mayor, &c. of York* 5 T. R. 766.

(f) *Taverner's case*, T. Raym. 446; vid. *R. v. Humphrey*, 10 A. & E. 335. Where a return that the party is not duly qualified, &c., has been made and the prosecutor takes no further proceedings, vid. as to the proper mode for the defendant to pursue and as to costs, *Reg. v. Mayor, of Dartmouth*, 2 Dowl. N. S. 980. As to costs of prosecutor, where there are several issues on traverses to a return, and he succeeds on some, *Emery v. Mayor, &c., of Malmesbury*, 3 Q. B. 577.

(g) *R. v. Mayor, &c. of York*, 5 T. R. 66. 76; vid. 9 Ann. c. 20, and 1 Will. 4, c. 21, ss. 3, 6, which enable a prosecutor, succeeding on a traverse, to have damages and costs, though he were not so interested as to have been entitled to sue in case for a false return; *Reg. v. Fall*, 1 Q. B. 636.

(h) *R. v. Mayor, &c. of Abingdon*, Holt, R. 440; S. C. Salk. 431; *Reg. v. Mayor, &c., of Bath*, Holt, R. 443. The stat. 1 Will. 4, c. 21, has put an end to the distinction between matter of public interest and matter of private damage, as far as the writ of mandamus is concerned; and, therefore, a party recovering on the traverse to any mandamus is entitled to some damages, though he might not have been sufficiently interested to have sued in case for the false return; *Reg. v. Fall*, 1 Q. B. 649. Semb. this supersedes the use of a criminal information in such cases. With respect to costs of such traverses, vid. *Emery v. Malmesbury*, 3 Q. B. 577; vid. 1 Q. B. 636.

making bye-law;"(i) and it is incident to the whole body, unless limited by express grant to a particular part,(k) and must be exercised at a duly *convened corporate assembly, held in a corporate character ;(l) [*241] and that it was so, must be shown in the return to a mandamus to restore the amoved officer.(l) The Queen's Bench is the proper court to apply to for the rectification of mistakes, or miscarriages of corporations in respect of amotions from their offices ; the courts of equity disclaim all jurisdiction both as to the election and amotion of officers in corporations.(m) The above is the general law regulating amotions with respect to the source from which they are to originate ; but since the Municipal Corporations Act, it appears that the power of amotion must be considered to reside, in general, in such corporations, who are to perform it by means of the council, for the powers of the whole body are in general to be exercised by the council ;(n) but a usage or custom, a law, statute, or charter, vesting the exercise of a power of amotion elsewhere, would not, it seems, be inconsistent with the spirit and meaning, nor the express words, of the Municipal Corporations Act, and could scarcely be held to be abrogated or annulled under section 1.

The causes for which a corporator may be amoved from an office, and which alone will justify his amotion, arrange themselves under three principal heads or classes.

I. Offences against his oath or declaration, the duty of his office, and the common profit and general interests of the corporation.(o)

(i) *R. v. Richardson*, 1 Burr. 539 ; *Bruce's case*, 2 Stra. 819 ; *R. v. Ponsonby*, 1 Ves. jun. 7 ; *R. v. Lyme Regis*, Dougl. 153 ; *R. v. Tiddlerly*, 1 Siderf. 14, per Hale, C. B. The act of amotion must be under the common seal, *R. v. Mayor, &c., of Wilton*, 5 Mod. 259 ; at least where the appointment has been so, *R. v. Mayor, &c., of Cambridge*, 2 Show. 70 ; *Pepys's case*, Ventr. 342 ; *Haddock's case*, id. 355 ; vid. per Powell, J., in *Gatton v. Milwich*, Salk. 536. On such appointment there must be an ad valorem stamp ; 55 Geo. 3, c. 184, sched. pt. 1 ; *Reg. v. Welch*, 2 Car. & K. 296.

(k) Per Buller, J., *R. v. Mayor, &c., of Lyme*, Dougl. 153. Amotion being an act of an odious nature, all classes in a charter concerning it must receive a strict interpretation, and, therefore, the word majority, mentioned in a charter for that purpose, shall be understood over of a majority of the whole corporation ; *R. v. Sutton*, 10 Mod. 76.

(l) *R. v. Mayor, &c., of Doncaster*, Sayer, 37 ; *Mer. & St. Hist. Bor.* 2058 ; *R. v. Taylor*, 3 Salk. 321. The power of holding such assembly is incident to the power of amotion ; *R. v. Mayor, &c., of Lyme* (*Fane's case*), Dougl. 153.

(m) *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491 ; per *Dodderidge, J.*, *Dyer*, 332, B., marg.

(n) 5 & 6 Will. 4, c. 76, ss. 6, 25, et. seq. Where municipal corporations have a prescriptive power of amotion from office, the requirements of such power must be pursued on amoving from old offices, for the Corporation Act has not erected these corporations anew, but merely continues the old ones ; but in the case of offices newly constituted by the act, as, for example, that of town clerk, the corporation may amove generally for reasonable cause, on due notice, and hearing the officer in his defence, without observing such formalities, in addition as might have been imperative under the charter, or by prescription or custom, with respect to the old office of the same name. The act does not regulate amotion by any direct provision whatever.

(o) This kind of offence is to be tried and determined only by the corporation themselves ; *R. v. Richardson*, 1 Burr. 539, i. e., in the first instance ; but if on a return to a mandamus or on plea to an information quo warranto, they state the cause for which they amoved, the court will judge whether it is a reasonable or sufficient cause or not ; *R. v. Richardson*, 1 Burr. 541. What is not such an ab-

[*242] *II Offences against the public of a nature to render the officer infamous, e. g., perjury, forgery, &c. In this class of cases, the loss of creditor being the ground of the forfeiture, it is in general indispensable that a conviction, which constitutes the true ground of the loss of credit, should precede the amotion. (p) But in some cases, as where the party before conviction leaves the country, the presumption of guilt is so strong that it appears unnecessary to wait for legal proofs, but the corporation may proceed at once to amove. (q)

III. Offences of a mixed nature (or such as are not only indictable as offences against the public,) but also are at the same time offences contrary to his duty as a corporator or officer. (r)

The late changes in the law of corporations have made it unnecessary to treat in much detail the classes of offences just stated; but some of the more important illustrations of them may be here stated, with a view to the guidance of the reader. It has been held that a refusal to deliver up the corporation books, upon demand of them, by the officer who has the

senting himself from the duties of his office as to justify an amotion, *R. v. Richardson*, 1 Burr. 541. A total desertion of the duties is a good cause; *Bull. N. P. 206*. A wilful disqualification of himself, as by habitual drunkenness; *R. v. Gloucester*, 3 Bulstr. 190; *R. v. Taylor*, 3 Salk. 231. So disqualification by poverty, such as to disable from paying scot and bearing lot; *R. v. Mayor, &c. of Andover*, 3 Salk. 229. Old age in general not sufficient cause; *Bac. Abr. Corporations*, E. 9. Writing a scandalous libel upon the mayor has been held a good cause upon conviction; *Lane's case*, cited *Cas. Temp. Hardw.* 155; *vid. tam. per Holt, C. J., Fortesc.* 275, 276. Imprisonment, without hope of discharge, a good cause; 4 Dougl. 360. Hindering the gathering by the corporation of unreasonable toll not good cause; *Reg. v. Mayor, &c., of Doncaster*, 11 Mod. 214. Where the office concerns the administration of justice, the officer is liable to amotion for prolonged and obstinate non-attendance; *Whitaker's case*, 4 Burr. 1999; *Salk.* 435, 3rd Resol.: but not for one instance of non-attendance, *R. v. Wells*, 4 Burr. 2004; 1 Hawk. P. C. c. 66, s. 1. But non-residence within the jurisdiction of the corporation is not a good cause, except in the case of offices requiring perpetual execution as sheriff, coroner, &c., *Bull. N. P. 206*. Steward of a Tolzey Court, *R. v. Griffiths*, 3 B. & Ald. 371. So where the attendance of the officer at corporate meetings is essential to the interests of the corporation, *R. v. Harris*, 1 B. & Ad. 936. Non-attendance, even without actual damage to the corporation, may be a good cause; *R. v. Ipswich*, 2 Ld. Raym. 1237; *vid. 4 Burr.* 2006.

(p) *R. v. Mayor, &c. of Derby*, *Cas. Temp. Hardw.* 154, i. e. followed by judgment thereon; *vid. per Lord Mansfield, C. J., Cowp.* 3. A simple assault is not an offence of this class; *Bull. N. P. 206*. Bankruptcy was not at common law a cause of amotion, though some of its consequences may become so; *R. v. Mayor, &c., of Liverpool*, 2 Burr. 732; *vid. R. v. Chitty*, 5 A. & E. 609; 5 & 6 Will. 4, c. 76, s. 52, *infra*. If the bankrupt officer absconds, the proper course is to amove him for neglect of duty; *Ex parte Butler*, 1 Atk. 215. However, in a case where the office implied a power over the revenues of the corporation, it seems from the judgments in *R. v. Mayor, &c., of Liverpool*, 2 Burr. 733, 735, that bankruptcy might be a good cause under the first class of causes. So of insolvency, *per Foster, J.*, 2 Burr. 735.

(q) *R. v. Harris*, 1 B. & Ad. 936.

(r) In this class of cases it is not necessary that an indictment should have previously been brought, &c., unless it would have determined the matter; *R. v. Mayor, &c. of Derby*, *Cas. Temp. Hardw.* 156. What not a sufficient offence, *Erle's case*, *Carth.* 173. The misconduct must be, it seems, such as specially relates to the execution of his office, *R. v. Mayor, &c., of Wells*, 4 Burr. 1999; *vid. Reg. v. Mayor, &c., of Newbury*, 1 Q. B. 751; and therefore, misconduct in one office is not cause of amotion from another office, *R. v. Mayor, &c., of Doncaster*, 2 Ld. Raym. 1564; *R. v. Mayor, &c., of Wells*, 4 Burr. 1999; *R. v. Harris*, 1 B. & Ad. 936.

charge of them, is not a good cause of amotion of such officer within the first class, for the corporation, it is said, may bring detinue for the books, &c.(s) They may also have an action on the case against him for the breach of duty.(t) Now all municipal corporations, mentioned in the Municipal Corporations Act, may proceed against him by the summary remedy given by the Municipal Corporations Act(t) by way of application to a magistrate, or they may proceed by way of action; but they shall not do both.(u) It seems, also, that where the county magistrates have jurisdiction, they ought to be applied to rather than the borough magistrates.(c) In one case the council of a borough, having demanded from the town crier, whom they had amoved, the bell belonging to the corporation, on his refusal to give it up, were considered to be entitled to proceed in the summary mode before magistrates for the recovery of it.(y) But it appears that the legislature cannot [*248] be intended to have given this power of summary proceedings to any boroughs but such as had a municipal corporation before the passing of the Municipal Corporations Act, so that municipal corporations, created since that period, will not be able, without fresh enactment, to exercise such summary mode of proceeding.(z)

The necessity for an amotion, where a freehold office is forfeited by the misconduct of the officer, is this, that if the officer chooses to hold on, the corporation cannot get rid of him in any other way; for unless there has been a regular amotion from a freehold office, to which a party has been duly elected and admitted, the court will not grant a quo warranto information to oust him.(a) And there is no inconvenience in this mode of proceeding, for if any one finds himself injured by the misconduct or laches of the officer, and the corporation refuse to interfere and do their duty, the court, on his application, will grant a mandamus to compel them to amove the officer.(b) If a statute enact that all persons in possession of certain corporate offices shall take an oath upon pain of being displaced, the court will grant a mandamus to compel the corporation to amove them, on its being shown that they have omitted to take

(s) *R. v. Mayor, &c. of Ipswich*, 2 *Ld. Raym.* 1238.

(t) *R. v. Mayor, &c., of Lichfield v. Simpson*, 8 *Q. B.* 65; *vid.* 5 & 6 *Will.* 4, c. 76, s. 60. (u) 5 & 6 *Will.* 4, c. 76, s. 60; *vid.* *infra*. Index.

(x) *In re Justice of Gateshead*, 6 *A. & E.* 550.

(y) *Baylis v. Strickland*, 1 *M. & Gra.* 591.

(z) *R. v. Greene*, 6 *A. & E.* 550. Nor will the court grant a mandamus, *id.* Such corporations, therefore, can only proceed by amotion and action at law. However, it seems that, according to *Anon.*, 1 *Barnard. B. R.* 402, the court perhaps might have issued a mandamus, in *R. v. Greene*; *et vid.* *R. v. Ingram*, 1 *W. Bla.* 50.

(a) *R. v. Heaven*, 2 *T. R.* 776; *Vaughan v. Lewis*, *Carth.* 227; *R. v. Ponsonby, Sayer*, 245; *S. C.* 5 *Bro. P. C.* 287; *R. v. Mayor, &c., of Truro*, 3 *B. & A.* 592. The rigour of the requirements which must be observed in amotion from an office spring out of the maxim, that forfeitures are odious in law, and shall be taken strictly; *Paston v. Urber*, *Hutt.* 103. As to municipal corporations, *vid.* *Reg. v. Ricketts*, 7 *A. & E.* 966; *R. v. Mayor of Oxford*, 6 *A. & E.* 349.

(b) 2 *T. R.* 776. It seems the writ will only be granted to an applicant who shows that he is injured, *R. v. Mayor, &c., of Portsmouth*, 3 *B. & C.* 156, unless the charter or a statute states the office shall be void on doing what the officer has done.

the oath.(c) And wherever the officer, holding a freehold office, does, or omits to do, any thing on which the office is declared, either by the constitution of the corporation or by statute, to be ipso facto void, the proper course for the corporation is to amove the officer, and if they omit or refuse to do so, a mandamus to compel them will go, even though no one can be shown to have been aggrieved.(d) And the reason is, that a freehold cannot be determined without some act done,(e) *which [*244] will apply wherever the office is for life, or held on such terms as are construed to give a life interest, and the officer has been duly elected and admitted. Where he has either not been duly elected, or not duly admitted, but yet acts in the office so as to be officer de facto only, the reason does not apply, and therefore it is not necessary to amove before a quo warranto information can be granted.(f)

Where an officer is appointed by a writing under the common seal, the law is, that his amotion will not be complete without a formal discharge also under the common seal;(g) but if he has been appointed by election, which, as before stated, is not one of the acts which needs the common seal to authenticate it, then an entry of a resolution to discharge and (move him will be sufficient.(h) So where a corporation have by statute a power of appointing an officer during pleasure, and they appoint one accordingly by a resolution duly entered on the minute-book of their proceedings, a resolution rescinding the previous one is a sufficient amotion of the person appointed under it.(i)

So where a party was in the possession of an office held during pleasure, and another party was elected and appointed, it was held in equity, that

(c) *R. v. Master, &c., of St. John's College*, Skin. 549; *vid. Reg. v. Humphrey*, 10 A. & E. 335, that where a statute enjoins an oath, &c., to be taken upon admission, and the elected party declines to take them, that is a void election, and the course is for the corporation to proceed to a fresh election. The distinction is between avoiding the election and avoiding the office.

(d) *R. v. Truro*, cited 3 B. & C. 154, reported 3 B. & Ald. 590; *vid. R. v. Thacker*, 2 Jone, 121; *Smith's case*, Skin. 293; *R. v. Master, &c., of St. John's College*, Comberb. 279; for this is not a case where the corporation have a discretion to amove or not; *vid. per Holt, C. J., Usher's case*, 5 Mod. 453.

(e) *R. v. Truro*, 3 B. & Ald. 592. Unless where the officer by acceptance of an incompatible office in the corporation waives a formal amotion from the original one; *R. v. Pateman*, 2 T. R. 777; *vid. 9 M. & W. 178*; 4 B. & Ad. 24. The result of the cases cited above, it is submitted, is, that where the offence is such that the corporation have the power to amove, the court will only compel them in case some one is injured by their omission to do so; where they are required to amove, or, what is nearly the same, the office is declared void by statute or charter, there the court will interfere generally; *vid. R. v. Mayor, &c., of West Looe*, 5 Dowl. & R. 416; *R. v. Totness*, id. 483; *et vid. cases cited, Cas. T. Hardw. 215.*

(f) *Vid. R. v. Courtenay*, 9 East, 246. Where an officer has been duly elected and admitted, so far as forms go, but it is discovered afterwards that he originally wanted a requisite qualification, the corporation cannot amove for that cause, nor of course will a mandamus to compel them to amove issue for such cause; the question can only be gone into upon an information in the nature of quo warranto, requiring him to show his title to the office; *R. v. Mayor, &c., of Lyme (Mitchell's case)*, Dougl. 80. 85.

(g) *Bull. N. P. 208*; *R. v. Mayor, &c., of Cambridge*, 2 Show. 70; *vid. sup. p. 58.* Unless where the officer accepts another incompatible office in the corporation; for his election or appointment to such an office, together with acceptance, operates as an amotion from his original office; *R. v. Pateman*, 2 T. R. 777; *Staniland v. Hopkins*, 9 M. & W. 178; *vid. 4 B. & Ad. 24, 25.*

(h) *Bull. N. P. 208.*

(i) *Reg. v. Thomas*, 8 A. & E. 183.

the former party not having contested the appointment, it was a good amotion of him from the office.(k) So wherever an officer holds office under an appointment at pleasure, he may be removed at pleasure, and no summons to him to appear and answer is necessary.(l) So if the officer were removable at discretion.(m) So if by custom, or charter, the corporation had power in the alternative to choose the officer to hold for life, or at pleasure, and he had been chosen to hold at pleasure, they may remove him at pleasure.(n) In all these cases of offices held during pleasure, it is a sufficient return to a mandamus to restore, to state the facts;(o) but they must rely upon them, for if they state a *cause*, and it be insufficient, they must restore the party; for by *doing so they [*245] show that when they amoved him, they did not mean to use their power of amoving at will.(p) In general the rule is, that every officer, before amotion, shall be summoned and heard in his defence before the body in whom is vested the power of amotion; but this rule is subject to various necessary exceptions, arising from the presence of circumstances which would make it useless to apply it. Thus there need be no summons where the party has permanently left the precincts of the corporate jurisdiction, and in fact abandoned his office;(q) for in such a case a summons or notice that the amotion would take place, would be merely an idle form; and *lex neminem cogit ad vana seu inutilia*;(r) and in such a case it is also wholly unnecessary to summon the party to return and reside upon his office previously to proceeding to amotion;(s) and it does not make any difference that the office was a freehold office.(s) Also there is no ground of excepting to the amotion that the officer was not summoned, if in fact he was present at the meeting of the amoving body called for the purpose of amoving him, and if he defended himself,

(k) *Att.-Gen. v. Mayor, &c., of Poole*, 8 Beav. 75. If the amotion turns out to be erroneous and invalid, the party nevertheless cannot have an action against the corporators who took part in it, without showing both malice and want of probable cause; *Harman v. Tappenden*, 3 Espin. 278; *S. C.* 1 East, 555; *Ferguson v. Earl of Kinnoul*, 9 Cla. & F. 289, 290.

(l) *R. v. Mayor, &c., of Coventry*, 1 Ld. Raym. 391; *S. C.* Salk. 430; *R. v. Mayor, &c., of Oxford*, Salk. 428; *R. v. Mayor, &c., of Canterbury*, Stra. 674; *vid.* 3 Keb. 641.

(m) *Reg. v. Governors of Darlington School*, 6 Q. B. 682; *R. v. Mayor, &c., of Andover*, 1 Ld. Raym. 710.

(n) *R. v. Mayor, &c., of Cambridge*, 2 Show. 69; *Pepy's case*, 1 Ventr. 342; *R. v. Churchwardens of Taunton*, Cowp. 413.

(o) *Reg. v. Bailiffs of Ipswich*, 2 Ld. Raym. 1232; *R. v. Mayor, &c., of Cambridge*, 2 Show. 69; *Warren's case*, Cro. Jac. 540. They need not state how; 2 Show. 69, 70.

(p) 2 Ld. Raym. 1240; *R. v. Mayor, &c., of Oxford*, Salk. 429; *R. v. Bailiffs of Ipswich*, Salk. 434; *Crips v. Mayor, &c., of Maidstone*, 1 Keb. 812, 813.

(q) *Cas. Temp. Hardw.* 151; *Reg. v. Truebody*, 2 Ld. Raym. 1275; *R. v. Grimes*, 5 Burr. 2601; *R. v. Harris*, 1 B. & Ad. 936. The acceptance of a statutory office requiring continual attendance at a great distance from the borough, is a virtual abandonment of a corporate office requiring perpetual attendance in the borough. *R. v. Griffiths*, 3 B. & Ald. 735.

(r) *Broom's Max.* 189. When presumption of abandonment of an office arises. *R. v. Harris*, 1 B. & Ad. 936.

(s) *R. v. Mayor, &c., of Lyme (Fane's case)*, Dougl. 144, where the office was a freehold office; *R. v. Harris*, 1 B. & Ad. 936; *per Parker, C. J., Reg. v. Simpson*, 0 Mod. 380.

and was heard in his defence,^(t) for those circumstances operate as a waiver of the right of notice.^(t) So if it is confessed that he was removed for good cause, the court will not interfere by mandamus to restore, although he had no notice to appear and defend himself; as for example, where an officer has repeatedly declared that he would not perform the duties of his office;^(u) for the effect of restoring him would only be that the corporation would amove him again, and it is an absolute rule that the court will never interfere by a mandamus to restore, where they can see that there is good ground of amotion, and therefore, that if they granted the writ to restore the officer, on the ground of proper formalities not having been observed, the corporation would immediately amove him again, observing those formalities, and consequently, the writ would fail [*246] *of any practically useful effect.^(x) But with these exceptions, every officer in a corporation, holding a freehold office, has a right to notice of the intention to amove, and the grounds, or at least a summons to attend the meeting, and the reason why; and has a right to have such notice served upon himself personally a reasonable time previous to the meeting of the body in whom resides the power of amotion;^(y) and he has the further right of being fully heard in his exculpation.^(z) The rights of officers in corporations are further guarded by the general rule, that all the members of the body who are to meet to do a specific act must be summoned to the meeting, and have notice of the business to be brought before the meeting,^(a) with this qualification, that no such previous notice is necessary where the meeting is held by adjournment from one at which, by the constitution, every member of the corporation is supposed to be present,^(b) and where the subject was commenced and gone into to a certain extent.

(t) *R. v. Mayor, &c., of Wilton*, Salk. 428; *vid. R. v. Fishermen of Feversham*, 8 T. R. 356; *R. v. Burgesses of Carmarthen*, 1 M. & Selw. 697.

(u) *R. v. Mayor, &c., of Axbridge*, Cowp. 523; *vid. 2 T. R. 182*. A corporation cannot, on any pretence appoint themselves to fill an office in their gift; nor can they pretend to abolish the office and take the fees themselves; *Hall v. Mayor, &c., of Swansea*, 5 Q. B. 545. Generally, however, a corporation may fill an office; thus a corporation may be warden of a hospital, and shall be called warden and not wardens; *Queen's College, Oxford*, case, 1 Leon. 134. By 6 & 7 Vict. c. 73, s. 21, the corporation of the "society of attorneys, solicitors, proctors and others, not being barristers, practising in the courts of law and equity of the United Kingdom," are appointed registrar of attorneys and solicitors. So the University of Cambridge is clerk of the market in the town; *Case of University of Cambridge*, Hetl. 145; S. C. Litt. R. 296. So the corporation of London is conservator of the Thames, though the office is executed by the Lord Mayor; *Att.-Gen. v. London*, 18 L. J. (N. S.) Chan. 326.

(x) *R. v. Griffiths*, 3 B. & Ald. 735; *vid. Blgrave's case*, 2 Siderf. 6. 49. 72. Though outlawry might not forfeit the office, it will constitute a disability to be restored, and to entitle the party to a mandamus to restore, he must show to the court that the outlawry has been duly reversed; *R. v. Rowe*, 1 Show. 188; S. C. Carth. 199. The general principle is, that an outlaw cannot be heard in a court of justice, except to set aside the outlawry.

(y) *R. v. Richardson*, 1 Burr. 540; *R. v. Mayor, &c., of Liverpool*, 2 Burr. 734; *R. v. Mayor, &c., of Doncaster*, 2 Burr. 738; *vid. 1 B. & Ad. 942*. The power of holding a corporate meeting for amotion is incident to the power of amotion, *R. v. Mayor, &c., of Lyme (Fane's case)*, Dougl. 153. (z) 2 Burr. 734.

(a) *R. v. Mayor, &c., of Liverpool*, 2 Burr. 733; *R. v. Langhorne*, 4 A. & E. 538.

(b) *R. v. Harris*, 1 B. & Ad. 936.

The amotion and election of the successor, where only colourable, do not call for a writ to restore, for the office is still de jure full of the first holder; but the court will grant a mandamus to enable the latter to exercise the office.(c)

Several formalities have been stated to be necessary in the case of amotion of officers of a freehold tenure; as that if appointed under seal, they must be removed by an instrument under seal; that they must have notice a reasonable time before the meeting of the body having power to amove, and must be fully heard in their defence; but what has been laid down to this effect does not of course apply to cases where the office is avoided by the acceptance *within the corporation* of another office of an incompatible nature; for the due election by the proper electors to, and the acceptance of, such an office, operates either as a surrender of,(d) or as an amotion from, the former; and it will operate as an emotion whenever the acceptance of the second office is made by or with the privity of the same authority in the corporation that had power to amove from the first;(e) but there cannot be considered *to be any good authority, [*247] since the decision above cited, to show that in either case anything more than election and acceptance is requisite as an act of determination of the first office. An officer cannot be obliged by the corporation to accept an incompatible office, in order that his original office may be vacated.(f)

Where an eleemosynary corporation, for want of an heir to the founder, became subject to the visitation of the crown, the mode of amoving a corporator was held to be not by way of bill or information in the court, but petition to the great seal.(g)

We shall now proceed to examine in detail the principal points constituting the law of mandamus to restore to an office.

There is a great deal of difference between the case of a mandamus to admit, and a mandamus to restore, to an office. The former is granted merely to enable the party to try his right, there being no other legal remedy available for him; but the court have always looked more strictly to the right of a party applying to be restored. He must show a *prima facie* title; for if he has been before regularly admitted, he may try his right, where the office has fees attached to it, by bringing an action for money had and received for the profits. Therefore, in order to entitle

(c) R. v. Mayor, &c., of Oxford, 6 A. & E. 349.

(d) R. v. Trelawney, 3 Burr. 1615; vid. 4 B. & Ad. 24.

(e) R. v. Patteson, 4 B. & Ad. 25; Staniland v. Hopkins, 9 M. & W. 178. It has been held generally, that, to complete the resignation, there must be a fresh election, for until then the party resigning may retract his resignation; R. v. Mayor, &c., of Ripon, Salk. 433, qu. tam. The question, in cases of offices for life, would perhaps turn upon the inquiry, whether what was done could be brought within the principle that, upon an assent first had, and act done afterwards, a freehold may be divested out of one man and vested in another; per Hales, J., Plowd. Com. 31. In general, a freehold cannot be divested by parol without other circumstances.

(f) Baston's case, Dyer, 332, B., marg., cited Awdley's case, Noy, R. 78; 19 Vin. Abr. 151. It is not necessary, in pleading respecting an office, to aver an acceptance of it, unless in the case of a voluntary office not cast upon one by law, where it is necessary to plead both the appointment and the acceptance; Serra v. Wright, 6 Taunt. 65; vid. 4 B. & Ad. 27.

(g) Att.-Gen. v. Earl of Clarendon, 17 Ves. 491; Att.-Gen. v. Dixie, 13 Ves. 510.

himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him.^(h) Hence, where several officers are removed at once, they cannot join in the writ, but must have separate writs; for the election of one is not the election of another, and perhaps they may all have been chosen at several times, and it may be for several faults that they have been severally removed; therefore such a writ would not show to the court a *prima facie* case of individual right in each of them;⁽ⁱ⁾ and generally a writ complicated with several matters, as by requiring the corporation to restore, and also to do other things independent of restoring the party, will not be allowed;^(k) but where A. has been amoved, and B. elected and admitted in his place, the writ may direct the corporation to amove B. and restore A., these being dependent matters.^(l) Besides cases in which an officer has been actually amoved, the better opinion seems to be, that where he has been improperly suspended, the writ to restore lies;^(m) but it should only be to restore to ^{*248}the exercise of the office, for the freehold remains in him during suspension. An annual officer may have a writ to restore if he be amoved before the expiration of his year of office.⁽ⁿ⁾

The effect of a *mandamus* to restore is to replace the party in his office, so that after the restoration he is in, not by a new right, but as of his original right to it;^(o) so that the officer who is restored will be considered as having had a continuous enjoyment of the office from the period of his admission, just as though no amotion had ever taken place. The act of amotion is considered in such case as a mere nullity *ab initio*. But if A. have been amoved, and B. elected and admitted in his place, and a *mandamus* to amove B. and restore A. issues, but another officer of the same class vacates his office in the meantime, the effect is, not that B.'s previous election to A.'s office gives him a right to claim the last mentioned vacant office, but by the writ he is remitted to his former station, and he must have a fresh election to entitle him to the vacancy.^(p)

The return to a *mandamus* to restore is required to exhibit peculiar certainty.^(q) In excusing the amotion, it must show that the amotion

(h) *Per Buller, J.*, 3 T. R. 577, 578; *R. v. Mayor, &c.*, of Chester, 5 Mod. 10; *vid. R. v. Mayor, &c.*, of Lyme (Mitchell's case), Dougl. 83. Outlawry disables a man from obtaining the writ; *R. v. Mayor, &c.*, of Bristol, 1 Show. 288; *R. v. Rowe*, Carth. 199. In some cases the court have required that a right should be shown before they would grant a *mandamus* to admit; *R. v. Askew*, 4 Burr. 2191; *Com. Dig. Mandamus*, C. 3.

(i) *R. v. Mayor, &c.*, of Chester, 5 Mod. 11; *S. C. Salk*. 436; case of Andover, *Salk*. 433; *vid. Bull. N. P.* 200.

(k) *R. v. Mayor, &c.*, of Hull, *Str.* 578.

(l) *Shuttleworth v. Mayor, &c.*, of Lincoln, 2 Bulst. 122; *vid. Case of Christ Church*, *Bull. N. P.* 200, 201.

(m) *Per Lord Eldon*, C. 17 Ves. 323; 15 Vin. Abr. 192, pl. 19, marg.; *R. v. Guildford*, 1 Keb. 868, contra; 1 Lev. 162. At any rate the party suspended may try the right in action for the profits of the office, *vid. 2 T. R.* 525, 526; 2 T. R. 182. Perhaps in such case the court would grant a feigned issue if the parties consented. the case being within 9 Ann. c. 20; or they might, in cases of non-municipal corporations, order one under 1 Will. 4, c. 21, s. 4.

(n) *Colchester Town v. Northern*, 1 Rol. R. 335.

(o) *Summers v. Reg.*, Cowp. 503.

(p) *Shuttleworth v. Mayor, &c.*, of Lincoln, 2 Bulstr. 122.

(q) *Vid. sup. pp.* 129. 239.

was made at a meeting of the body, in whom the power of amotion resides by the constitution; (*r*) that such meeting was regularly convened, (*s*) and held in the regular place for holding corporate meetings; (*t*) that the charges against the party were then stated to him; that, having had notice of them a reasonable time previous to the meeting, he was fully heard in his defence; (*u*) or else such other facts must be shown as make it appear either that he was out of reach of summons (ex. gra. from having left this country altogether), or that summons would be idle (ex. gra. from his imprisonment in execution, without any probability of his discharge), or such other facts as may fully warrant them in amoving without notice and hearing. It must also show, or at least state, in case he were heard, that the defence and answers that he made were unsatisfactory, (*x*) or that he refused to answer at all. (*y*) And everything material to excuse or justify the act must be stated by direct averment, and not by way of recital or argumentatively; (*z*) and therefore it will not be sufficient to state that he was amoved secundum chartam, without they show a cause, and the manner of his amoval; (*a*) the object being that the court may see that they have properly pursued the authority vested in them; unless the officer is removable at pleasure, when they must state that and the amotion accordingly. (*b*)

A return to a mandamus to restore, that the party was amoved for speaking opprobrious words of another officer, is not good; for words (whatever may be the case of a defamatory writing) are no cause of amotion; at any rate where they do not concern the corporation. (*c*)

A return that he was never elected is good; (*d*) so that he was not duly elected, if the return, in using that phrase, pursues the language of the writ, (*e*) though if it had not followed the writ (which it is a gene-

(*r*) Vid. sup. p. 229. If it state the amotion to have been by the body at large, it need not aver that the power of amoving was vested in them, for it is incidental unless otherwise disposed of by the constitution; *R. v. Mayor, &c. of Lynn*, 1 Dougl. 177; *R. v. Mayor, &c., of Doncaster*, Sayer, 37.

(*s*) Vid. sup. p. 154. *Morris's case*, cited 4 Mod. 37; *R. v. Mayor, &c., of Wilton*, Salk. 428. It will be sufficient to state that the body, &c., was duly assembled to amove, *R. v. Mayor, &c., of Doncaster*, 2 Burr. 738; *S. C.* 2 Ld. Keny. 391.

(*t*) *Taylor's case*, 3 Bulst. 189; 15 Vin. Abr. 188.

(*u*) Vid. sup. p. 245. *Protector v. Town of Colchester*, Styl. 446. 452. It is not enough to state that he was present when the charges were made, and did not deny them; 8 T. R. 352; vid. 1 M. & Selw. 697. (*x*) 3 Bulst. 189.

(*y*) Vid. sup. p. 246.

(*z*) Thus, if a custom be the cause, it is not a direct affirmation of it to state that there has been a usage to that effect; *Yates v. Mayor, &c., of Kingston-on-Thames*, Styl. 477. So non constat nobis that he was ever elected, is a bad return; *T. Raym.* 153.

(*a*) *Braithwaite's case*, 1 Vent. 19; vid. *Haddock's case*, *T. Raym.* 437.

(*b*) Vid. sup. p. 244; *Dighton's case*, *T. Raym.* 506.

(*c*) *Jay's case*, Vent. 302; *Clerk's case*, Cro. Jac. 506. It is not likely that any return of this kind would at present be held a good cause of amoving an officer, unless, by amounting to a breach of trust, the words could be considered as wholly opposed to his duty. But this does not extend to a declaration that the party will not do the duties of the office, for that is a good cause of amotion; vid. sup. p. 245.

(*d*) Com. Dig. Mandamus, D. 3; (vid. tam. id. D. 4); *Lambert's case*, Carth. 170; *S. C.* 12 Mod. 2.

(*e*) *Reg. v. Twitty*, Salk. 434; *Lambert's case*, Carth. 170; *R. v. Hill*, 1 Show. 253; vid. 4 Burr. 2044.

ral rule that a return to a mandamus must do), there is authority to show that such a return would be considered evasive, and therefore bad,^(f) or, perhaps, as involving a negative pregnant;^(g) but if election, and due election, mean the same thing, as seems settled,^(h) it is difficult to perceive any grounds for the objection; for such a return would answer not, it is true, the words, which it need not do, but "the materiality of the writ," as it must do.⁽ⁱ⁾ But the return must not be that he was not duly elected, admitted, and sworn, for that would be fallacious, although it pursues the suggestion of the writ, but a return to such a writ that he was not duly elected, or admitted, or sworn, might be good.^(k) In later cases the return that he was not duly elected has been made without objection.^(l)

A return that the officer had been absent from his office for twenty-two years would undoubtedly be a good return in all but very peculiar cases, as where the office might be exercised by deputy, and had been so during that time by a sufficient deputy duly appointed.^(m)

With respect to the quality of the offices for which the mandamus to restore will go, there appears to be little difference between the cases [*250] of this writ and that to admit. Neither lies for offices of no higher rank than those of mere servants; but for some ministerial offices they will lie; as all offices (not servile) connected with the administration of justice and police, provided they be of a public character,⁽ⁿ⁾ one test of which is, if the officer is obliged by custom, charter, or statute, to take oaths upon admission;^(o) and the court is in the habit of granting them more freely for freehold offices than for offices of a lower tenure. Perhaps the writ to restore is granted in some cases in which the court would not allow a writ to admit. A writ to restore has been granted, though with hesitation, for the office of treasurer of the New River Waterworks' Company.^(p) It has also been granted for the office of workman of the Mint;^(q) of sword bearer to the mayor of Bristol;^(r) of usher of a free school, of which a corporation was visitor;^(s) of clerk or surveyor of the city works (London), being a freehold office;^(t) of physician to Bartholomew's Hospital,^(u) notwithstanding the right of visitation was vested in the donor;^(u) of scholar of King's College, Ox-

(f) Reg. v. Twitty, Salk. 434.

(g) Com. Dig. Mandamus, D. 5; vid. tam. sup. pp. 239, 240.

(h) R. v. Mayor, &c., of Lyme (Mitchell's case), Doug. 84, 85; per Lord Mansfield, C. J., 4 Burr. 2011.

(i) R. v. Mayor, &c., of Lyme, (Mitchell's case), Dougl. 85.

(k) Ibid.

(l) R. v. Mayor, &c., of Cambridge, 2 T. R. 457. 461; which, however, was a mandamus to admit; vid. sup. pp. 230. 239, 240.

(m) R. v. Mayor, &c., of Newcastle, Sayer, 39.

(n) White's case, 6 Mod 18; Vaughan v. Company of Gunmakers, 6 Mod. 82; vid. 15 Vin. Abr. 185.

(o) Vid. 2 T. R. 182, note.

(p) Middleton's case, 15 Vin. Abr. 197, pl. 5. Mandamus to restore one to be a member and assistant to the Company of Traders to the Bermudas; Trott's case, 2 Keb. 693.

(q) Stirling's case, Sid. 304; R. v. Rowe, Carth. 199.

(r) Roe's case, 15 Vin. Abr. 198, pl. 9.

(s) Protector v. Craford, Styl. 457; vid. tam. Ayliffe's case, T. Jones, 174; S. C. Trem. P. C. As to mandamus to restore to fellowship of a college, 2 Lev. 14; S. C. Trem. P. C. 478; Appleford's case, 2 Keb. 799. 861.

(t) 2 T. R. 182, note.

(u) Cited Andr. 184.

ford;(x) of receiver under the conservators of the Bedford Level.(y) A mandamus to restore has also been granted for a serjeant at mace, being an officer for life;(z) but the writ has been refused to a serjeant at mace to compel him to deliver up his mace, &c.,(a) there being a remedy by action.(b) And the limits, to which the court will go, in granting a writ to restore, are evidently not measured by those, within which they restrain themselves, in granting a mandamus to compel one of their officers to perform his duty; for in such cases the principle has been distinctly laid down, that a mandamus is not to be granted to compel the execution of duty by an inferior officer;(c) meaning, it seems, by an inferior officer, one who is amenable to some superior officer or body.(d) However, in fact, in cases of corporate officers, this principle has not been adhered to at all; for a mandamus has been granted to a town clerk to deliver the corporation books, &c., to his successor;(e) to a clerk of a city company to deliver books, papers, &c., the property of the corporation;(f) to a town clerk to inrol indentures of *apprenticeship;(g) to a surveyor of highways to deliver books, &c., to churchwardens;(h) [*251] to the officer of a corporation having charge of the public books to attend and produce them at the next corporate meeting;(i) to a town clerk to give up insignia of office, &c.;(k) to the keepers for the time being of the common seal of the University of Cambridge to affix the seal in a case of an appointment to an office with a salary, but there, it was said, there was no other remedy.(l)

From these cases, therefore, it would appear that the courts interfere by mandamus to compel the discharge of their duty, or to rectify misfeasances by corporate officers (although such officers may be inferior in the above sense,) when the remedy by indictment is not the quicker and better remedy; and where the remedy by action (as in the case of books, insignia, &c.,) would be too tedious.(m) As before has been pointed out, in municipal corporations, the remedy for the detention of books or other corporation property, is by application before two justices under the Municipal Corporations Act,(n) and therefore to such cases the remedy by mandamus is no longer applicable, but to other cases the above decisions are still applicable; and we may safely infer from them, that where the court can see that the remedy by mandamus is either the only effective

(x) Ibid.

(y) Anon., 1 Barnard. B. R. 195.

(z) R. v. Barnard, 2 Keb. 402; R. v. Mayor, &c., of Dartmouth, 3 Salk. 229. But refused to swear in a serjeant at mace, who was removable at pleasure of the mayor; R. v. Winter, 2 Keb. 134.

(a) R. v. Todd, 2 Jur. 565.

(b) Vid. Lill. Entr. 51.

(c) Per Lord Kenyon, C. J., in R. v. Bristow, 6 T. R. 170; vid. R. v. Jeyes, 3 A. & E. 423; Bull. N. P. 199.

(d) Vid. per Lord Denman, C. J., 3 A. & E. 421; et vid. sup. p. 225.

(e) 1 Sid. 31, cited Cas. Temp. Hardw. 99. (f) R. v. Wildman, Stra. 879.

(g) R. v. Marshall, 2 T. R. 2; R. v. Coopers' Company of Newcastle-on-Tyne, 7 T. R. 543.

(h) R. v. Round, 4 A. & E. 139.

(i) Case of Calne, Stra. 948.

(k) Crawford v. Powell, 2 Burr. 1013.

(l) R. v. University of Cambridge, 1 W. Bla. 553.

(m) Vid. per Patteson, J., 3 A. & E. 424; R. v. Commissioners of Navigation of River Thames, &c., cited 3 A. & E. 420; per Pratt, C. J., and Powys, J., Stra. 538, 539.

(n) Vid. sup. p. 242.

tual remedy, whether in the courts of law or equity, or the spiritual courts, or the only one that can be made effectual within a reasonable time, they will grant the writ in cases of applications on behalf of corporations, though the officer, who is to be compelled to discharge his duty, may be a mere ministerial officer. The reason why the rigour of the general principle, that a mandamus is not to be granted to compel the execution of his duty by an inferior officer,^(o) has been departed from in favour of corporations, is obviously this, that "the writ of mandamus is the proper remedy to enforce obedience to acts of parliament and to the king's charter, and in such case is demandable of right;"^(p) and, moreover, as all corporations, whether constituted by charter, or by the modern method of statute, are, by their creation, invested with a greater or less portion of the powers of the crown, it would be nugatory to give them such authority, without also extending to them the corresponding means of enforcing it;^(q) *for otherwise, although [*252] clothed with rights, and also with liabilities resulting therefrom, of a higher nature than belong to individuals, they would be left to maintain, defend, and support such rights, and answer such liabilities, by no higher authority than are at the command of private persons in ordinary cases. Incorporation under such circumstances would become, in many respects, not a boon, but a burden, in which light there is no ground to infer that the law has ever considered it. On the other hand, the extraordinary remedy of mandamus will not be granted to compel a corporation to do what by law they are entitled to do, or not to do, at their discretion, not even to a party who has been injured by the mode in which they have chosen to make a fair exercise of their power; but it will be granted where they refuse to perform a duty cast upon them by the law of the land, or the provisions of their charter,^(r) though the

(o) Vid. sup. pp. 225. 250.

(p) Bull. N. P. 199; per Buller, J., in *R. v. Bishop of Chester*, 1 T. R. 404. The rule has lately been laid down by the court that wherever the common law imposes a duty, and no other remedy can be shown to exist, or only one, which has become obsolete or inoperative, the Court of Queen's Bench will interfere; *Veley v. Burder*, 12 A. & E. 266.

(q) That such means must belong to them may be deduced from the principle, than which (it has been said by a very high authority) "nothing is more certain in law," viz. "that when an act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person who executes it;" *Middleton v. Crofts*, 2 Atk. 661. A refusal therefore by an individual to conform himself to an act done by a corporation within the scope of their authority, is a refusal to obey the giver of that power, and calls for the mode of coercion which is appropriate to enforce the authority of the crown or of parliament. For example, if a corporation legally elect to an office any corporator qualified for, and not legally exempt from, serving it, a mandamus is the fit mode of compelling him to perform, what is in fact the command of the executive, laid upon him by the agency and medium of the corporation.

(r) Vid. instances, sup. pp. 231. 241. So a mandamus will not be granted to compel a corporation to make or renew a lease which it is not obligatory on them to make or renew, in the absence of proof that any one is injured by the refusal; *R. v. Mayor, &c., of Liverpool*, 1 Barnard. B. R. 83. The reason of the exception in favour of an injured party is, that he has no other remedy; and "where a body has a discretion conveyed to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for" to the party; vid. per Lord Brougham, in *Ferguson v. Earl of Kinnoul*, 9 Cla. & F. 290. If malice can be shown, it is different.

applicant does not show that injury has resulted to any one from their misconduct.

The courts of equity, however, are in the practice of interfering to regulate the exercise of the discretion of corporations for charitable purposes, but in those cases only in which the disposition of the revenues is vested in the corporation or the governing body of it.(s)

We have had repeated opportunities of observing, that, generally speaking, where there is a plenarty of an office, for which an information in the nature of a quo warranto will lie, the court will not grant a mandamus either to proceed to a fresh election, or to admit the party who contends he is duly elected, or to amove the party who is actually in the office; for a writ of mandamus only lies where there is no other specific legal remedy, and here, in the two first cases, the quo warranto information is the appropriate and the most expeditious mode of trying the right. It is requisite, therefore, to examine when this information may be had for corporate offices. Now, it is laid down, that the proceeding by information in the nature of quo warranto lies for the usurpation of any office, whether created by charter from the crown, or by the crown with the consent of parliament, if it be of a public nature, and a substantive independent office, not merely the employment *of a servant or deputy at the pleasure of others;(t) and the rule [*253] is so clear, that there will be found but little difficulty in applying it to particular cases. First, we may observe, that notwithstanding this rule, the court, in the exercise of its discretion, will refuse the information against a corporate officer where it appears that the object is to try the validity of a charter granted pursuant to the stat. 7 Will. 4 & 1 Vict. c. 78, s. 49.(u) On the other hand, leave to file such an information will not be refused merely because the proceeding *may or will* have the effect of dissolving the corporation.(x) The discretion of the court, exercised

(s) Mitf. Plead. Chanc. 100, n. This subject will be fully discussed hereafter; vid. inf. CHARITABLE TRUSTS.

(t) Darley v. Reg., 12 Cl. & F. 520, overturning the old doctrine that this proceeding could only be taken where there was usurpation of the crown. Whether it is a good ground for applying for this information that there is no other remedy, seems to be unsettled; vid. per Patteson, J., Re Aston Union, 6 A. & E. 785, that it is not; per Lord Kenyon, C. J., R. v. Bond, 2 T. R. 770, that it is. Information refused against registrar of corporation of Bedford Level, as being a mere servant of the corporation; R. v. The Corporation of Bedford Level, 6 East, 356, 367. One information may be had calling upon the same person to show by what authority he exercises two offices, or, perhaps, more than two; R. v. Patteson, 4 B. & Ad. 9; Reg. v. Thomas, 11 A. & E. 183. So one information may call on several persons to show, &c.; 9 Ann. c. 20, s. 4; R. v. Foster, 1 Burr. 573. For precedents of informations in the nature of quo warranto, pleas, replications, &c., vid. 6 Wentw. Prec. 28—242; ex officio informations, Co. Entr. 527, et seq.; et vid. 4 Burr. 2262. The parties in one information cannot be compelled to be bound by the result of another, though the objection is the same in each; R. v. Cozens, 6 Dowl. 3; S. C. 7 A. & E. 285.

(u) Reg. v. Taylor, 11 A. & E. 949. By "the court" here, and throughout this subject of information in the nature of quo warranto, the Court of Queen's Bench is always intended. The information will not lie in the Exchequer; Pippard v. Mayor, &c., of Drogheda, 2 Bro. P. C. 328.

(x) Rex v. Parry, 6 A. & E. 810; vid. contra, R. v. Stacey, 4 Burr. 1963, 2121; R. v. Binsted, Cowp. 77; R. v. Dawes, 4 Burr. 2124. If the corporation *must necessarily* be dissolved by impeaching the defendant's title and that of those who

on a view of the circumstances, both with respect to the relator and the other party, and also the consequences of granting the information, is the principle on which all the cases of this class turn.(y) Therefore, the information will not be granted where some time has been allowed to elapse, and the court sees reason to think that the relator seeks by it to obtain an indirect decision on the merits of his own election to a franchise of the same class.(z) A general principle on which the court acts with respect to the question of qualification to be a relator is, that he who has concurred in inducing a party to exercise an office cannot be heard on an application to turn him out of the office.(a) Therefore, the borough officer, who administers an oath or declaration on admission to office to a party whom he knew to be disqualified at the time, cannot be a relator against such party.(a) So, though the applicant did not know [*254] of the objection at the time that he *concurred in the election, if the objection was one that he was bound to know of, ex. gra. if it arose out of the provisions of the charter, which every corporator is bound to be aware of.(b) If the objection is not of a sort he was bound to be aware of, he must show that he was actually ignorant of it when he concurred in the election, &c.(c)

Another general rule is, that a person whose own title to his office in the corporation stands in the same predicament with that of the person whose title he seeks to impugn, cannot be a relator.(d)

But, subject to the above general principles, any one may be a relator, provided he is subject to the local jurisdiction of the corporation as an inhabitant, although he be not a member of the corporation.(e) Mere poverty does not disqualify from being a relator, though it may be a ground to induce the court to make the party find security for costs.(f) If he dies pending the proceedings, it does not follow that the court will stay proceedings, for the crown has a right to have the proceedings

claim under him, probably the court would refuse the rule; *R. v. Bond*, 2 T. R. 767; *R. v. Trevenen*, 2 B. & A. 479. On the other hand, it has been decided not to be an objection to the motion that the information is a friendly proceeding to enable the defendant to disclaim; *R. v. Marshall*, 2 Chit. R. 370; vid. 11 A. & E. 8; 4 Q. B. 146, as to costs of disclaiming.

(y) Per Lord Denman, C. J., 6 Q. B. 820, 821; vid. 2 B. & A. 479; 11 A. & E. 949; 6 A. & E. 810. This last authority shows that the court may refuse, though a valid objection to the title be shown; vid. 1 East, 43, acc., per Yeates, J.; vid. *Re Harris*, 6 A. & E. 475.

(z) *Reg. v. Anderson*, 2 Q. B. 740.

(a) *Reg. v. Greene*, 2 Q. B. 460; *R. v. Trevenen*, 2 B. & A. 343. This does not in general extend to a mere subsequent recognition of the election, *R. v. Clarke*, 1 East, 38; vid. *R. v. Stewart*, 3 East, 213; *R. v. Bonney*, 1 B. & Ad. 684; *R. v. Carter*, Cowp. 58; but it does extend to concurrence in the election of another officer to whose title the same objection applied, *R. v. Parkyn*, 1 B. & Ad. 690.

(b) *R. v. Trevenen*, 2 B. & A. 339; vid. 4 T. R. 223. The legal adviser of the officer who advised him that he was duly elected cannot be relator; *R. v. Payne*, 2 Chit. R. 369.

(c) *R. v. Slythe*, 6 B. & C. 240.

(d) *R. v. Cudlipp*, 6 T. R. 503; vid. *R. v. Smith*, 3 T. R. 573.

(e) *R. v. Parry*, 6 A. & E. 810; *R. v. Hodge*, 2 B. & A. 344; *Reg. v. Quale*, 11 A. & E. 508. The rule has been made absolute even where it did not appear that the relator was in any way connected with the corporation; *R. v. Brown*, 3 T. R. 574. n.; vid. 1 East, 46.

(f) *R. v. Wakelin*, 1 B. & Ad. 50; vid. *Reg. v. Alderson*, 11 A. & E. 3; *Cole*, Qu. Warr. 174. As to the proper time of applying for security, *R. v. Day*, 1 Dowl. 32. *R. v. Dudley*, 7 Dowl. 700.

brought to a close, because of the fine which may become due in case the defendant is convicted.(g)

It is not an objection that the information calls upon the defendant to show on what authority he exercises different franchises or offices. Any number of franchises may be joined in one information against him.(h)

With respect to the question, for what offices the information will be granted, perhaps no rule beyond the above general one can be laid down.(i) To entitle a relator to the information, there must have been an user of the office, not a claim to it merely.(j) A defect of title, or want of title, in the presiding officer, is no longer a ground of impugning the title of officers appointed by election in municipal corporations.(k) But, perhaps, that one or more of the persons, before whom the officer ought to have been sworn in, was absent when he was sworn, and that therefore he had never been duly admitted, might be a good ground.(l)

*As it will be impossible clearly to state the law on this subject without perpetual reference to the statute(m) on which it [*255] principally rests, we shall here cite the two principal enactments, which are as follows. First, in case any person shall usurp, intrude into, or unlawfully hold and execute any of such offices and franchises (*i. e.* corporate offices and the franchises of burgesses or freemen of cities, towns corporate, boroughs, or places, in England or Wales,) the proper officer in the Queen's Bench, with the leave thereof, may exhibit an information in the nature of a quo warranto at the relation of any person desirous to prosecute the same, *and who shall be mentioned therein(n) to be*

(g) Vid. the Ilchester case, cited Stra. 105.

(h) Vid. cases cited Cowp. 499.

(i) Informations have been granted for claiming and exercising the office of steward of a borough 6 Wentw. Prec. 81; town clerk and clerk of the peace, Reg. v. Thomas, 11 A. & E. 183; aldermen and justices of the peace, R. v. Patteson, 4 B. & Ad. 9; sheriff of a county of a city or town, R. v. Whitwell, 5 T. R. 85.

(j) R. v. Whitwell, 5 T. R. 85; R. v. Saunders, 3 East, 119; vid. 4 East, 337; 7 A. & E. 749; 11 A. & E. 508.

(k) 7 Will. 4 & 1 Vict. c. 78, s. 1; Reg. v. Jones, 7 A. & E. 430; Reg. v. Hooker, 9 A. & E. 680.

(l) Vid. R. v. Brooks, 8 B. & C. 321. For a swearing in must be with the assent of all those before whom the swearing in is appointed to take place, R. v. Ellis, Stra. 994; S. C. more fully, 9 East, 252, n.; vid. 4 Burr. 2135.

(m) 9 Ann. c. 20; vid. as to officers in corporate boroughs, 6 & 7 Vict. c. 89, s. 5.

(n) The motion will only be granted on affidavit by the parties making it that they are relators; and such persons shall be deemed the relators in case the rule shall be made absolute, and be named as such in the information in case it shall be filed, unless the court shall otherwise direct; vid. rule of court, Mich. T. 3 Vict., 11 A. & E. 2. The affidavit must state at whose instance the application is made; it is not enough for the party to depose, that if the court grant the information it is his intention to become really and bona fide the relator; Reg. v. Hedges, 11 A. & E. 163. As to the notice of the application under 6 & 7 Vict. c. 89, in cases of claimants to corporate offices, vid. sect. 5 of that statute. If the relator be poor and unable to pay costs, on the discharge of a rule nisi for a quo warranto information, there being behind a person who is the real prosecutor, the latter will be ordered to pay them; Reg. v. Greene, 4 Q. B. 646. The above rule of court has the effect of withdrawing the indulgence formerly allowed to a person who was himself estopped to be a relator, viz. that he might be qualified to make such

the relator, against such person so intruding, &c.,^(o) and proceed therein in the manner usual in such informations; and if it appear to the court that the several rights of divers persons to such offices or franchises can be determined on one information, the court may give leave to exhibit one information accordingly, in order to try their respective rights, and such person, against whom such information is prosecuted, shall appear and plead as of the same term or sessions in which such information was filed, unless the court shall give the relatee further time to plead, and the relator shall proceed thereon with all convenient speed.^(p)

Corporations are under no restraint at common law as regards the mode in which they may take the votes of their members at elections of their officers; and, provided they make no regulation which infringes the law of elections generally, as by giving a casting vote to the presiding officer, or other person, or by declaring that the election shall be [*256] *carried by some majority other than a simple one, they may adopt any mode of voting they please, as by show of hands, voting papers, ballot, &c. In municipal corporations the mode of election is in most cases of corporate offices regulated and ascertained by the Municipal Corporations Act and subsequent statutes, and they cannot deviate from the arrangements so made; but with respect to other corporations, and with respect to offices in corporations not regulated as above, it may be useful to point out the great objection there is to voting in secret modes, as by ballot, arising from the difficulty of upsetting an election which there may be reason to deem bad, as depending on the votes of non-qualified electors; for on an application for a quo warranto information, it lies upon the relator to show that the defendant's majority was obtained by means of bad votes, proof of which it is almost always impracticable in such case for the relator to make out.^(q) However, several of the old charters of municipal corporations expressly gave the

an affidavit as the court would grant the application on, provided the motion were made on behalf of a properly qualified relator; *vid. R. v. Braine*, 4 A. & E. 664; *R. v. Parry*, 6 A. & E. 810, 819. A party who has exercised an office by usurpation may be proceeded against by information, though he has resigned the office, and his resignation has been accepted by the corporation, for he is liable to a fine to the crown for the usurpation, *R. v. Warlow*, 2 M. & Selw. 75; or after expiration of his year of office, 2 Ld. Keny. 498; *qu. tam. vid. 2 Q. B. 744*; *Reg. v. Hodson*, 4 Q. B. 648, n.

^(o) A party who acts in an office where an oath forms part of the form of admission, without being sworn, is such an usurper; *Case of Mayor of Penryn*, Stra. 582, affirmed Dom. Proc. 2 Bro. P. C. 294. As to the proper judgment in such case, *R. v. Clarke*, 2 East, 75. A party who acts in an office after having duly resigned it, or having vacated it, "unlawfully holds the office;" *R. v. Payne*, 2 Chit. R. 367; *vid. 9 B. & C. 703*.

^(p) 9 Ann. c. 20, s. 4. It seems that the franchise of sharing in the common lands or joint stock of a municipal corporation held by the old freemen, and in some cases by inhabitants, is not settled to be a franchise in a corporate place under this statute, so that the court will grant an information in respect of it; *vid. per Bayley, J.*, 10 B. & C. 233; *Reg. v. Pepper*, 7 A. & E. 745.

^(q) *R. v. Jefferson*, 5 B. & Ad. 855; *Faulkner v. Elger*, 4 B. & C. 455, 457. Voting, by giving in the name of the candidate voted for, without the name of the voter, seems to be an illegal mode of voting; *Faulkner v. Elger*, 4 B. & C. 455. In general the personal presence of the voter is necessary; and it seems that a corporation not authorized so to do by charter or statute, could not establish a mode of voting by proxy; *R. v. Ellis*, 17 Sta. Tri. 822.

power of voting by ballot(r) in corporate elections, &c. In case this mode of election were to be revived in any such corporations in cases not provided for by the Municipal Corporations Act, the proper mode of raising the question of the legality of such proceeding, especially after the non-user (which has been almost universal, it is believed, for a great length of time,) would seem to be by scire facias, or information in the nature of quo warranto exhibited by the attorney-general.(s)

Referring to the latter part of the section of the statute cited above, it may be observed, that the only case in which the power there given seems to have been exercised of consolidating into one information several brought to determine rights urged by various claimants to the same office, was a case where four persons claimed the same office;(t) and the decision seems, though not very fully reported in regard to the circumstances, to militate against the doctrine that there must have been a user, as well as a claim, to lay ground for quo warranto information.(u)

As to the time within which an application for an information in the nature of quo warranto must be made, it is enacted, that applications for the purpose of calling on any person to show by what warrant he claims to exercise the office of mayor, alderman, councillor or Burgess *in any borough, shall be made before the end of twelve calendar [*257] months after the election or the time when the person against whom such application shall be directed shall have become disqualified;(x) and no election of mayor shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor, to which he may have been previously elected, unless application shall have been made calling upon him to show cause by what warrant he claims to exercise such office of alderman or councillor, within twelve calendar months after such his election to the said office of alderman or councillor; and every election to the office of mayor, alderman, councillor, or any other corporate office within a borough, which shall not have been called in question by such application within twelve calendar months from such election, shall be deemed to have been to all intents and purposes a good and valid election.(y) Therefore, in all these cases, the rule *nisi* must be moved for within twelve months of the election or disqualification; in all other cases of offices in cities or boroughs the application must be in time to admit of filing the information within six years from the day of swearing in, &c.(z) The

(r) Vid. provisions for voting by ballot in the election of mayor, in the charters of Hen. 4, to Pomfret, Leicester, and other places, M. & Steph. Hist. of Boroughs, 1567; vid. R. v. Askew, 4 Burr. 2186, 2193.

(s) Peter v. Kendall, 6 B. & C. 703.

(t) R. v. Foster, 1 Burr. 573. All the four parties against whom rules had been made absolute in that case could hardly be said to be in possession and user of the office; vid. Reg. v. Pepper, 7 A. & E. 749.

(u) Vid. sup. p. 254; per Lord Kenyon, C. J., 4 T. R. 146. A swearing in, and nothing more, has been held to be a sufficient user without any possession being shown; R. v. Harwood, 2 East, 177; vid. R. v. Tate, 4 East, 337.

(x) 7 Will. 4 & 1 Vict. c. 78, s. 23.

(y) 6 & 7 Vict. c. 89, s. 1.

(z) 32 Geo. 3, c. 58, s. 3; Reg. v. Harris, 11 A. & E. 518. In cases of offices,

affidavits in support of the application must state every material fact in the first instance; no amendment can be allowed; (a) and, indeed, it would be violating a general rule of the Court of Queen's Bench to allow a party who makes an application, and fails in it from a defect caused by his own neglect in his materials, to move again upon amended materials; (b) the only exceptions which the court will in general admit, are where the amendment consists merely of correcting an error in the title or jurat of the affidavits. (c) But although the same relator cannot apply again upon amended materials, it is no objection to an application that a former information, impeaching the defendant's title on similar grounds, had been abandoned. (d) If an affidavit state that the election was contrary to the charter, it must state that the charter was accepted, or that the usage had been in conformity with the charter; (e) and if a custom as to the election, &c., be stated, the party must state his belief that it was immemorial. (f) So, if the ground of objection be that the defendant was not elected by a majority of the legal electors, the relator must show who constituted the class entitled to vote, and that another candidate had the majority of [*258] such votes. (g) It is material to take objections in the first instance, as the information will not be quashed on motion, and it seems the recognizances can only be discharged by consent. (h)

With respect to pleading to a quo warranto information the defendant may put on the record such several pleas as the court on motion shall allow. (i) The practice appears to be left without much illustration, as regards pleading double to an information at common law for an office which is not a corporate office (whether within a corporate borough

&c., in corporations not municipal, the rule of court limiting six years still applies 4 T. R. 248.

(a) *R. v. Barzey*, 4 M. & Selw. 253. As to the proper mode of stating acceptance of office, *vid. Reg. v. Slatter*, 11 A. & E. 505; *Reg. v. Quayle*, 11 A. & E. 508. As to proper degree of certainty in averments, 2 East, 177; 6 B. & C. 240; 9 B. & C. 702; 11 A. & E. 505; 1 Burr. 405.

(b) *Reg. v. Barton*, 9 Dowl. 1021; *Ex parte Hasleham*, 1 Dowl. N. S. 792; *Reg. v. Manchester, &c., Railw. Co.*, 8 A. & E. 725; *Reg. v. Great Western Railw. Co.*, 1 D. & L. 874. After rule nisi has been granted, the court will not receive additional affidavits; *R. v. Newling*, 3 T. R. 314.

(c) *Reg. v. Great Western Railw. Co.*, 5 Q. B. 597.

(d) *R. v. Bond*, 2 T. R. 767.

(e) *R. v. Barzey*, 4 M. & Selw. 253; *R. v. Hughes*, 7 B. & C. 708.

(f) *R. v. Lane*, 5 B. & A. 488.

(g) *R. v. Mashiter*, 6 A. & E. 153.

(h) *R. v. Edgar*, 4 Burr. 2297. The information must be certain, at least as much so as an indictment; an argumentative information is bad; 2 Hawk. P. C. 261; *R. v. Knight*, Salk. 375.

(i) *R. v. Autridge*, 8 T. R. 467. This is by force of 32 Geo. 3, c. 58, s. 1. The leave can only be obtained where the office is within the latter statute, viz. a corporate office in a city or corporate borough; *R. v. Richardson*, 9 East, 469; *R. v. McKay*, 5 B. & C. 646; *vid. Reg. v. Grimshaw*, 5 D. & L. 249; 4 Burr. 2146, marg. The being appointed to the office by the corporation does not make the officer a corporate officer; *Reg. v. Grimshaw*, 5 D. & L. 262. *Vid. instance*, 9 M. & W. 178; 13 Hen. 8, fol. 12. As to certainty in informations, 1 Burr. 405. Where an appearance has been entered, a rule to plead must be served on defendant's attorney, which expires in eighteen days after the service thereof, *Corner, Pract. Crown Sid. Q. B. App. p. 4*; and defendant cannot be required to plead sooner, *R. v. Radford*, 6 T. R. 595, note.

or not.) In one case of that kind the defendant had obtained a rule to plead several matters, and the court, on motion, refused to discharge the rule and strike out all the pleas except one, on the ground that by pleading double the defendant placed himself in this position, that the error, if any, was apparent on the face of the record, and, therefore, the question might be discussed before a court of error, whereas if they had granted the application, calling on them to discharge the rule, &c., he would have been altogether prevented from setting their judgment right by writ of error.(*k*) Probably, in such case, the preferable course for the prosecutor would be to demur to the pleas as being double, if he intends to dispute the right to plead in that manner. Where the defendant set out a defective title in his plea, the court will give judgment on the plea as amounting to a confession of the alleged usurpation.(*l*) A traverse of the usurpation is a wholly immaterial issue.(*l*) Where part of the plea is immaterial, the proper course is to demur to that part and join issues on the material parts.(*m*) Otherwise, although there be many other issues (as there almost always are,) and although all of them should have been found for the crown, the whole verdict will be set aside.(*m*) There is this difference between a civil action and an information of this nature, that in the former, when it appears on the whole record that the plaintiff has no cause of action he cannot, in any case, have judgment; but here, if the plea does not contain a complete title against the crown, there must be judgment for the crown.(*n*) In other *respects, however, this information is now considered as a civil proceeding, and a new trial may be had as in the case of common [*259] action,(*o*) except that where one material issue is found for the relator, he has the costs of all the issues upon judgment of ouster on that issue.(*p*)

As to the replication, it must be observed that though the defendant can only plead several pleas, in cases within the statute of Anne, provided the court grant leave to do so; yet, on the other hand, the relator may always reply by as many replications as he pleases; because the crown is supposed to be plaintiff, and the crown, in the exercise of its

(*k*) *R. v. Highmore*, 5 B. & A. 771.

(*l*) *R. v. Philips*, *Stra.* 394. 397. This was after verdict for the crown; but the same result would have followed if the verdict had been for the defendant; *Gwynne v. Burnell*, 7 Cl. & F. 572; *Chit. Archb. Pract.* 1352, 8th edit.; 10 Mod. 211. 296; form of disclaimer, *Corn. Cro. Pract. App.* 126. As to the effect of a plea of disclaimer and judgment thereon, *vid. R. v. Clarke*, 2 East, 75. There cannot be a disclaimer in *vacuo*; *R. v. Morton*, 4 Q. B. 146. 148.

(*m*) *R. v. Phillips*, 1 Burr. 305. In a later case, however, the jury have been discharged from giving a verdict on the immaterial issues; *R. v. Johnson*, 5 A. & E. 488; *vid. Powell v. Sonnett*, 1 Bli. N. S. 545.

(*n*) *R. v. Leigh*, 4 Burr. 2146.

(*o*) *R. v. Francis*, 2 T. R. 484; *vid. 4 Bla. Com.* 312; 4 M. & Selw. 338; *Stra.* 1102; 4 Burr. 2135. So as to costs; *Stra.* 33. Therefore the information and pleadings may be amended at any time before trial, as in case of a common action; *R. v. Birch*, 4 T. R. 610; *R. v. Grimes*, 4 Burr. 2147, and so on variance at the trial, under 3 & 4 Will. 4, c. 42, ss. 23, 24; *et vid. id. s. 25*, as to stating a special case.

(*p*) *R. v. Downes*, 1 T. R. 453. It is a good challenge to the array that it was returned by one of the same class as the defendant, or perhaps by one of the corporation; *Reg. v. Delme*, 10 Mod. 199.

prerogative, has a right to plead severally in all cases.(q) Therefore there is no objection to the information containing several counts; and so of the remaining pleadings of the relator, subject, however, to the restriction that no objection to the title of the defendant can be taken by special pleading unless it be specified in the rule to show cause, without special leave of the court or a judge of the Court of Queen's Bench.(r)

Secondly, with respect to the judgment, it is enacted,(s) that in case any person or persons, against whom any information or informations in the nature of a quo warranto shall, in any of the said cases,(t) be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises,(u) it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster(x) against such person or persons, of and from any of the said offices or franchises, as to fine(y) such person or persons respectively for his or their

(q) Chit. Archb. Pract. 251, 8th edit.; vid. Cas. Temp. Hardw. 257. Rules to reply expire in four days; Corn. Cro. Pract. App. p. 4. The replication must not state matter immaterial to or inconsistent with the matter stated in the plea; to do so is an abuse of the privilege of the crown; per Buller, J., *R. v. Knight*, 4 T. R. 423, 424, 425; vid. instance where eighteen replications were made to one plea in a case not within the statute, the place not being a corporate place, *R. v. Jolliffe*, 2 B. & C. 54; another of fourteen, vid. 1 Burr. 293.

(r) Reg. Hil. T. 7 & 8 Geo. 4; vid. 6 B. & C. 267.

(s) 9 Ann. c. 20, s. 5. Form of judgment of ouster, &c., Corn. Cro. Pract. Q. B. Append. 127.

(t) Vid. sect. 4, sup. p. 255. It is said not to be customary to fine a defendant for usurpation, but only to award judgment of ouster and costs; Corn. Cro. Pract. Q. B. 199, qu. tam. inf. note (x).

(u) The office, though an office in a city or corporate town, if not a corporate office, is not within this act, so as to give the relator his costs on recovering judgment; *R. v. Hill*, 1 B. & C. 237; *Horn v. Cutlers' Company*, Selw. N. P. 1167, 9th edit.; vid. 1 Burr. 408; *R. v. McKay*, 5 B. & C. 640; *Reg. v. Grimshaw*, 5 D. & L. 249; *R. v. Wallis*, 5 T. R. 375. As to relator's costs on recovering on a feigned issue granted by consent, *Thomas v. Powell*, 1 Burr. 603.

(x) Though it was found that defendant was duly elected, yet if he acted without being sworn (where swearing in was essential), the judgment of ouster must be given against him; *Case of Penryn*, Stra. 582, affirmed in Dom. Proc. 2 Bro. P. C. 294. But where defendant confesses usurpation for part of the time charged, but proves a due election afterwards, the judgment is only *capiatur pro fine* for that part; *R. v. Biddle*, Stra. 952.

(y) Therefore the information will lie after the usurper has resigned, and his resignation been accepted by the corporation; *R. v. Warlow*, 2 M. & Selw. 75. In informations *ex officio* the attorney-general has power over the proceedings, and may enter a *nol. pros.* at his discretion; but the court, after granting an information, will not order a *nol. pros.* to be entered by the officer of the court; for there is no precedent of the court ever interfering with the conduct of the proceedings, and the rule, perhaps, arises partly from the consideration on which the court proceeded in the above case, viz. that a fine is due to the crown upon an usurpation or wrongful holding being proved; *R. v. Brown*, 4 T. R. 277. But, to prevent suspicion of collusion, where the facts of the case call for it, they will transfer the carriage of the information to another relator; *Reg. v. Alderson*, 11 A. & E. 3. They will not quash an information, even by consent; but by consent the relator's recognizance may be discharged; *R. v. Edgar*, 4 Burr. 2297. And where a rule nisi had been granted, and the defendant appears, but does not defend his title, the rule was made absolute; the defendant paying the costs of the application, the relator undertaking not to file the information unless necessary; *R. v. Morton*, 4 Q. B. 146.

*usurping, intruding into, or unlawfully holding and executing, any of the said offices or franchises; and also it shall and may be [*260] lawful to and for the said courts respectively to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution, and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid.(z) This enactment, therefore, gives full costs to the successful party, whether relator or defendant, but it must be carefully observed that it is only in cases within this statute that either party, when successful, can have judgment for his full costs, but the clerk of the crown cannot, in any case, issue *the process* without taking the recognizance required by the stat. 4 & 5 W. & M. c. 18,(a) from the relator to the defendant, in the penalty of 20*l.* to prosecute the information effectually; and if the relator does not, at his own costs, within one year after issue joined, procure the same to be tried; or in case of a verdict for the defendant; or in case a nol. pros. be entered by the relator; then the court may award the defendant his costs *up to the extent of the penalty*, unless the judge certifies there was reasonable cause.(a) In cases of ex officio informations the maxim applies, that the crown neither pays nor receives costs.(b)

The effect of a judgment of ouster is wholly to vacate the office, and render null a previous election to it; so that the corporation ought immediately, upon such judgment being given, to proceed to a fresh election.(c) But this is only in cases within the statute of Anne; in cases of these informations, filed as at common law, judgment of ouster is not given,(d) and the defendant, in case of judgment for him, as before stated with respect to cases under the statute, can in like manner, in such cases, only get his costs to the amount of the recognizances, viz. 20*l.*(e)

Judgment of ouster is conclusive in evidence except where it is shown to have been obtained by collusion, when it may be controverted.(f)

*Also a judgment of ouster does not operate to annul the acts of an officer de facto, as least as far as regards acts which he [*261] is compellable as such officer to do.(g) The acts of mere usurpers, how-

(z) i. e. by *capias ad satisfaciendum*, *fieri facias*, or *elegit*; 9 Ann. c. 20, s. 2. As to levying poundage, 2 Smith, R. 8.

(a) R. v. Howell, Cas. Temp. Hardw. 248, 249; vid. R. v. Mayor, &c., of Hertford, Salk. 376; et vid. 13 East, 5; 2 T. R. 147; R. v. Morgan, cited 1 East, 41, 42.

(b) Corporation of London v. Att.-Gen., 1 H. Lds. 471.

(c) R. v. Hearle, Stra. 625, affirmed in Dom. Proc. R. v. Clarke, 2 East, 83.

(d) R. v. Ponsonby, Sayer, 245.

(e) R. v. Filewood, 2 T. R. 147. Form of such recognizance, Corn. Cro. Pract. Q. B. App. 121.

(f) K. v. Hebden, And. 388—392; R. v. Mayor of York, 5 T. R. 66, recognised 4 B. & C. 379.

(g) R. v. Mayor, &c., of Shrewsbury, Cas. Temp. Hardw. 150, R. v. Slythe, 6 B. & C. 240. The rule has been said to be, that on ouster from a defect in an election, or appointment, of an officer in a corporation, all acts properly corporate and official done by him are void, yet acts done as a justice, or in judicial character,

ever, who have come in without election, or with only a pretended election, stand on a different footing, and are wholly void.

Where, to an information for an usurpation of an office, the defendant pleads, confessing usurpation of the office from such a time to such a time, the judgment of ouster must be entered accordingly, and not generally for the whole time laid in the information.^(h)

What has been said relates almost entirely to information under the provisions of the statute of Anne, which, we have observed, refers only to corporate offices in corporate places, and it is to such offices, therefore, that the enactments relative to pleading several pleas, &c., and to relators under that statute, that its regulations giving costs refer. However, at common law, it must be remembered, the court may give leave to file an information of this nature, or the attorney-general, at his discretion, may file one *ex officio*. Instances of the first kind have been preserved, occurring before the statute. Thus the court entertained a motion for a rule against the Duke of Bedford for claiming to be Governor of the Corporation of the Conservators of the Bedford Level.⁽ⁱ⁾ Various other instances are found in the records of the crown office;^(k) so that there is no foundation for supposing, as was once held, that previously to the statute informations, at least in cases of corporations, were always filed *ex officio* by the attorney-general,^(l) and that the court had no power to allow of one being filed at the instance of a private relator. An instance of the second is an information filed by Sir Edward Coke, when attorney-general, for claiming a franchise of exemption from the government of the corporation of London for a district within the city, together with power to hold courts leet, appoint coroners, &c., and others against individuals or corporations for holding fairs and markets, taking toll, &c., without authority.^(m)

And since the statute the court still retains its common law power of granting such motions; thus the rule was made absolute against an [*262] individual claiming to be master of the Patten Makers' Company in the city of London,⁽ⁿ⁾ which though an office in an incorporated body, in a corporate place, is not an office, it would seem,

are not invalid; *Margate Pier Company v. Hannam*, 3 B. & Ald. 271; *O'Brian v. Kniven*, Cro. Jac. 554.

(h) *R. v. Taylor*, 2 Kelynge, 272.

(i) *R. v. Duke of Bedford*, 1 Barnard. B. R. 242. 280; *vid. S. P.*, admitted *R. v. Williams*, 1 Burr. 402; *S. P.*, per Lord Mansfield, C. J., *R. v. Gregory*, 4 T. R. 241, note; *S. P.*, recognized *R. v. Highmore*, 5 B. & A. 771. So *R. v. Howell*, Cas. Temp. Hardw. 248; *R. v. McKay*, 9 B. & C. 640.

(k) *R. v. Mayor, &c., of Hertford*, *R. v. Warburton*, *R. v. John*, *R. v. Pole*, *R. v. Lewis*, cited 4 Burr. 2260—2262; *vid. 1 Salk.* 374; *Carth.* 503; *Stra.* 299. 621; 3 Burr. 1818, marg.; *Stra.* 836. 1161. 1213.

(l) Where the Att.-Gen. has the power to file an information *ex officio*, the court will not interfere; *R. v. Phillips*, 4 Burr. 2090.

(m) *Co. Entr.* 527, B., where see judgment, pleadings, &c. Where a public corporation has been dissolved, and a party who held a corporate office in it claims to exercise another office of a public nature, alleged to be dependent on the possession of the former, that is a case for the attorney-general, not for a private relator; *R. v. Saunders*, 3 East, 119. He may always exhibit the information *ex officio* where he has the right to do so, although leave to file one has been refused to a private relator; *R. v. Wardroper*, 4 Burr. 1963. 1965.

(n) *R. v. Bumstead*, 2 B. & Ad. 699.

within the statute of Anne, which relates to offices belonging to the corporation which has local jurisdiction over the corporate place, not to such as belong to incorporated bodies otherwise connected with the corporate place. The question, however, seems not to be free from doubt.(o) Also the court has granted the motion against a person claiming to be a member of the incorporated Company of Tailors of Litchfield.(p) So for the office of mayor of Petersfield, which is not an incorporated place.(q) So an information lies at common law for a single instance of holding a borough court of record without authority.(r) So an information lies at common law for the office of borough coroner, appointed to under the Municipal Corporations Act.(s) So for the office of constable,(t) of registrar, and clerk of the court of requests,(u) and so of portreeve of a borough.(x)

We may repeat here what has been already observed, that in informations of this nature, that is, informations at common law, on the one hand the relator may insert as many counts, and use as many replications, &c., as he pleases, but can recover no costs; on the other, the defendant has no right to a rule to plead several matters, while a verdict for him only carries costs to the extent of 20*l.*, and not even that, if the judge certify that there was reasonable cause for filing the information.(y) But where a rule is granted to show cause why a quo warranto information should not issue against a person who had exercised a corporate franchise, ex. gra. the right of voting for a corporate officer, and it appears clearly on showing cause, that the defendant was entitled to vote, the rule will be discharged with costs.(z) On error to the Exchequer Chamber on a quo warranto information, the party in whose favour the court of error decides is not thereby, or by statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, entitled to enter up judgment of that court for his costs in error.(a) Either party may bring a writ of error.(b)

The next attribute of corporations of which we shall treat consists of the power of disfranchisement or expulsion from the corporate union of an unworthy member, which involves a total deprivation of *all [*263] privileges, rights, interests, profits and advantages which the individual enjoyed whilst a corporator; but without absolving him from

(o) *R. v. Attwood*, 4 B. & Ad. 481, where, however, the motion for a mandamus had been disposed of on the ground that quo warranto information was the proper course; *id.* 499; *vid.* 6 Wentw. Preced. 63. An information, perhaps, would be granted for the office of paving, &c., commissioners of the city of Exeter, the commissioners being incorporated, and having a considerable local jurisdiction; *R. v. Beedle*, 3 A. & E. 437.

(p) *R. v. Wakelin*, 1 B. & Ad. 50.

(q) *R. v. Jolliffe*, 2 B. & C. 54.

(r) *R. v. Williams*, 4 Burr. 402.

(s) *Reg. v. Grimshaw*, 5 D. & L. 249; the coroner not being a corporate officer.

(t) *R. v. Wallis*, 5 T. R. 375.

(u) *R. v. Hall*, 1 B. & C. 237; *semb.* an action for the fees is the proper mode of trying the right; *Staniland v. Hopkins*, 9 M. & W. 178.

(z) *R. v. Richardson*, 9 East, 469; *R. v. Mein*, 3 T. R. 599.

(y) *Vid.* 4 & 5 W. & M. c. 18; *R. v. Howell*, *Cas. T. Hardw.* 248.

(a) *R. v. Carpenter*, *Str.* 1039. So where the charge appeared to be groundless; *R. v. Lewis*, 2 Burr. 780; *R. v. Wardroper*, 4 Burr. 1963; *R. v. Kemp*, 1 East, 46, note; *vid.* 4 Q. B. 646.

(b) *Rowley v. Reg.*, 6 Q. B. 668.

(b) *Reg. v. Johnson*, 5 A. & E. 488; *Reg. v. Humphrey*, 10 A. & E. 335.

liability to the corporate jurisdiction so long as he remains within the local limits of their authority. Disfranchisement has been frequently confounded with amotion; and in many of the old cases and authorities, the terms are treated as convertible; but in fact there is a material distinction between the two; (c) for amotion is removal from an office in a corporation; disfranchisement is the taking away the franchise of being a corporator any longer. This right has been, as far as appears from the cases on the subject which have been recorded, but sparingly, exercised; though it is undoubtedly an incident to every corporation, with perhaps some exceptions in cases of trading and monetary bodies, where the exercise of such power would be inconsistent with the constitution, and often, indeed, impossible. The decisions which we shall have to examine are almost wholly of a negative character, showing what grounds have been considered insufficient to warrant disfranchisement, chiefly in municipal corporations; and as there is nothing to show that the legislature intended to deprive such corporations of this power by the Municipal Corporations Act, or any of the subsequent statutes relative to municipalities, and as the claim, right and title of burgesses to the rights, benefits, advantages, &c., which they enjoyed as corporators are reserved (with the exception of the corporate right of exemption from tolls, which is abolished); (d) but with a proviso, "that the same rights, &c., in every case may be brought in question, impeached and set aside in like manner as if this act had not passed;" (e) it appears to follow that the power remains, and that all decisions not incompatible with other provisions of the statute, will stand good and govern the exercise of the power of disfranchising at present and in future.

Disfranchisement is defined to be the taking a franchise from a man for some reasonable cause; (f) and no cause is reasonable unless it be just and legal. (g) Therefore no corporator who has a freehold in his franchise, that is, who is elected for life, or upon such terms as are construed to amount to a life interest, can be disfranchised at the mere will and pleasure of the corporation; (h) for it is inconsistent with, and repugnant to, the legal nature of a freehold interest, that it should be determinable at will; and moreover, to entrust corporations with an [*264] arbitrary power of this kind would tend greatly to disturb the peace of corporations, which the Court of Queen's Bench has always been solicitous to preserve, and to defeat many of the objects of

(c) *Vid. R. v. Mayor, &c., of Doncaster*, 2 *Ld. Raym.* 1564; *Jay's case*, 1 *Ventr.* 302.

(d) *Vid. sup.* p. 183.

(e) 5 & 6 *Will.* 4, c. 76, s. 2. Residence is a necessary qualification for the burgess-ship under the statute; but if a man has made himself liable to the corporate burdens, in respect of a house or premises occupied in the borough by him, it is no objection that he does not reside every day in the year, *R. v. Sargent*, 5 *T. R.* 469, 470; and in general the residence of a corporator is presumed, *Vanacre's case* (4th point), 5 *Mod.* 418, 442.

(f) *Symmers v. Reg.*, *Cowp.* 502.

(g) *R. v. Mayor, &c., of Liverpool*, 2 *Burr.* 732.

(h) *Warren's case*, *Cro. Jac.* 540. The power resides in the whole corporation at common law, and any expressions in a charter concerning majority in cases of disfranchisement, will, if possible, be construed to mean majority of the whole body; *R. v. Sutton*, 10 *Mod.* 76; *Symmers v. Reg.*, *Cowp.* 503.

the institution of corporations ; for it would furnish the ready means to an unscrupulous majority, of compassing many private and personal objects of their own by means of the corporate character.

The legal causes of disfranchisement are these;(i)—

- I. Offences against the Corporator's duty to the Corporation, as a Member of it.
- II. Offences of a heinous, infamous character, affecting the Corporator's duty as a subject, being indictable at common law.
- III. Offences compounded of the two.

We shall proceed to examine the decisions under these heads.

I. OFFENCES AGAINST A CORPORATOR'S DUTY.

These it has been laid down must be "things done which work to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof;"(k) though, perhaps, we shall see hereafter that some causes have been held good which could not be said to come up to the full extent of that rule. At any rate, another part of what was laid down at the same time remains the law ; viz. that a mere personal offence of one member to another is not a ground ;(l) nor opprobrious language applied to a corporate officer ;(m) and even a custom to disfranchise for such cause is bad, even in the city of London.(n) Bankruptcy, also, is no ground, in general, for disfranchisement ; for where there is no pecuniary qualification necessary for being a member of the corporation, to become a bankrupt is not of itself an offence against the corporator's duty.(o) But where a certain amount of property is a qualification for becoming a corporator, the loss of such qualification, manifested by insolvency, would be a ground of disfranchisement ; and if a long imprisonment were a consequence of a bankruptcy, by which the corporator were detained from the proper performance of his duties, such facts might form a good ground.(p)

(i) *R. v. Richardson*, 1 Burr. 538 ; *R. v. Mayor, &c., of Liverpool*, 2 Burr. 732 ; *R. v. Mayor, &c., of Derby*, Cas. Temp. Hardw. 154. The disfranchisement can only be legally performed at a duly convened corporate assembly of the body corporate, the party having had reasonable notice and summons, and been heard in his defence ; *R. v. Chalk*, 1 Ld. Raym. 226. If the membership of the corporation is held on terms, amounting to a freehold, the act of disfranchisement must be under the common seal ; *R. v. Mayor, &c., of Wilton*, 5 Mod. 259.

(k) *Earle's case*, Carth. 176. A mere attempt to do such act, no detriment resulting to the corporation, is not sufficient ; *Bagg's case*, 11 Rep. 98.

(l) *Earle's case*, Carth. 176. (m) *Clerk's case*, Cro. Jac. 506 ; 1 Vent. 327.

(n) *Reg. v. Rogers*, Salk. 426 ; *Clark's case*, 1 Vent. 327 ; *Lumley v. Wright*, cited Palm. 455.

(o) *R. v. Mayor, &c., of Liverpool*, 2 Burr. 732.

(p) *Ibid.* Having originally wanted a qualification is not a cause of disfranchisement ; *R. v. Mayor, &c., of Lyme* (*Mitchell's case*), Dougl. 79. Poverty, to such an extent as to disable from paying scot and lot, is reported to have been said, by Holt, C. J., not to be a ground of disfranchisement ; *R. v. Mayor of Andover*, 3 Salk. 229.

[*265] *To burn or rase the charters, or to falsify or rase the books, of the corporation, are breaches of duty which amount to a forfeiture of the corporate character; (q) for these are acts which tend in the highest degree to the detriment of the corporation. So it seems to be the better opinion that a refusal to pay sums by custom payable by members towards the support of the corporation is a good cause; (r) for it is an attempt to obtain the benefits without sharing the burdens of incorporation, and contrary to the duty of the member; so to endeavour to hinder an officer in the corporation from attending a corporate assembly, at which it was the officer's duty to be present, and actually hindering other members of the assembly from being present, though only a single instance be alleged, is a sufficient ground. (s) To continue after a corporate meeting has been adjourned by the presiding officer, who has withdrawn, and to pass resolutions, and enter them in the corporation books as corporate acts, is a good ground (t) for disfranchising all concerned in such proceedings. Misconduct of this nature manifestly strikes at the root of corporate jurisdiction; though, perhaps, it cannot be said to work to the destruction of the corporation, or of the liberties and privileges thereof; but mere misconduct in an office, though it may amount to ground of amotion from the office, is not necessarily ground of disfranchisement. (u) This being an act of an odious nature, (x) provisions in a charter concerning it must receive a strict interpretation, and it would almost seem as if the court had in general leant against such a result, as the total deprivation of the corporate rights and character, being inflicted in any but very clear and grave cases. Total abandonment of, and even protracted non-residence in, the borough, or corporate district, may be a good ground of disfranchising. (y)

II. OFFENCES OF AN INFAMOUS CLASS INDICTABLE AT COMMON LAW.

For these there must be a previous indictment and conviction before disfranchisement can take place. (z) Immediately, therefore, upon judgment being given (for before, it is not certain that the defendant is guilty of the crime of which he has been convicted, for a judgment is the necessary complement of a conviction), a corporation may proceed to disfranchise, and, as it seems, without a previous summons to the corporator, and hearing him in his defence; for a summons and hearing in such case must be nugatory, though in general those are essential preliminaries, [*266] *which must be carefully observed. (a) It is not necessary, however, to observe them where the corporator has become perma-

(q) *Mayor, &c., of Wigan v. Pilkington*, 1 Keb. 597; *vid.* 1 Lord Raym. 226, that the rasure must be malicious, and without authority.

(r) *Com. Dig. Franchise*, F. 33.

(s) *Reg. v. Mayor, &c., of Derby*, *Cas. Temp. Hardw.* 156. That it is the duty of every member of a corporate assembly to be present, if he has been duly summoned, *vid.* *R. v. Langhorne*, 4 A. & E. 538.

(t) *Protector v. Kingston*, *Styl.* 478. 480.

(u) *R. v. Mayor, &c., of Doncaster*, 2 Ld. Saym. 1566.

(x) *R. v. Sutton*, 10 Mod. 76.

(y) *Vaughan v. Lewis*, *Carth.* 229; *R. v. Mayor, &c., of Lyme*, *Dougl.* 144.

(z) *R. v. Richardson*, 1 Burr. 538, 539.

(a) *R. v. Chalke*, 1 Ld. Raym. 226.

nently non-resident, and is beyond the limits of the corporate jurisdiction ; for in that case also to summon him would be a mere idle form.

Though it is said that misapplication of the corporate funds is not a good cause of disfranchisement, because the corporation may have satisfaction for the injury by action;(b) yet in the case of embezzlement of the money of the corporation, there would, no doubt, be good ground of disfranchisement after judgment; though, perhaps, this case would belong rather to the next class. Perhaps writing a libel may in some cases be a ground of disfranchisement; as where it is written of and concerning one or more of the chief officers of the corporation, and of them as acting in their official capacity, and attributing to them, in such capacity, dishonesty, or other improper conduct;(c) upon conviction of the offence, upon indictment, and judgment accordingly, the corporation would probably be justified in proceeding to disfranchisement.

III. OFFENCES OF A MIXED CHARACTER.

In cases of this nature, it seems the corporation need not wait for a conviction and judgment, but may disfranchise at once, having first summoned and heard the corporator in his defence, in cases where such steps would not be nugatory or useless.

Thus it has been said, that a corporator may be disfranchised for a riot during a corporate assembly in the council chamber,(d) without a previous conviction; but whether bribery is a ground of disfranchisement, without previous conviction, is left in doubt, from the discrepancy of the reports of cases in which the question arose,(e) being such as to render it impossible to rely upon them; but it would seem, that on a clear case of bribery in a corporation election being made out against a member, there would be a sufficient violation of his duty to entitle them to proceed to disfranchisement at once, without waiting for two years for the conviction, as they might be obliged to do; at least, it seems improbable that the court would interfere to restore within the two years, for if the corporation had acted *bonâ fide* in the exercise of their power to disfranchise, it would be contrary to the principles on which the court acts, to call upon them to rescind their act before anything had occurred to prove them in the wrong; for *omnia ritè acta præsumuntur* is a maxim peculiarly applicable to corporations. The above is nearly all, it will be found, that can be gleaned from the cases which have been decided on this subject.

*The remedy for undue disfranchisement is a *mandamus* to restore; or, to speak more correctly, this writ is the proper mode [*267] of discussing the question of the legality of the disfranchisement; for the writ is not properly a remedy in the first instance, though a *peremp-*

(b) *R. v. Chalke*, 1 *Ld. Raym.* 226. (c) *Vid. R. v. Chalke*, 11 *Mod.* 270.

(d) *Yates's case*, *Styl.* 477, cited 1 *Mod.* 101; *vid. per Lord Hardwicke*, *C. J.*, *Cas. T. Hardw.* 154.

(e) *Vid. R. v. Hutchinson*, 8 *Mod.* 19; *R. v. Mayor, &c., of Carlisle*, 8 *Mod.* 99—103; *S. C. Fortesc.* 200.

tory mandamus may be termed so. Whether for a mere suspension from the franchise of being a corporator the writ will lie, is a point on which the authorities are at a variance. In one case, *(f)* Lord Eldon, C., expressed his opinion to be that it would; but on an application arising with reference to the same corporation, the Court of Queen's Bench refused the writ, *(g)* on the ground that an action would lie, there being a right in the corporator to a share in a dividend of profits of a common stock. The writ was also refused in a case of suspension from a corporate office, it appearing, on the party's own showing, that there was good cause for suspending him, although the suspension had been irregularly performed, inasmuch as the defendant was not summoned nor heard in his defence. *(h)* That was also a case in which an action for money had and received for the profits of the office would have lain. *(h)* A writ of this kind appears to have been granted in very early times, viz. temp. Edw. III., to restore a man who was bannitus by the University of Oxford; *(i)* and it seems, that a person may be banished from the University of Cambridge by the Vice-Chancellor, assisted by the heads of houses in the Vice-Chancellor's Court, without being banished from his college. *(k)* In general it may be laid down, that mere misconduct, not being criminal, immoral, or grossly fraudulent, in any corporate office, is not ground for disfranchisement, though it may be for amotion. *(l)* Where a person has been disfranchised, and restored on peremptory mandamus, he has no right of action against the corporators who took part in his disfranchisement, at least without proof of malice, although the disfranchisement may have been performed irregularly, in not summoning and hearing the corporator in his defence. *(m)* He cannot recover even the costs of the mandamus. *(m)*

A subject has been once or twice incidentally alluded to, which it may be desirable to give a more complete view of in this place.

Every corporator may resign either an office in the corporation, *(n)* or [*268] *his character and privileges as a corporator, *(o)* but it rests with the corporation whether they will accept the resignation in either

(f) *Adley v. The Whitstable Fishermen*, 11 Ves. 323. In the *City of London v. Estwick*, Styl. 32. 35. 42, a writ of restitution was granted to a common councilman who has been suspended.

(g) *R. v. The Whitstable Fishermen*, 7 East, 353; *vid. R. v. Guildford*, 1 Keb. 868, 880; *S. C. T. Raym.* 152; 15 Vin. Abr. 192; 2 T. R. 179; *R. v. Chamberlain of Chester*, Trem. P. C. 516. There are cases of disfranchisement in which it has been held that equity will interpose; *Att.-Gen. v. Lock*, 3 Atk. 164.

(h) *R. v. Mayor, &c. of London*, 2 T. R. 177. 182.

(i) *Vid. per* *Ld. Mansfield, C. J.*, 4 Burr. 2189; *R. v. Chancellor, &c. of Cambridge*, 6 T. R. 89; *et vid.* 1 Q. B. 964, 965; an instance of the same punishment of a M. A. of Christ Church, A. D. 1713.

(k) *R. v. Chancellor, &c. of University of Cambridge*, 6 T. R. 89.

(l) *R. v. Mayor, &c. of Doncaster*, 2 Ld. Raym. 1564.

(m) *Harman v. Tappenden*, 1 East, 555; *S. C.* 3 Esp. 278; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 269; *Att.-Gen. v. Wilson, Cra. & Phil.* 1.

(n) *R. v. Mayor, &c., of Ripon*, Salk. 433; *Com. Dig. Franchise*, F. 30; *Taylor's case*, Poph. 134; *vid.* 4 B. & Ad. 26. A due acceptance must be at a meeting of the corporation duly summoned, and held at the usual place; *Musgrave v. Nevinson*, Stra. 584; *vid.* 19 Vin. Abr. 151, pl. 3.

(o) 1 Bla. Com. 484. This kind of resignation cannot be valid without accept-

case, and they have an absolute *veto* on the question. Also the resignation must be tendered and accepted at a corporate meeting duly convened, &c.,(p) and must be made, it seems, by deed-poll or instrument under seal, if it be a resignation of a freehold office, or of a membership which is tenable for life;(q) for a freehold cannot be determined except by an act done, and accordingly the practice appears to be, that these descriptions of resignations should be effected in this way.(r) When a resignation has been once duly accepted, the corporator cannot claim to be restored.(s) If the resignation be not accepted, and the party still desire to quit his franchise, according to some authorities, there is no objection(t) to a friendly information in the nature of *quo warranto* being exhibited, on which he may disclaim. Until acceptance, however, the tender of resignation may always be waived.(u) Disfranchisement and resignation, it has been said, have often been resorted to, in order to capacitate a corporator as a witness, where otherwise his evidence would have been objectionable as that of an interested person, and it is added, "that it is sufficient if he release his right to the corporation,"(x) with the explanation that a release of the corporator's right or interest in the subject-matter of the suit is not sufficient, if he retain an interest in the general funds of the corporation;(y) but upon the principles already discussed, it would appear that such a release is invalid, and a late decision confirms that conclusion,(z) it being repugnant that a man should release to himself.(a) The proper mode of enabling a corporator to give evidence in a suit by or against the corporation in such circumstances, seems to be by getting rid of the corporate character by resignation, and not by disfranchisement; for if what has been laid down above be correct, a corporation

ance by the corporation; *Pekham's case*, 9 Edw. 4, A. D. 1469, cited M. & Steph. Hist. Boroughs, 953.

(p) *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550; *R. v. Tidderley*, 1 Siderf. 14. A resignation of a corporate interest cannot be made to a select body; *R. v. Powell*, cited 2 Burr. 742.

(q) *Vid. Reg. v. Morton*, 4 Q. B. 148; where a common-councillor in a borough resigned by deed-poll. Where the resignation was only in writing, a *quo warranto* information was held to lie against the party for afterwards acting as a corporator, *R. v. Payne*, 2 Chit. R. 367; when by deed, it is not necessary to say so in pleading, 1 Ld. Raym. 564.

(r) *Bailiffs of Godmanchester v. Philips*, 4 A. & E. 558; *Reg. v. Morton*, 4 Q. B. 148. However, a parol resignation, if accepted at a corporate assembly, and an entry made of it, and an election of a successor into the place of the party resigning, is valid, and cannot be waived, or the party restored; *R. v. Mayor, &c., of Ripon*, Salk. 433.

(s) *R. v. Warlow*, 2 M. & Selw. 75. In a return resignation will be intended to mean resignation by deed, where a deed was necessary; *R. v. Ripon*, 1 Ld. Raym. 563; Salk. 433; *vid. R. v. Payne*, 2 Chit. R. 367.

(t) *R. v. Marshall*, 2 Chit. R. 370. When he may enter the disclaimer without costs, *R. v. Holt*, 2 Chit. R. *vid. infra*, p. 269. (u) Salk. 433.

(z) 2 Stark. Evid. part 4, p. 427, 1st edit. If a corporator would be competent under the old law by giving a release, he is now so without one; per Pollock, C. B., 3 Exch. 145.

(y) *Id.* 245, 2nd edit., citing *Doe d. Mayor, &c., of Stafford v. Tooth*, 3 Y. & J. 19.

(z) *Bailiffs, &c., of Godmanchester v. Phillips*, 4 A. & E. 550; *vid.* 12 Vin. Abr. 17. pl. 16. The proper evidence of disfranchisement is the act of the corporation to that effect; 12 Vin. Abr. 217; *Case of Corporation of London*, 3 Keb. 295.

(a) *Vid. sup.* p. 197; 4 A. & E. 550.

[*269] have no power *to disfranchise, except for the offences stated; and unless therefore the disfranchisement took place upon some breach of corporate duty, or some criminal offence, it would not be valid to divest the party of the corporate character: (b) or the corporator may procure a friendly quo warranto information, and upon disclaimer and judgment of ouster thereon, he would be rendered a competent witness; (c) but as this would be in all cases a very slow as well as expensive proceeding, the mode of resignation appears to be in all respects preferable. The whole question however is of limited importance, as since the statutory (d) alteration of the law of evidence, it will probably occur but in few cases of actions by or against corporations, that a corporator will be excluded; for it probably can only happen where it can be said that he is "a person in whose immediate and individual behalf the action is brought or defended, either wholly or in part." (e)

As has been observed, it is the office and province of the Court of Queen's Bench to exercise a control and supervision over the proceedings of corporations, to preserve order in their acts, to enforce attention to the provisions of their constitution, and to repress irregularities both in their acts and proceedings. Therefore, not only in the cases of elections and questions arising out of elections, but on all occasions where there is no other specific legal or equitable remedy, or none that can be made available to prevent the mischief apprehended before it is consummated, the court will interfere by mandamus. Thus where a corporation is constituted for a certain purpose, the preliminary part of which is to be accomplished in a certain time, and the corporation are also invested with the proper authority and other means for effecting the whole object of their incorporation, if they attempt to leave that preliminary part undone or only in part accomplished, the mode of compelling them to proceed is by mandamus, and in such circumstances a return, stating in effect that the thing required is impossible, will be bad. (f) And it would certainly seem to follow, as well from the general principle of corporation law,

(b) *Reg. v. Mayor, &c., of Gloucester*, Holt, R. 450; *Anon.*, Cro. Eliz. 33, pl. 14; 5 Vin. Abr. 402; *vid. tam. Warden, &c., of Sadler's Company v. Jones*, 6 Mod. 165; *Reg. v. Lane*, 2 Ld Raym. 1304; *Corporation of London's case*, 3 Keb. 295.

(c) *Vid. sup. p. 268*; *Colchester case*, 1 P. Wms. 595, note; *R. v. Mayor, &c., of Winchester*, 7 A. & E. 215; *per Lord Denman, C. J., Reg. v. Alderson*, 11 A. & E. 8. The proceedings must be regular, and so not liable to be set aside; *Brown v. Mayor, &c. of London*, 11 Mod. 225; *vid. 12 Vin. Abr. 18, pl. 26.*

(d) 6 & 7 Vict. c. 85.

(e) 6 & 7 Vict. c. 85, s. 1. In case of plaintiffs, these words mean "the party who causes the action to be brought;" *per Cresswell, J., Hill v. Kitching*, 3 C. B. 309. Therefore, in case of a corporation suing for an assault upon the mayor in the exercise of his office, he would not be a competent witness; *vid. tam. infra. EVIDENCE.*

(f) *Reg. v. Eastern Counties Railway Com.*, 10 A. & E. 531; *vid. S. C. as to proper form of the writ*; *R. v. Round*, 4 A. E. 139; *Reg. v. Payne*, 11 A. & E. 955. The difficulties ought to have been duly estimated by those who obtained the act of incorporation; 10 A. & E. 548; 10 M. & W. 391. Want of funds no answer, *R. v. Wells*, 4 Dowl. 562; *R. v. Market Street Commissioners, Manchester*, 4 B. & Ad. 333, note. Perhaps, however, a return stating that the writ was delivered so late that the corporation had not time to do the thing required, might be good: *Stra. 763.*

which looks upon corporations as *being immortal, as from the general principle of interpretation which has been applied to [*270] statutes constituting corporations, viz., that they are to be taken strictly as against the corporation, and beneficially for the public; that no corporation, when once constituted by statute, can be entitled to abandon the whole or any part of the purpose for which it was incorporated. And though there are dicta to the contrary of this proposition in particular cases,^(g) yet the general current of the interpretations of charters is, that when once accepted, the provisions of them are obligatory as well as permissive,^(h) and there is no reason, but the contrary, why a more relaxed mode of interpretation should be applied to statutes conferring immeasurably greater powers than ever were conferred by the charters of the crown, and there is abundance of authority for their strict interpretation. Thus railways are considered as constituted for public purposes, and their powers are granted to them only on certain conditions to be found in the acts of parliament enabling them to interfere with the private property of any individual whose property happens to be in the line of the projected railway. The evils which must arise from the exercise of the despotic powers conferred upon them are supposed to be compensated by the public good which is expected to be derived from the works to be accomplished by means of those powers. These works are to be accomplished strictly upon the conditions which are imposed by the several acts of parliament; per Lord Langdale, M. R., in *Carlisle v. South Eastern Railway Company*, 14 Jur. 515; et vid. 3 Q. B. 528, 543; 2 Q. B. 64.

Accordingly, where a railway company had proceeded to destroy a portion or branch of their line, and thereby to render it impassable for the public, a mandamus issued to compel them to restore the road and replace the rails;⁽ⁱ⁾ and there can be no doubt, that if an incorporated company of any description were to suspend, abandon, or shut up their works, then (the public having an interest in the matter) a mandamus would go to compel them to re-open and do all that they were incorporated to do. But as in equity we have seen that the courts will not interfere to relieve against the proceedings of the governing body, unless it be shown that all the means of compulsion in the power of the corporation have been resorted to in vain, as by calling general meetings of

(g) Vid. *R. v. Proprietors of Birmingham Canal*, 2 W. Bla. 708.

(h) Vid. sup. p. 34. We have seen, that a corporation instituted by charter may surrender it, if the crown chooses to accept the surrender. But where a statutory corporation created for the purpose of making a railway from A. through B. to C., abandon the intention of carrying the line all the way to C., and determine to take it only so far as B., equity will interfere to restrain the application of the capital subscribed to this mutilated object, *Cohen v. Wilkinson*, 18 L. J. (N. S.) Chanc. 378; and the court will interfere, even at the instance of a single shareholder, *S. C. id.* 411. 417; et vid. *Cooper v. Shropshire Railway Company*, 13 Jurist, 443; *Bagshaw v. Eastern Counties Railway Company*, 7 Hare, 114.

(i) *R. v. Seven and Wye Railway Company*, 2 B. & Ald. 646; et vid. per Lord Eldon, C., *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 162; *R. v. Cumberworth*, 3 B. & Ad. 108; *Lee v. Milner*, 2 M. & W. 824, recognized Reg. v. *Eastern Counties Railway Company*, 10 A. & E. 546; that the statutory constitutions of companies incorporated by act of parliament, are obligatory as well as permissive, vid. 7 M. & Gra. 263.

the corporators, &c., or that no power remains with the general body by reason of their numbers having been reduced too low, so that the corporation is virtually suspended; (*k*) so before the Court of Queen's Bench will issue a mandamus of the above nature, it must appear that the company had been required, but had refused, to acts upon the provisions of their constitution in respect to the subject-matter of the writ; that they had actually abandoned the object of their constitution in whole or in part; and that no other effectual remedy, at law or in equity, *was open to the relators. (*l*) The leading principle is, that the Court of Queen's Bench interferes where bodies or persons are found refusing to proceed in some course prescribed by law, but not where there is a mere error, or misapprehension in their course of proceeding, provided they have entered upon it. (*m*) If, therefore, it appears that a corporation, erected by act of parliament for a purpose in which the public have an interest, are substantially, though it may be not in the very best or most desirable manner, complying with the terms of the undertaking, into which the law considers them as entering with the public upon obtaining their constituting statute, then the court will not interfere with the course they have adopted and entered upon. (*n*) They will not, however, be allowed to substitute their own mode of proceeding for that pointed out by their constituting statute, although their mode may be alleged to be the more convenient for the public; (*o*) but although neither a trading nor any other corporation will be allowed to do acts inconsistent with its constitution, it is said to be incident to every trading corporation to apply to parliament to make changes in the object and character of its constitution. (*p*)

One of the acts which would seem to be inconsistent with the character and constitution of a trading corporation, is to institute a suit for a debt against a corporator without being specially empowered by their constituting act to do so; (*q*) for such a partnership, though incorporated, still retains so much of its original character, that without special permission in the act or charter by which they are constituted, they could not sue one of their own body for a debt, not being the penalty under

(*k*) *Foss v. Harbottle*, 2 Hare, 415. 494; sup. p. 73; *Exeter and Crediton Railway Company v. Buller, Ltd.* Chan. T. T. 1847. A mandamus, it seems, will not issue, where the corporation is suspended; *Reg. v. Victoria Park Company*, 1 Q. B. 288.

(*l*) *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 531. The relators there were a minority of the corporators, complaining of the conduct of the corporation; *Reg. v. Bristol, &c., Railway Company*, 4 Q. B. 171.

(*m*) 10 A. & E. 547. It is obviously no answer to say, that the majority have agreed to and sanctioned the existing state of things, for the essence of the complaint is, that the corporation (that is, the majority), are refusing to do what they are bound by law to do. "Prescribed by law," means by statute, not by the general law of the realm, which they must be brought to conform to by action, indictment, or information; *Ex parte Robins*, 7 Dowl. 568; vid. 1st reason of the court. 12 A. & E. 512, *Reg. v. Chapter of Exeter*.

(*n*) *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 547.

(*o*) *Reg. v. Manchester and Leeds Railway Company*, 3 Q. B. 528.

(*p*) *Ware v. Grand Junction Water Company*, 2 Russ. & M. 483.

(*q*) *Per Patteson, J.*, 1 Q. B. 669.

a bye-law, nor due on a penal statute to the corporation as the party grieved.^(r)

It must always be remembered, that, in general, the writ of mandamus issues for public purposes, and to compel the performance of public duties; and therefore it will not be granted for the benefit of an individual member, or body of members, of a corporation, to compel the corporation to do some act for his or their individual benefit, which, in general, nevertheless, it may be the public duty of the corporation to perform; as although it is in general the duty of a public trading company to declare dividends when the state of their affairs admits of it, *yet the court will not compel the company to produce their accounts for the purpose of declaring a dividend of the profits, [*272] when the majority at a properly constituted corporate meeting have refused the production of such accounts.^(s) The ground upon which the refusal of the court rests in such cases appears to be, not that the court will not interfere by this writ with private corporations, for it has at various times interfered in cases in which the corporations partook but slightly of a public character, as the Amicable Assurance Company (a company created by charter),^(t) the New River Water Company,^(u) and other cases;^(x) but that the Court of Queen's Bench will not interfere where they can see that the question raised merely arises out of the indisposition of the minority to be bound by the decision of the majority, and, in fact, resolves itself into a dispute between the corporators.^(y) Indeed it would seem that for the court to interfere on such occasions, would in general amount to abrogating the great principle, that the majority shall govern, provided they act consistently with, and not beyond, the limits of the constitution of the corporation.

Upon somewhat similar principles, it is a rule in equity that a suit by an individual shareholder of an incorporated company, complaining of an injury to the corporation, cannot be maintained if it appear that the plaintiff have the means of procuring a suit to be instituted in the name of the corporation itself; and the rule applies equally whether the subject-matter of complaint be an act or transaction which is merely avoidable at the discretion of a majority of shareholders, or an act absolutely illegal and incapable of being confirmed by such majority.^(z)

Still it must be admitted that there is some refinement and subtlety in the distinctions which have been applied to the decision of questions of this kind, so that it is not very easy to say when a mandamus ought to be granted or not. But it may be laid down with some confidence, that a thing which a constituting statute does not require the corporation to do at all, they will not be compelled to do in a particular instance.^(a)

(r) Where an act of parliament creates the debt and gives the corporation a mode of recovering it, that, and no other mode, can be pursued by the corporation; *Dundalk, &c., Railway Co. v. Tapster*, 1 Q. B. 667.

(s) *R. v. Governor, &c., of Bank of England*, 2 B. & Ald. 620; *vid. Adley v. Whitstable Fishermen*, 17 Ves. 323; 19 Ves. 304.

(t) *Anon.*, 2 Stra. 696. So in case of the *Turkey Co.*, 2 Burr. 999.

(u) *Middleton's case*, 1 Lev. 123. (x) *Vid. Reg. v. Abrahams*, 4 Q. B. 157.

(y) *R. v. London Assurance Company*, 5 B. & Ald. 898.

(z) *Mozley v. Alston*, 1 Phill. 790.

(a) *Ex parte Robins*, 7 Dowl. 566.

On the other hand, where it is essential to justice that the corporation should do in a particular case what they are empowered and required by their statute to do in a class of cases within which the particular case perhaps does not literally, and in rigorous strictness, fall, they will be compelled by mandamus to do it.^(b) Thus in the first case, a mandamus was refused to compel a railway company to convey the goods of the applicant along their line, their constituting statute containing no provision that they should carry all goods offered to them for conveyance; in the second, the company being authorized to purchase [*273] *lands, &c., necessary for their undertaking, the value of such lands as they decided to purchase being to be paid to the owners on the estimate of a compensation jury, empaneled at the quarter sessions, to be summoned by warrant from the corporation to the sheriff on notice to them, a mandamus went commanding them to issue their warrant for a jury, to assess damages sustained by tenant for life of property required for the corporate purposes. Further, the jury having met and assessed the damages at a certain amount, the corporation refused to pay it, with the costs, on which it was held a fresh mandamus lay to compel payment, although the constituting statute made the verdict and judgment thereon records of the quarter sessions.^(c) There seems, however, to be much room for doubt, whether such being the enactment of the statute, the statutory remedy ought not to be adhered to, excluding all others;^(d) and from decisions subsequent to that above stated, it seems that in similar circumstances the courts have considered an action of debt on the judgment to be the proper course;^(e) while from still later cases it would appear that the only mode by which the plaintiff can avoid (unless in very peculiar circumstances) paying the costs of recovering the judgment, in action of debt on the record of the quarter sessions, is by removing such record into a superior court at Westminster, and then issuing execution against the corporation thereon;^(f) for the costs will be refused, unless the motion is made upon an affidavit giving a satisfactory reason why the latter proceeding was not adopted.^(g)

[*274] *ACTIONS, &c., AGAINST CORPORATIONS.

WE have now arrived at the subject of actions and other proceedings against corporations; and the first question which arises on suing a corporation, is obviously how, in case of need, the appearance of the corporation is to be compelled.^(h) The process against corporations aggregate

(b) *R. v. Nottingham Waterworks Company*, 6 A. & E. 355.

(c) *R. v. Nottingham Waterworks Company*, 6 A. & E. 355.

(d) *Vid.* 1 Q. B. 667.

(e) *Vid.* *Corrigall v. London and Blackwall Railway Company*, 5 M. & Gra. 219, *qu. tam.*; *et vid.* *R. v. Kington*, 8 East, 41.

(f) *Hammer v. White*, 12 M. & W. 519; *S. C.* 1 D. & L. 405.

(g) *Revell v. Wetherell*, 3 C. B. 321.

(h) It is scarcely necessary to observe, that a corporation aggregate can only appear by attorney, *Co. Litt.* 66 b; 10 Rep. 32; *Lush, Pract.* 199; who must be

to enforce appearance in a personal action is now the same as in ordinary cases; *i. e.*, by writ of summons, or summons and distringas.⁽ⁱ⁾ As in all legal proceedings, so especially in the writ of summons, must the name of the corporation be accurately stated.^(k) There can be no difficulty in the cases of municipal corporations, or corporations connected with the land, and whose locale is determined by such connection, or spiritual corporations aggregate, as to describing in the writ such locale, situs or "residence;" but in the case of trading corporations, many of which have no fixed connection with the land any more than mere partnerships, the requirements of the statute, which, after prescribing the form of a writ of summons, goes on to enact, that, "in every such writ, and copy thereof, the place and county of the residence, or supposed residence, of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned,"^(l) would be sometimes with much difficulty complied with in suits against such corporations. We may safely, however, lay down that to describe such a corporation as "now or late carrying on business at," &c., is too ambiguous, and will not suffice in case of a corporation any more than of an individual;^(m) and where there is real difficulty in the service, the courts, or judges at chambers, will probably allow a distringas to compel an appearance to issue, without obliging the party to conform in all respects to the strictness enforced in favour of individual defendants.⁽ⁿ⁾

With respect to service of a writ of summons on a corporation, the law is, that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the *town clerk, clerk, treasurer, or secretary of such corporation;"^(o) [*275] and this appears to be a general rule extending to all corporations aggregate. Then with respect to joint stock companies incorporated by statute since the 8th day of May, A. D. 1845, it is enacted, as to the mode of such service of writ of summons, &c., that "any summons, or notice, or any writ, or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to, the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or, in case there be no

appointed under their common seal, *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 574.

(i) 2 Will. 4, c. 39, ss. 21, 22, 23; 2 Chit. Archb. Pract. 1037, 8th edit.

(k) Reg. 10, M. 3 W. 4, 8 T. R. 508.

(l) 2 Will. 4, c. 39, s. 1.

(m) *Pilbrow v. Pilbrow's Atmospheric, &c., Company*, 3 C. B. 736.

(n) 2 Will. 4, c. 39, s. 3; 3 C. B. 734. Bail not taken in cases of corporations defendants, 2 Chit. Archb. Pract. 1037. The statutory form and notice must be observed, though, in fact, the corporation had no goods to distrain upon; *Ward v. Kirkman*, 4 M. & Gra. 35. In case a corporation had no lands or goods, the old practice was to "lay them by the heels of their natural capacity" to compel appearance; *Thusfield v. Jones, Skinn.* 27; *vid. Cowp.* 85.

(o) 2 Will. 4, c. 39, s. 13. The clerk here mentioned must be *the clerk* to the company, not a clerk to the secretary; *Walton v. The Universal Salvage Company*, 4 D. & L. 558. It is not necessary to name the mayor or other head officer in the writ, because in their corporate capacity the body has no other name than that by which they are incorporated; *Newton v. Travers*, 3 Salk. 103.

secretary, then by being given to any one director of the company.”(p) In case of trading companies, incorporated under 7 Will. 4 & 1 Vict. service may be on the clerk, or by leaving at the head office for the time being, or in case the clerk be not found or known, on any agent or officer employed by the company, or by leaving at his usual place of abode.(q) In the first and second cases, therefore, the service must be on some one of the officers of the corporation, and must be personal, and subject to the same requirements with respect to what amounts to personal service, as in the case of individual defendants.(r)

The mode of compelling appearance to an indictment of a corporation, after a removal by a certiorari, is also by distress infinite.(s)

A corporation, it is held, may be indicted for a breach of duty imposed on it by law, but not for a felony, or offence attended with violence, as a riot or assault.(t) Thus a corporation may be indicted for a nuisance.(u)

When in a civil action against a corporation, the defendants have appeared by attorney, appointed under their common seal,(x) the action proceeds by the usual steps.

The principles have already been stated,(y) according to which actions on simple contracts may be brought against corporations; those brought [*276] against them on their bonds, or other specialties, require *little illustration. It may be here observed, however, that a promissory note, though impressed with the common seal of a corporation, not being a trading corporation, is not such a specialty, but remains a mere promissory note, which does not bind such a corporation, and on which, therefore, they cannot be sued;(z) and such notes, though bearing the common seal, yet not being delivered as deeds, render such corporations

(p) 8 Vict. c. 16, s. 135.

(q) 7 Will. 4 & 1 Vict. 73, s. 26.

(r) *Pilbrow v. Pilbrow's Atmospheric Company*, 3 C. B. 730. In this as in cases of individuals, semble, personal service may be waived, and an appearance entered for the corporation; *Jones v. Boxer*, C. B. 1849. Banking copartnerships, since 1 & 2 Vict. c. 96, are within this rule; for they are in the nature of corporations, and not of mere partnerships, so that notice to any member is not notice to the body; *Steward v. Dunn*, 12 M. & W. 664.

(s) *Reg. v. Birmingham, &c., Railway Company*, 3 Q. B. 233. The indictment must be removed by certiorari, after having been found at the quarter sessions, because as the appearance there must be in person, and the corporation can only appear by attorney, the trial cannot be had at the sessions; *id.* As to costs in such case, *R. v. Richards*, 8 B. & C. 420; *Corner's Pract. Co. Q. B.* 156; *R. v. Hawdon*, 11 A. & E. 143.

(t) *Reg. v. Birmingham Railw. Company*, 3 Q. B. 232; *vid. inf.* pp. 283, 284.

(u) *Reg. v. Scott*, 3 Q. B. 547.

(v) *Vid. sup. COMMON SEAL*; *R. v. City of Chester*, 2 Show. 366; *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 574; *Faviell v. Eastern Counties Railway Company*, 2 Exch. 344.

(y) *Vid. sup.* pp. 61—67.

(z) *Reg. v. Lichfield*, 4 Q. B. 899; *Slark v. Highgate Archway Company*, 5 Taunt. 792; *Broughton v. Manchester Waterworks Company*, 3 B. & Ald. 1. Assumpsit lies for the difference of toll taken by a railway company from the plaintiff above that taken from other parties using the line, the tolls being uniform according to the statute; *Kent v. Great Western Railway Company*, 4 D. & L. 481. Debt lies on a bond of an incorporated company, though the constituting statute gives the bondholders a lien on the tolls, &c.; *Hill v. Manchester, &c., Waterworks Company*, 2 B. & Ad. 544. Debt for a penalty; *Collinson v. Newcastle, &c., Company*, 1 Car. & K. 546.

as *may* by law issue them liable only as other promissory notes render individuals liable; that is, *assumpsit* or debt may be brought upon them against the corporation, where such actions lie against individuals in like cases. None but a trading corporation, unless expressly empowered by statute, can accept bills of exchange, or issue notes: and where bills may be accepted, or notes made, the same rules apply as in suing individuals in like cases. (a) To enter upon the question of what are the descriptions of trading companies, who may accept bills, or issue promissory notes, without express permission by statute, is not within the limits of this work; (b) it must suffice to observe, generally, that corporations, from the purposes of whose creation it is foreign to enter into contracts of this kind, will be held not to be bound by such contracts (without express authority,) although they may be constituted for purposes affording a profitable investment of capital to the corporators, or shareholders; and that it is only trading bodies, strictly so called, that are so liable, it being indispensable to the purposes of their creation that they should be so.

It has been seen in what cases, and on what descriptions of bye-laws, debt may be maintained by a corporation; but debt is, perhaps, maintainable at common law against a corporation on a bye-law which reserves or grants pecuniary advantages to a specified class of persons, by any one of such class from whom the corporation, upon demand, withhold his share of the said grant; (c) and in general (d) it is no answer that the corporation exhausted the funds (from which the payments *to the specified class were of right to be made,) in payment of law- [*277] ful debts by law payable in priority and preference to the payments to the specified class, without showing either that the corporation were compelled by their creditors to pay such debts, or that the debts paid were a specific charge upon the lands out of which the sums payable to such class issued.

But without such a bye-law, or a statute, it seem no *such* action could be maintained, for, except on a bye-law, a corporation in general cannot maintain *such* an action (not being expressly thereto authorized by statute) against a corporator; and the rule must be reciprocal. Ac-

(a) *Broughton v. Manchester Waterworks Company*, 3 B. & A. 1; *vid.* *Wigan v. Fowler*, 1 Stark. 459; *per Patteson, J.*, 4 Q. B. 908; *Harmer v. Steele*, 19 Law J. (N. S.) Exch. 35.

(b) As to the privileges of the corporation of the Bank of England in this respect, *vid.* 7 & 8 Vict. c. 32; *R. v. Bigg*, 3 P. Wms. 419. As to the East India Company, *Edie v. East India Company*, 2 Burr. 1216; 1 W. Bla. 295; *Murray v. East India Company*, 5 B. & A. 294. As to the mode of obtaining a charter establishing a joint-stock banking corporation, and the privileges of such bodies, *vid.* 7 & 8 Vict. c. 113. As to joint-stock companies registered and incorporated, and as to their bills and notes, *vid.* 7 & 8 Vict. c. 110, s. 45. As to form of declaration on a promissory note against such corporation, *Thompson v. Universal Salvage Company*, 1 Exch. 694.

(c) *Hopkins v. Mayor, &c., of Swansea*, 4 M. & W. 621, affirmed 8 M. & W. 901, though chiefly upon another point. As to right of a corporation to stop out of stock belonging to a member debts due from him to the corporation, *Gibson v. Hudson's Bay Company*, Stra. 645; *vid.* 8 Vin. Abr. 561, pl. 28.

(d) In case of a municipal corporation, *vid.* *Hopkins v. Mayor, &c., of Swansea*, and 5 & 6 Will. 4, c. 76, s. 92, and s. 2.

cordingly, where a statutory corporation, authorized to make bye-laws under their seal, had made, not a bye-law, but a resolution, not under seal, that their directors should have a certain remuneration for their daily trouble, &c., it was held that the directors could not bring an action against the corporation for the amount.(e)

Nevertheless a corporation may be responsible, by indictment, to the public, and in an action on the case to an individual injured, for neglect of the provisions of a charter from the crown alone;(f) and the distinction is not easy to realize between responsibility upon acceptance of a charter, and responsibility upon a bye-law, made in pursuance of a charter; indeed, the reason for responsibility would appear to be somewhat stronger in the former case than in the latter.

In general, an action on the case for a breach of duty will lie against a corporation whenever it would lie against an individual;(g) it is therefore unnecessary to pursue this part of the subject(g) further, than to remark the important principle that, in trover against a corporation, and after a verdict against them, the conversion will be [*278] presumed to have been authorized by them under their common seal, if such authorization is necessary to constitute the conversion;(h) and that, generally, a corporation is liable in tort for the tortious act of their agent, though not appointed by their common seal, if such act be done in the course of his ordinary service.(i)

(e) *Dunstan v. Imperial, &c., Company*, 3 B. & Ad. 125. Definition of bye-law, 7 Q. B. 451. Precedent of declaration on debt on bond, given by corporation to plaintiff's wife *dum sola*, *Knight v. Mayor, &c., of Wells*, 3 Ld. Raym. 166. Plea, *Cowp.* 224. Effect of non est factum, *Hill v. Manchester Waterworks Comp.* 5 B. & Ad. 866.

(f) *Mayor, &c., of Lyme v. Henley*, 3 B. & Ad. 77; affirmed *Dom. Proc.* 2 Cl. & F. 331. So case will lie for breach of a prescriptive duty in the corporation, the declaration alleging that the corporation, and their predecessors, whose estate they have, time out of, &c., by reason of tenure, &c., have cleansed the said ditch, &c.; *Yearb.* 12 Hen. 4, fol. 8, pl. 13; 2 Vin. Abr. 36, pl. 6; *vid. Reg. v. Middlesex*, 1 B. & Ald. 64, note. It seems there may be an indictment against two corporations jointly, 3 Q. B. 229, note. So case would lie against a corporation as an officer, for breach of duty in the office; for a corporation may hold an office. *Vid. grant of office for three lives to Mayor, &c., of Newcastle*, 3 Chandel. Debs. 96. 6 & 7 Vict. c. 73, s. 21, makes Incorporated Law Society registrar of attorneys.

(g) Case for negligently managing fire of a locomotive engine, whereby plaintiff's property was hurt, *Piggott v. Eastern Counties Railway Company*, 3 C. B. 229; for not repairing a creek of the sea, *v. Mayor, &c., of Lynn v. Turner*, *Cowp.* 86; for negligence, *Matthews v. Westminster, London, &c., Company*, 3 Camp. 403. Indictment for not repairing a gaol, *Dogh. Cro. Circ. Ass.* 398; *vid. 9 Car. & P.* 469. Case against the Bank of England for refusing to pay dividends on stock, *Partridge v. Governor, &c., of Bank of England*, 15 Law J. (N. S.) Q. B. 395. (Mandamus will not lie in such case, *R. v. Bank of England*, *Dougl.* 508; *R. v. London Assurance Company*, 5 B. & A. 899; *Anon.*, *Stra.* 696.) Against Railway companies for injuries caused to houses near the lines, &c., *Turner v. Sheffield Railway Company*, 10 M. & W. 435. Indictment or presentment against a corporation accepting a grant on condition to repair sea banks, may charge that they have been used time out of mind, &c., to repair; *Callis, Sewers*, 116, 117. Case for distraining for toll not due, 1 Com. Dig. 128. When case lies for breach of duty to the public, imposed by their charter, *Mayor, &c., of Lyme v. Henley*, 2 Cl. & F. 331. Case against mayor and aldermen of London for falsely certifying a custom to the damage of the plaintiff, *Day v. Savage*, *Hob.* 87.

(h) *Yarborough v. Bank of England*, 16 East, 6; *vid. Vin. Abr. Successor*, B. pl. 4, that a corporation cannot do wrong except by writing under their common seal.

(i) *Smith v. Birmingham, &c., Gas Company*, 1 A. & E. 526. If it is not an

An action on the case having been fully established to lie against a corporation, it seems remarkable that it should have ever been made matter of doubt whether trespass would lie; for since in trespass innocence of intention is no excuse;^(k) whereas "in case the whole turns upon it; malice, or quo animo, is the very gist of the action;"^(l) it would appear to be much more easy, consistently with the nature of corporations, to attribute to them the ability to do acts falling under the former than the latter class of actions. However, it is only of late that the law has been considered to be settled, affirming the liability of a corporation to an action of trespass.^(m) That this is perfectly in accordance with the old law appears from cases determined in the reigns of Edw. 3, Henry 6, Edw. 4, and Henry 7, which were not brought to the notice of the court in the last-mentioned case.⁽ⁿ⁾

Ejectment may be maintained against a corporation, notice to quit (where it is necessary) having been personally served on some officer, &c., of the corporation, according to the provisions of the Uniformity of Process Act,^(o) if the corporation is not a joint stock company incorporated since 8th May, A. D. 1845: or the Companies Clauses Consolidation Act,^(p) if it is. The notice ought to be addressed, in all cases, to the corporation by its corporate name, and not to its officers.^(q)

It appears to be the rule that, at least with respect to all incorporations within the Companies Clauses Consolidation Act, and to all other statutory corporations whose private acts contain clauses regulating *service of notices, &c., similar to that of the above act; the rule [*279] for judgment against the casual ejector, after service of the declaration accordingly, is absolute in the first instance.^(r) Whether it is so in other cases of corporations, where the Uniformity of Process Act has been obeyed in the mode of service of the declaration, has not yet

ordinary act, a defendant, justifying under the corporation, must show he was authorized to act as he did under their seal; *Horn v. Iry*, 1 Vent. 47; *Vin. Abr. Successor*, B. pl. 4.

(k) Per Rede, J., 21 Hen. 7, fol. 28, pl. 5; per Nares, J., De Grey, C. J., in *Scott v. Shepherd*, 2 W. Bla. 892; per Lord Mansfield, C. J., *Tarleton v. Fisher*, Dougl. 649; *vid.* 8 M. & W. 788.

(l) Per Lord Mansfield, C. J., *Tarleton v. Fisher*, Dougl. 649.

(m) *Maund v. Monmouthshire Canal Company*, 2 Dowl. N. S. 113.

(n) Yearb. 20 Hen. 6, fol. 9, pl. 19; 2 Edw. 4, fol. 26, pl. 29; 21 Edw. 4, fol. 5, pl. 13; *idem.* fol. 79, pl. 23. So 10 Hen. 6, fol. 22, pl. 75; 18 Hen. 6, fol. 11, pl. 1; 20 Hen. 6, fol. 38, pl. 2; 32 Hen. 6, fol. 8, pl. 13; *Pilgrim v. Southampton, &c.*, Railway Company, 18 Law, J. (N. S.) C. B. 330. Trespass may also be maintained against a corporation and an individual jointly, Yearb. 8 Hen. 6, fol. 1. 14; 1 *Vin. Abr.* 33; *Bro. Abr. Corporation*, 60. So an indictment, 3 *Chit. Crim. Law*. 600; 3 Hen. 6, fol. 31, pl. 21; *et vid.* Yearb., 41 Edw. 3, fol. 22, pl. 14; 45 Edw. 3, fol. 2, pl. 5.

(o) *Vid. sup.* p. 274; *Rector of Cheddington's case*, 1 Rep. 153; *Doe d. Coopers' Company v. Roe*, 8 Dowl. 134.

(p) *Vid. sup.* p. 275; 4 D. & L. 311. The case of *Doe v. Roe*, 1 Dowl. 23, can hardly be considered to be correct since *Walton v. The Universal Salvage Company*, 4 D. & L. 558, and 8 Vict. c. 16, s. 135. *Vid. tam.* 10 M. & W. 21. If the corporation is a trading company, under 7 Will. 4 & 1 Vict. c. 73, it seems a greater latitude is allowed by sect. 26 of that statute.

(q) *Doe d. Earl of Carlisle v. Woodman*, 8 East, 228; 2 Tidd, Pract. 1212, 9th edit.

(r) *Doe d. Bromley v. Roe*, 8 Dowl. 858.

been reported to be decided; but the probability is, that it would be so considered; and so it would, probably, where, in the case of trading corporations, under 7 Will. 4 & 1 Vict. c. 73, the formalities in sect. 26 had been observed with respect to the service of the declaration.

The rule, that in the consent rule defendant shall consent to confess upon the trial that he was in possession of the premises specified at the time of the service of the declaration, extends, it has been decided, to municipal corporations, and such a corporation must consent in that form, though the ejectment be brought to enforce an elegit against their lands, and the defence be that the lands are not possessed by the corporation for any but public purposes.^(s) The decision evidently applies a fortiori to all other corporations aggregate holding lands.

Lands are held by many bodies in the nature of a corporation, who nevertheless are not in such possession of the lands as to be the objects of an action of ejectment. Thus the Board of Officers of Her Majesty's Ordnance Department are in the nature of a corporation for the management of ordnance property, by virtue of the statutes 1 & 2 Geo. 4, c. 69, 3 Geo. 4, c. 108, and 2 Will. 4, c. 25; but an ejectment cannot be brought against them.^(t) Of course it will not lie against the crown, against whom no action of any nature can be maintained.

By the custom of the city of London, the parson and churchwardens of each parish are a corporation to purchase and hold land;^(u) and so in some other places; and in such cases they are liable in ejectment as other corporations. Also in every parish the churchwardens, jointly with the overseers of the poor, are constituted a corporation to some purposes by statute,^(x) vesting in them, as a corporation, lands belonging to the parish; the effect of it, being, that the legal estate is in them of all real property held for parochial purposes.^(y) Perhaps it would have been better (though it certainly could not have been done consistently with ancient and established principles) to have declared [*280] them corporations in omnibus; they would then have had a right to a common seal, and all the other incidents and privileges of corporations would have immediately applied to them; whereas at present, as they have no common seal,^(z) they cannot covenant as a corporation, and

(s) *Doe d. Parr v. Roe*, 1 Q. B. 700, where see the Reg. Gen., and 4 B. & Ald. 196. The inclination of opinion in the court was evidently against the supposition that the above defence is available, either in ejectment or any other action, against the lawful claims of any one making a demand upon a corporation.

(t) *Doe d. Legh v. Roe*, 8 M. & W. 579; *Commissioners of Sewers, Stracey v. Nelson*, 12 M. & W. 535.

(u) *Gibson*, Cod. 241; 1 Bla. Com. 394; 2 Wms. Saund. 47 c; *Warner's case*, Cro. Jac. 532; Co. Litt. 3 a. They may take by devise, *Humphreys v. Knight*, Cro. Car. 455; *Warner's case*, Cro. Jac. 552; 4 Vin. Abr. 484. 525, pl. 4.

(x) 59 Geo. 3, c. 12, s. 12. 18, viz. "to take into their hands, &c," or to purchase, or to hire and take on lease, for and on account of the parish, lands, &c. Vid. 4 & 5 Will. 4, c. 69, s. 3. As to leases to them, since 1st October, A. D. 1845, vid. 8 & 9 Vict. c. 106, s. 3; *Smith v. Adkins*, 8 M. & W. 362; vid. 8 Q. B. 394.

(y) *Doe d. Norton v. Webster*, 12 A. & E. 442. If they sue in respect of lands held by them in the nature of a body corporate, they must describe themselves as churchwardens and overseers of the poor; *Ward v. Clarke*, 13 Law J. (N. S.) Exch. 229.

(z) *Vid. R. v. Austrey*, 6 M. & Sel. 319. As to the nature of the corporation,

therefore their covenants are merely personal covenants.(a) It is material also to observe, that churchwardens and overseers taking to lease land jointly with other persons (ex. gra. surveyors) will not be considered as within the above-mentioned statute, but will be held personally liable upon such taking.(b)

From what has been said, it may be discovered when the legal estate is vested in this body; and when it is, of course ejectment may be maintained against them in all cases in which it would lie in the case of individuals. With respect to the service of notice to quit, and of declaration in ejectment, as it has been decided that one of this body may make or order a distress to be made without having the formal authority of the whole,(c) perhaps the courts would hold service sufficient in either case, if made on a single member; but the most advisable plan is to serve each with a separate notice and declaration, addressed to the body by the style of The Churchwardens and Overseers of the poor of the parish of Dale, added to their proper names in full. But the consent rule ought to be signed, it would seem, by an attorney authorized to do so by a majority of the body; for the signature of the defendant's attorney being indispensable,(d) perhaps it might be objected, with effect, that otherwise the attorney whose name appeared at the foot of the rule was not the defendant's attorney. But the majority may be a majority of the whole body, and need not include both churchwardens.(e) Not being a corporation having a name, they must appear and defend in their individual names.

Detinue may be brought against a corporation,(f) and so of replevin.(g)

Quare impedit may be brought against a municipal or other corporation.(h)

With respect to suits in equity, many notices of various proceedings of that kind against corporations will be found in the course of this *work; here it is only necessary to observe generally, that all [*281] proceedings may be taken in equity nearly in the same way as against private persons; and to such a suit it is not an objection, apparently, that the judge in equity is interested as a member of the corporation. Thus, in a case between a corporation and one of its members, it was held not to be an objection that the Lord Chancellor could not

vid. 11 M. & W. 342; 13 M. & W. 772; 8 Q. B. 394; 5 M. & Gra. 736; and inf. CHURCHWARDENS AND OVERSEERS.

(a) *Furnivall v. Coombes*, 6 Scott, N. R. 537; vid. per Patteson, J., in *Rew v. Pettitt*, 1 A. & E. 200; *Wrench v. Lord*, 4 Scott. 381.

(b) *Uthwatt v. Elkins*, 13 M. & W. 772; et vid. 2 Wms. Saund. 319. As to the legal estate in trust property for the benefit of the poor, &c., *Alderman v. Neate*, 4 M. & W. 704; *Churchwardens, &c., of Deptford v. Sketchley*, Q. B. Mich. Term, 1847; *Allason v. Stark*, 9 A. & E. 255.

(c) *Gouldsworth v. Knights*, 11 M. & W. 342; vid. 7 Q. B. 983; 3 D. & L. 578.

(d) *Doe d. Poole v. Wills*, Bail Court, 1848.

(e) *Reg. v. Justices of Surrey*, 3 D. & L. 578. (f) *Com. Dig Detinue, A.*

(g) *Basset v. Prior of St. John of Jerusalem*, Yearb. 2 Hen. 6, fol. 9, pl. 1; 8 Wentw. Prec. 102. To trespass for taking a horse, it is a good plea to allege that plaintiff has brought replevin against a corporation, of which defendant is a member, for the same taking; 16 Vin. Abr. 145, pl. 1; vid. *Bac. Abr. Corporations*, E. 2, cont. (h) Yearb. 14 Hen. 7, fol. 1, pl. 2.

entertain the cause, as being himself a shareholder and member of the corporation. *(i)* the case being such that there would have been an absolute failure of justice if he had not. A corporation which is trustee of funds for public purposes, cannot be made accountable in equity to any private individual or other corporation by way of suit, though the circumstances be such as would render it accountable to the crown in an information. *(k)*

In any action brought against a corporation, where the attorney, who has appeared, with their privity, in their behalf, has consented to a judge's order referring the plaintiff's claim to arbitration, the submission will be valid after award made, although the attorney was not specially authorized under common seal to defend or refer; *(l)* it being a general principle that an attorney authorized to appear in a cause has implied authority to refer. *(m)*

We shall briefly repeat here a most important principle of corporation law, which has before been adverted to, namely, that a corporation is not responsible, as a corporation, for acts which, though colourably corporate acts, are not within the competency of the corporation to perform; in such case, the individuals who take part in the pretended corporate act are personally responsible. Thus, where the majority concurred in placing on the corporation books a resolution libelling a court of justice, the individuals composing the majority were held liable to a criminal information; *(n)* and so in cases of contract. So where corporators abstain from doing a corporate act, which it was their duty to have performed by a certain day, the individuals, and not the corporation, are made to pay the costs of the delay. *(o)*

Connected with the subject we have last considered, of actions and proceedings against corporations, is the question how to proceed against persons claiming to be and to act as corporations. It has been said, that persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the crown by usurping on its prerogative. *(p)* We shall now inquire, first, what is acting as a [*282] *corporation, and, secondly, what are the proper means of punishing or stopping it. Now, although it has been forcibly asked what acting as a corporation meant, *(q)* yet it may be safely replied, that

(i) Grand Junction Canal Co. v. Dimes, M. R., May, 1849; Dimes v. Grand Junction Canal Co., Lord Chanc., 1849, 18 L. J. (N. S.) Chanc. 424.

(k) Skinners' Co. v. Irish Society, 12 Cl. & F. 487.

(l) Faviell v. Eastern Counties Railw. Co., 2 Exch. 344; Bayley v. Buckland, 1 Exch. 1.

(m) Smith v. Troup, C. B., East. T., 1849.

(n) R. v. Watson, 2 T. R. 204.

(o) Reg. v. Mayor, &c., of Cambridge, 4 Q. B. 801.

(p) Duvergier v. Fellows, 5 Bing. 268; vid. Macallum v. Turton, 2 Y. & Jerv. 184. In Harrison v. Heathorn, 6 M. & Gra. 107, Tindal, C. J., expressed an opinion, that presuming to act as a corporation was not an offence at common law. In Garrard v. Hardy, 1 D. & L. 60, he treats presuming to usurp a common seal as illegal. That the former was such an offence, vid. Mad. Firm. B. 26; Mer. & Steph. Hist. Bor. 1660, Quo Warr. against mayor and burgesses of Newcastle for claiming to be a corporation. In East India Co. v. Sandys, Skinn. 223, Holloway, J., says none can erect a company for trade but the king.

(q) Per Lord Eldon, C., in Kinder v. Taylor, cited in George on Joint Stock Companies, 46. The mode of taking advantage of the circumstance that the body

either presuming to sue by a name of incorporation, or to have and use a common seal, or to have a perpetual succession by which to hold lands, or to permit shares to be transferable, so that any holder of shares should always have the power of forcing his assignee upon the body, so as to make him a shareholder, or to set up the power and right of limiting each shareholder's responsibility to the world by the amount of his share, would be acting as a corporation, and that either of them would suffice to constitute whatever offence there is in acting as a corporation.^(r)

When any body of individuals claim to be a corporation of a public character connected with government, not having right to be so, that is a ground for an information in the nature of a *quo warranto* by the attorney-general against the whole body, to show by what authority they claim to be a corporation; and if the franchise claimed is connected with police or public government, the attorney-general can alone prosecute such information.^(s)

Where the body assuming to be a corporation is of a private nature, that is, constituted professedly for the advancement of its private interests, and not laying any claim to franchises connected with police or government, a *quo warranto* information, either at the instance of the attorney-general or a private relator, is not available; and the result of the decided cases is, that some doubt appears to exist in what manner to take advantage of the irregularity. The plea of *nul tiel* corporation is certainly available in bar to an action by a body of persons suing as a *corporation, not, in fact, being so; but it does not appear that [•283] their holding themselves out to the world as a corporation, provided they do not usurp a common seal, or attempt to do any other of the acts mentioned above, is such an illegality as nullifies a contract with them; at any rate, a bond given by a corporation *de facto* will bind them, though they cannot take one for their own benefit.^(t)

suing has no right to the corporate character, is by plea of *nul tiel* corporation; *Vin. Abr. Corporations, C., A., pl. 35.* "Presuming or pretending to act as a corporate body" is spoken of by the legislature as a known offence in 6 Geo. 1, c. 18, s. 19.

^(r) In *Garrard v. Hardy*, 7 M. & Gra. 438, it is said by the court, that raising and transferring stock cannot be considered to be of itself an offence at common law, such species of property being altogether unknown to the law in ancient times; but it is submitted, that professing to sell transferable stock, that is, to sell the membership in a corporation, whereby the buyer's responsibility becomes limited to the aggregate stock of the corporation, is a fraud and false pretence punishable by indictment at common law.

^(s) *R. v. Ogden*, 10 B. & C. 233; *R. v. Mayor, &c., of Carmarthen*, 2 Burr. 869. It seems that they may be informed against in their incorporate name, and judgment of *capiantur pro fine* entered against them, and so the dissolution of the body follow of course as a legal consequence. *Vid. the Case of New Malton*, cited *Quo. Warr. Case*, Att.-Gen. arg.; 31; 2 T. R. 547, where the cases cited seem to show that usurping corporate privileges is an offence at common law. But a private relator may, by leave of the court, bring an information in the nature of a *quo warranto* against individuals claiming franchises or rights as such pretended corporators, or as officers of the pretended corporation, *Rex v. Mayor, &c., of Carmarthen*, 2 Burr. 869; provided the pretended corporation claimed some franchise of a public character, and connected with police or public government. *R. v. Ogden*, 10 B. & C. 233; *vid. 6 East*, 359; *Rex v. White*, 5 A. & E. 618; *Ibbotson's case*, Cas. Temp. Hardw. 261; *R. v. Marsden*, 3 Burr. 1812; *R. v. Lowther*, 1 Stra. 637.

^(t) *Knight v. Mayor, &c., of Wells*, 1 Lutw. 508; *vid. 19 L. J. (N. S.) Q. B. 185.*

In many cases indictments may be maintained against corporations for the non-performance of public duties cast upon them by law. Thus, either by prescription,^(u) or by statute,^(x) a corporation may be bound to the repair and maintenance of a bridge. But a municipal corporation will not in general be obliged by indictment to repair a bridge situate in a district that has been added to it by the Municipal Corporation Act^(y) without proof that the old borough had been used to maintain such bridge,^(z) but on the contrary, it appearing that they had shared with the rest of the county the burden of repairing it. Where, however, the district belonging to a county of a city, or a county of a town, has been enlarged by charter, as was often done in former times,^(a) or by statute, and thereby a bridge placed within the corporate district, which before had been supported by the county at large, the law appears to be different; and the inhabitants, in such case, would be bound to repair, and might be indicted for neglecting to do so;^(b) the distinction being, that a county is *prima facie* liable for the repair of bridges within it, a town or borough only by immemorial usage.^(c) The course of proceeding derivable from analogy, is to indict the inhabitants and not the corporation by its corporate name; but it would seem, and the precedents are so, that to indict the corporation would be the correct course, where, by the original constitution of the corporation, all the inhabitants of the county of the city, or borough, were incorporated; for as the corporation must by their justices, it is apprehended, assess and then levy the rate upon the inhabitants, the corporation *would be the proper party to be called to account, and [*284] not the inhabitants, for the neglect of duty, as the inhabitants, it is apprehended, have no power in such case to take measures for the repairs.

Again, a corporation is indictable for refusing to perform duties directly cast upon them by statute; *ex. gra.* for refusing obedience to an order of justices requiring them to execute works pursuant to a statute.^(d) So

(u) 2 Inst. 700, 701; 3 Q. B. 232. So of a highway, *vid.* 4 Q. B. 499; *Bridges v. Nicholls*, Godb. 346, 347; 3 Q. B. 232; 11 A. & E. 344; 8 A. & E. 65. As to evidence, 4 Q. B. 499; as to pleading, 2 Wms. Saund. 158, n. (o) 6th ed.; 1 B. & A. 348.

(x) *Vid.* 22 Hen. 8, c. 5, s. 3, under which a corporation having local jurisdiction or holding lands only *may* be liable for the repair of bridges then in existence; *R. v. West Riding of Yorkshire*, 2 East, 342; *vid.* 1 Stra. 178; per Lord Denman, C. J., 7 Q. B. 946, 954. Indictment of a corporation for non-repair of a bridge; 6 M. & Selw. 365, n.; 8 A. & E. 65, where see as to the extent of liability.

(y) *Vid.* 5 & 6 Will. 4, c. 76, s. 7. As to the distinction between the liberties and suburbs of a city, *Jones v. Walker*, Cowp. 624; *et vid.* Index.

(z) *Reg. v. New Sarum*, 7 Q. B. 941; *vid.* 2 Inst. 700, 701; *Skin. R.* 254.

(a) *Vid.* 1 Stra. 178; *Mitton's case*, 4 Rep. 33; *Anon.*, Poph. 17; 5 B. & C. 410.

(b) *R. v. Norwich*, 1 Stra. 177; *Reg. v. St. Peter's, York*, 2 Ld. Raym. 1249. It is said, *Plowd. Com.* 129, 130, that if privileges belong to a district, and the district is enlarged, the new district shall not have the old privileges extended to it.

(c) *Reg. v. New Sarum*, 7 Q. B. 945, per Lord Denman, C. J., *Williams, J.*; *Hall's case*, *Aleyne*, 51; 2 Inst. 700, 701; Godb. 346, 347. A general statute relating to counties in general does not apply to counties of cities and counties of towns; *R. v. Haythorne*, 5 B. & C. 410, 429; *M. & Steph. Hist. Bor.* 2025. The county of the city may extend beyond the city; 21 Vin. Abr. 161, pl. 31, 162, pl. 37.

(d) *Reg. v. Birmingham and Gloucester Railw. Co.*, 3 Q. B. 223. From this case and that of *R. v. Mayor, &c., of Stratford*, 14 East, 348, it follows that indict-

for obstructing a highway,^(e) that being a nuisance at common law. With respect to indictment or presentment for not repairing sea-banks, &c., there is this difference between individuals and corporations; that whereas the former are only liable *ratione tenuræ*, yet a corporation may be liable to perform the duty in consequence of their having accepted a charter imposing it, although they have no land by the grant, and therefore an indictment or presentment charging that the corporation had used time out of memory, &c., to repair, &c., is good.^(f)

As a corporation cannot appear in person, and at assizes and quarter sessions appearance by attorney is not allowed, an indictment against a corporation must be removed into the Queen's Bench by writ of certiorari, when the appearance will be compelled, if necessary, by distress infinite,^(g) or by means of an attachment in the nature of a *pone*.^(h)

The result of what has been said is, that a corporation may be indicted for a nonfeasance in not carrying out the provisions either of their constituting statute, or of their charter, or for a misfeasance consisting of an offence at common law, not being treasonable, felonious, or attended with *violence, or for an offence against a statute, or against a pre-
scriptive or chartered duty. [*285]

In accordance with what has just been laid down as to the general liabilities of corporations, we find that they are liable like individuals, in the character of owners or occupiers of houses and other real pro-

ment lies against any corporation of a public character, and perhaps against any corporation, for an offence of a public nature, or by possibility affecting the public, if against a statute, but not, it is said, for a felony or offence attended with violence; *et vid. Reg. v. Great North of England Railw. Co.*, Q. B., May 6, 1846, 9 Q. B. 315, that indictment lies for a mis-feasance at common law. 4 Geo. 4, c. 95, s. 68, recognizes the liability of corporations to indictment. That a corporation cannot commit treason, *vid. Yearb. 21 Edw. 4, fol. 13, B.*; *Vin. Abr. Corporation, Z.*, pl. 2. Precedents of indictments of corporations, 4 Wentw. Prec. 157; *Cro. Circ. Comp. 355*; 3 Chit. Crim. Law, 586, 603. The corporation may be fined, upon conviction, on an indictment, 3 Q. B. 233, n. (*d*); the fine being leviable, not of the goods which every member in special has by himself, but of the goods which they have in right of the corporation; *Yearb. 9 Hen. 6, fol. 36, B.*; 16 *Vin. Abr.* 519. No indictments but such as are removed out of London are amendable in B. R., and they are so because by their charter the city returns only *tenorem recordi*; 1 *Keb.* 252, pl. 20; *id.* 571; *Anon.*, Lane, 83; *vid. 1 A. & E.* 608; *sup.* p. 277.

(*e*) *Reg. v. Scott*, 3 Q. B. 547; or the individuals who commit the offence may be indicted, *id.*, *et vid. Reg. v. Great North of England Railw. Co.*, Q. B., May 6, 1846, 9 Q. B. 315. As the corporation cannot appear, it cannot enter into recognizances; *Case of Mayor of Lincoln*, G. Benl. 121; *Case of Mayor, &c., of Norwich*, *Yearb. 21 Edw. 4, fol. 79*; *Burghill v. Abp. of York*, 1 *Ld. Raym.* 79; *qu. tam. et vid. 1 B. & C.* 336, 337; *Madox, Firm. B.* 136, 137; *Anon.*, Moor. 68, pl. 168; *Com. Dig. Franchises, F. 13*.

(*f*) *Yearb. 21 Edw. 4, 38, pl. 3*; *R. v. Mayor, &c., of Liverpool*, 3 *East*, 86; *Callis, Sewers*, 116, 117. That an obligation of a public nature may be imposed by charter, so that the corporation may become liable for the breach of it to indictment or an action on the case, *vid. Mayor, &c., of Lyme v. Henley*, 2 *Cla. & F.* 331; *Bret's case*, *Cro. Jac.* 399, 521; *Mayor, &c., of Linn v. Turner*, *Cowp.* 86; *S. C. Lofft, R.* 536; *sup.* p. 277. As to averment of special damage in such action on the case, *vid. last case*, and *Hart v. Bassett, T. Jones*, 156. Distress for sewers rates on corporation, 12 & 13 *Vict. c.* 50, s. 7.

(*g*) *Hawk. P. C. Bk. II. c.* 27, s. 14; 6 *Vin. Abr.* 310; 8 *A. & E.* 65; *Reg. v. Birmingham, &c., Railw. Co.*, 3 Q. B. 233; *Com. Dig. Franchises, F. 19*.

(*h*) *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 *H. Bla.* 209.

perty, to the pecuniary burdens on such property. Thus a corporation, seised in fee of lands for their own profit are, within the meaning of the poor laws, inhabitants or occupiers of such lands, and therefore liable in respect of them, in their corporate capacity, to be rated to the poor; and the court, in so deciding, treated as of no weight the objection that the statutory remedy by distress was inadequate, and the remedy of imprisonment impossible; and, therefore, that as an action for poor rates will not lie, none being given by the 43 Eliz. c. 2, which creates the charge and points out the above remedies, corporations must be considered as excluded; *(i)* though, as he observed in a subsequent case, *(k)* it was thought there was some difficulty in enforcing the remedy. However, the distress may be taken elsewhere than in the particular district in which the lands, &c., lie, and even out of the county; *(l)* and the corporation may be indicted for disobedience to the order of quarter sessions *(m)* imposing the rate; or perhaps an attachment of contempt might issue against the guilty corporators. *(n)*

So a corporation are chargeable to the church-rate in respect of lands, &c., held in their corporate capacity, *(o)* and ought to be cited for non-payment in the spiritual court by their corporate name. *(p)*

And, generally, wherever a tax or impost is levyable by statute upon inhabitants, *(q)* or occupiers, *(r)* a corporation is liable to it in respect of lands, &c., held in their own hands as a corporation, or of which they are seised in fee, for their own profit. Therefore, a corporation is liable to the land tax in respect of corporate property; *(s)* and being liable, by tenure or otherwise, to repair any old turnpike road, is in the same manner liable to repair it when widened, diverted, &c. *(t)* So they are liable to be rated to the poor on navigation tolls of which they are owners, &c., in the district where the tolls become due. *(u)* So for port and other dues. *(x)*

*With respect to suits in equity against corporations, it is to [*286] be observed that the mode of bringing the corporation into court, or of compelling an appearance, is the following: The subpoena having

(i) R. v. Gardiner, Cowp. 79; vid. HOSPITALS. As to municipal corporations, 4 & 5 Vict. c. 48; 9 A. & E. 435; 12 A. & E. 2; vid. 4 T. R. 731; 19 L. J. (N. S.) M. C. 122.

(k) Reg. v. Birmingham, &c., Railw. Co., 3 Q. B. 233. *(l)* 17 Geo. 2, c. 28.

(m) Reg. v. Birmingham, &c., Railw. Co., 3 Q. B. 223.

(n) Vid. sup. p. 281. It is doubtful whether a mandamus will lie; R. v. Margate Pier Co., 3 B. & A. 220. *(o)* Thursfield v. Jones, T. Jones, 187.

(p) Per Aston, J., Cowp. 85.

(q) 2 Inst. 703.

(r) Ironmongers' Co. v. Naylor, T. Jones, 85; 1 Vent. 311; Cowp. 84; vid. 4 & 5 Vict. c. 48, as to municipal corporations.

(s) Roy. Exch. Assur. Co. v. Vaughan, 1 Burr. 155.

(t) 4 Geo. 4, c. 95; et vid. Reg. v. Barton, 11 A. & E. 344.

(u) R. v. Mayor, &c., of London, 4 T. R. 21; R. v. Dock Co. of Hull, 1 T. R. 219; vid. 3 M. & W. 423, and next note; 1 Q. B. 558.

(x) Reg. v. Dock Co., &c., of Hull, 7 Q. B. 2. There must be a beneficial interest in the toll, 4 T. R. 730; except in the case of municipal corporations, 4 & 5 Vict. c. 48; or they will not be rateable. Rateability for right of pasture, 6 A. & E. 419; 9 A. & E. 444. Et vid. Reg. v. Bristol Dock Co., 1 Q. B. 535; R. v. Oxford Canal Co., 4 B. & C. 74; R. v. Trent Navigation, 1 B. & C. 545; Reg. v. London, &c., Railw. Co., 1 Q. B. 558. 585; Reg. v. Cambridge Gas Light Co., 8 A. & E. 73; 4 Q. B. 18; 6 Q. B. 179; 10 Q. B. 208.

been duly served, *(y)* *i. e.*, being served on any of the corporators, upon proof of such service, a distringas issues, commanding the sheriff, &c., to distrain the lands, goods and chattels of the corporation, so that they may not possess them till the court shall make other order to the contrary, and that in the meantime the sheriff, &c., do answer to the court for what he distrains, so that the defendant may be compelled to appear in chancery and answer the contempt. On return of this writ, without obedience on the part of the corporation, an alias distringas issues; and, if that is returned without being obeyed, a pluries distringas issues, on return of which a commission of sequestration may be obtained against the corporation to sequester the goods, chattels, rents, and profits, and real estate of the corporation, which cannot be discharged until the corporation has appeared and paid the costs. However, as the plaintiff may now enter an appearance himself, it is not likely that this process of contempt, for the purpose of compelling an appearance, will be often found necessary in future. *(z)*

Where the bill does not disclose circumstances from which it can be discovered by the court that the body suing is not a corporate body, but only assumes that character, the objection may be taken by way of plea; *(a)* but where the bill discloses this defect, the objection is to be taken by demurrer; *(a)* such, at least, seems to be the result of the authorities. But whatever be the most proper mode of preventing a body of persons from assuming the corporate character, when it does not belong to them, in proceedings in equity, it has been fully decided to be "the absolute duty of courts of justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the record." *(b)*

The subject of suits by a portion of the corporation against directors of it, for alleged misconduct, has already been incidentally considered, *(c)* and does not, it is almost needless to observe, fall within the above rule. We shall proceed to mention the principles which have been laid down *in some of the leading cases with respect to the proper parties [*287] to suits in equity where corporations are concerned.

The 32nd order of August, 1841, declares, that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to the suit concerning such demand, all the persons

(y) 1 Headl. Dan. Eq. Pract. 413.

(z) 1 Harris. Chanc. Pract. 265; 1 Dan. Eq. Pract. 443, 444; 2 Vern. 395. A corporation, that has a head, cannot be sued (in the vacancy of the headship) without the head; for the corporation, during that period, is incomplete, 1 Headl. Dan. Pract. 150. But it is not necessary, in suing a corporation with a head, to state the name of the head, *id.* 150; *Newton v. Travers*, 3 Salk. 103.

(a) Mitf. Chanc. Plead. 180, compared with Coop. Plead. Eq. 164.

(b) Per Ld. Eldon, *Lloyd v. Loaring*, 6 Ves. 773; *vid.* Head Dan. Eq. Pract. 24.

(c) *Vid.* sup. p. 72; *Foss v. Harbottle*, 2 Hare, 461; *Parsons v. Spooner*, 15 Law J. (N. S.) Chanc. 155; *Preston v. Grand Collier Dock Company*, 11 Sim. 327. As to when an individual shareholder will be allowed to file a bill complaining of acts of the majority, *vid.* *Lord v. Copper Miners' Company*, 18 Law J. (N. S.) Chanc. 65; *Bagshaw v. Eastern Counties Railway Company*, 114; *et vid.* sup. pp. 71, 72; *Salomons v. Laing*, 19 L. J. (N.-S.) Chanc. 225.

liable thereto ; but the plaintiff may proceed against one or more of the persons severally liable."

Hence, in a suit for a breach of trust, it is unnecessary to bring all the parties to the breach of trust before the court ; and where a corporation is party to a breach of trust, the suit may be against the corporation alone.(d)

Another principle of importance to be considered in suing corporations connected with landed property is this, that a person is not a necessary party merely because one object of the bill is to restrain an act by which he is affected. Therefore, where a vendor files a bill for a specific performance, and to restrain a trespass by the purchaser in the meantime the tenant not being a party to the purchase contract, is not a necessary party to the suit.(e)

Although the general rule is well established, that a plaintiff is not allowed to make any person defendant to the bill against whom no relief is prayed ; and, therefore, to a bill for relief, a mere witness cannot be made a defendant ;(f) yet there is an exception in the case of the clerks, secretaries, and other officers and servants of corporations, arising out of the necessity of the case ; for as a corporation cannot answer on oath, the court, unless the rule were thus broken in upon, would be deprived in such case of its usual means of arriving at the truth.(g) It is the practice, therefore, to join such parties for this purpose. The engineer of a railway incorporated company has been held to be properly made a party to a bill, praying an account on behalf of a party who had contracted to perform certain works for the corporation, the due execution of which was to be certified by such engineer ;(h) and such account will always be decreed against a trading corporation, either in favour of a member or a stranger, where there is no remedy, or not a complete remedy, at law.(i) So that where improper conduct is imputed [*288] *to particular members of the corporation in a bill for relief, they may be joined to a corporation so as to obtain an answer upon oath from them.(k) In fact, the rule derivable from the decisions is, that officers, servants, and members of the corporation, may be joined with the corporation in a bill against it, whether for discovery or relief.(l) Indeed, the only practical difference in this respect between the two descriptions of bills seems to be this, that an answer to a bill for

(d) *Att.-Gen. v. Mayor, &c., of Leicester*, 7 Beav. 176. On the other hand, it is no objection that a corporation, beyond the jurisdiction of the court, is not made a party as defendant to the suit ; *Att.-Gen. v. Baliol College*, Mitf. Pl. 32, note (u).

(e) *Robertson v. Great Western Railway Company*, 10 Sim. 314.

(f) *Fenton v. Hughes*, 7 Ves. 287 ; *Le Texier v. Margravine of Anspach*, 15 Ves. 159 ; *vid. note*, 1 Ves. jun. 293. A bill of discovery will not lie against the clerk of a corporation to oblige him to produce books of the corporation, which he is sworn not to show without the consent of the corporation ; *Chanc. Rep.* 24.

(g) *Wych v. Meal*, 3 P. Wms. 310 ; *Glascott v. Copper Miners' Company*, 11 Sim. 305 ; *Anon.*, Vern. 117 ; *Gibbons v. Waterloo Bridge Company*, 5 Price, 491 ; *Bolton v. Mayor, &c., of Liverpool*, 1 My. & K. 88. It seems the corporation must pay the costs of parties so joined ; *Taml.* 249.

(h) *Mackintosh v. Great Western Railway Company*, 18 Law J. (N. S.) Chanc. 94.

(i) *Adley v. Whitstable Fishermen*, 17 Ves. 323 ; 19 Ves. 304.

(k) *Dummer v. Corporation of Chippenham*, 14 Ves. 245.

(l) *Glascott v. Copper Miners' Company*, 11 Sim. 305.

relief necessarily comes before the court while that to a bill for the discovery of evidence to sustain an action or rebut other evidence, is not necessarily ever heard of in the court of equity which has enforced it.

Nevertheless the above rule does not apply further than has been stated; thus, where a bill had been filed for a discovery and an injunction to stay proceedings, the injunction which had been granted was dissolved upon the coming in of the answer of the corporation, without the answer of the officers who had been joined, notwithstanding it was urged that, to dissolve the injunction in such circumstances, would be making it useless to join officers in order to obtain their oaths.^(m) A bill of discovery will not lie against a corporation for the purpose of aiding a defence to an action for town dues by making them produce their title deeds to such dues.⁽ⁿ⁾ So where a certificate of a corporation is to be used in evidence at a trial at common law, witnesses must be produced to support it on oath, and the appearance of the corporation seal appended will not suffice to establish the truth of the fact it alleges,^(o) except in the case of a custom of the city of London; for that corporation is entitled to certify their customs by the mouth of the recorder *ore tenus* in the courts at Westminster,^(p) whether of common law or equity;^(q) and, except in the case of a record of a court of the city of London pleaded in one of the superior courts at Westminster, where the same privilege holds.^(r) But there is no authority that one court can take notice of a custom so certified to another court, though the practice is for each court to notice in future a custom which has once been certified to it.^(s)

Where a corporation is in contempt in equity, there is no mode of *proceeding against the real offenders personally, but the mode of compulsion is by sequestration by taking possession of the [*289] personal estate, and the rents and profits of the real estate, of the corporation.^(t) But it has been doubted whether the commissioners, on a writ of sequestration, have power to seize the corporation books.^(u)

(*m*) Ibid. 314.

(*n*) *Bolton v. Mayor, &c., of Liverpool*, 1 My. & K. 88. As to bill of discovery to enable a corporation to defend an action brought against them, *South-Eastern Railway Company v. Martin*, 18 L. J. (N. S.) Chanc. 103. The Court of Chancery only interferes in matters of accounts where there are mutual accounts, and where it has better means of ascertaining the rights of the parties than courts of law have, *id.* 104. Where an action against a corporation for moneys alleged to be due for services, &c., will not be restrained by injunction, *id.* Where an indictment will be restrained by injunction, *Mayor, &c., of York v. Pilkington*, 2 Atk. 302.

(*o*) *Burgesse's case*, Cro. Car. 365; *Vin. Abr. Trial, G., pl. 1, marg.*; *Munday v. Vaughan*, 21 *Vin. Abr.* 38, pl. 1. In equity, however, a plea of privilege of university may be put in without oath; *Masters v. Bruett*, 2 *Freem.* 143. Certificate of a foreign convent not allowed; *Carte v. Ball*, 3 Atk. 499.

(*p*) *Vin. Abr. Trial, G., pl. 1*; 3 *Burr.* 1857. As to pleas of such customs, and how to traverse them, 21 *Vin. Abr.* 26, pl. 7. Form and mode of certificate *ore tenus*, 1 *Burr.* 248; 4 *M. & Gra.* 945. (*q*) *Bruin v. Knott*, 12 *Sim.* 436.

(*r*) *Vin. Abr. Trial, G., pl. 4, H., pl. 1.*

(*s*) *Piper v. Chappell*, 14 *M. & W.* 649, 650; *vid.* 12 *Sim.* 436.

(*t*) *R. v. Windham*, Cowp. 377; *Att.-Gen. v. Mayor, &c. of Leicester*; *Att.-Gen. v. Leather Sellers' Company*, cited *Shelf. Mortm.* 444.

(*u*) *Lowten v. Mayor, &c., of Colchester*, 2 *Meriv.* 395.

The ordinary mode of enforcing a decree in equity is by *distringas*,^(x) which will issue, as we have seen, against a corporation, just as it does against an individual.

In a charity suit, in general, a corporation, whose conduct in the administration of the funds of the charity has given occasion to the suit, will be made to pay the costs.^(y) So they will be made liable to costs for suppressing evidence.^(z)

Where the legal remedy against a corporation is inadequate, it is a principle that the courts of equity will interfere. Thus, where it was impossible accurately to measure in damages the loss from a breach of covenant by a corporation, and the plaintiffs could only recover such speculative damages as a jury might give in repeated actions, an injunction will issue to protect the plaintiffs' right to a specific performance of the covenant.^(a) So where a corporation have covenanted to do certain things forthwith, on land which they have purchased from the plaintiff, on proof of their refusal, specific performance of the covenant will be decreed against them.^(b) So if a corporation have been established by statute for the purpose of executing certain works, &c., which however were to be completed within a certain period limited by the act of parliament, then the moment the time has elapsed, the court of chancery will interfere by injunction to prevent the future exercise of the powers granted to the corporation for the above purpose, on the application of any persons against whom those powers were to be executed.^(c) The act of parliament, in such cases, is in the nature of a private bargain between the undertakers and the public, and they are invested as a body with the powers contained in it only on the faith of their completing the works [*290] according to the intention of parliament. *In the well known words of Lord Eldon, C., "I apprehend those who come for these acts of parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else; that they shall do, and shall forbear, all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of indivi-

(x) *Per Wigram, V. C.*, 1 Hare, 398; 1 Dan. Chanc. Pract. 190.

(y) *Att.-Gen. v. Mayor, &c.*, of Stafford, Barnard. Ch. R. 33; *Att.-Gen. v. Haberdashers' Company*, 2 Bro. P. C. 72; *Att.-Gen. v. Mayor, &c.*, of Winchester, Coop. Ch. R. 502; *Att.-Gen. v. Mercers' Company*, 2 My. & K. 654; *Att.-Gen. v. Earl of Mansfield*, 2 Russ. 501.

(z) *Borough of Hertford v. Poor of Hatfield*, 2 Bro. P. C.; *Att.-Gen. v. Mayor, &c.*, of East Retford, 2 My. & K. 35.

(a) *Rigby v. Great Western Railway Company*, 4 Railw. Cas. 175; *vid. Att.-Gen. v. Manchester, &c., Railway Company*, 1 Railw. Cas. 436. 458. So in all cases of trespass, where damages would be an inadequate and uncertain remedy; 3 Railw. Cas. 345.

(b) *Price v. v. Mayor, &c.*, of Penzance, 4 Hare, 506.

(c) *Lee v. Milner*, 2 M. & W. 843. Where the application is to restrain the company from proceeding by an action at law to enforce their powers, it must be made in proper time after the commencement of the action; *Thorpe v. Hughes*, 3 My. & C. 742. Where there is admitted legal right in the corporation, the injunction will only be granted upon the courts seeing clearly, that upon the suit coming on for hearing, the relief must be decreed: *Playfair v. Birmingham, &c., Junction Railway Company*, 1 Railway Cas. 640.

duals.”(d) The same learned judge also laid down, that where a body of persons assumed to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, and the event is that that sum is not nearly sufficient; if the owner of an estate, through which the legislature has given the right of carrying the work, can show that the corporation are unable to complete the work, and is prompt in his application, the Court of Chancery will not permit the farther prosecution of the undertaking;(e) that is to say, provided the court can see that the undertaking cannot be completed, and therefore that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by individuals, it will protect the individual from being compelled to make the sacrifice, until it appears that the public will derive the proposed benefit from it.(f) These principles, it is obvious, must be of great importance, in ascertaining the powers of corporations established by act of parliament. But there is also a third principle, or rather an extension of the first principle just stated, which is, that not only will the courts of equity interfere where the interests of the public, and where the interests of strangers to the corporation are to be defended from injury, but also the powers of the court may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers, funds, &c., for the accomplishment of purposes not within the scope of their institution, and an injunction will issue accordingly.(g) A corporator may not only sue singly in equity the directors, &c., or the company, on behalf of himself and other shareholders, &c., but he may also join other parties as defendants, who may be receiving benefits from the transactions which he impeaches; *Salomons v. Laing*, 19 Law J. (N. S.) Chanc. 291; but the plaintiff cannot examine a shareholder not a defendant in support of the bill; *Fyler v. Newcombe*, 19 Law J. (N. S.) Chanc. 278. This, however, does not extend to prevent an application by a parliamentary corporation to parliament for an alteration and extension of their objects and powers; the right to take proceedings in parliament by application under the corporate seal being incident, it is said, to corporate bodies constituted by act of parliament (g) *But such a corporation are not entitled, without express permission in the incorporating statute, to apply [*291]

(d) *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 154; *vid. R. v. Cumberworth*, 3 B. & Ad. 108; 7 M. & Gra. 263; *Meigh v. Clinton*, 11 A. & E. 418.

(e) *Agar v. Regent's Canal Company*, 2 Russ. & M. 250; *vid. Thicknesse v. Lancaster Canal Company*, 4 M. & W. 472.

(f) *Salmon v. Randall*, 3 My. & C. 444.

(g) *Ware v. Grand Junction Waterworks Company*, 2 R. & My. 483; *vid. Coll. 376*; *vid. Att.-Gen. v. Manchester, &c., Railway Company*, 1 Railw. Cas. 436. And as to costs of getting an act of parliament, *Att.-Gen. v. Earl of Mansfield*, 2 Russ. 501. Wherever a single corporator, as such, has an interest in a particular subject adverse to that of the corporation, he may file his bill for relief alone; but if any one else is interested as well as himself in the subject, then that person, whether a stranger or a corporator, must be joined; *Mangles v. Grand Coll. Dock Company*, 10 Sim. 519. Where the parties in such a situation are numerous, *vid. as to the practice, Walf. Law of Railw. 375*, 2d edit. And as to making particular corporators co-defendants, *vid. id. 376*. Where a stranger is interested only as one of the public as regards the right, *ex. gra.* in the stoppage of a navigable river, there, though the extent of his interest may be greater than

their corporate powers to the support of any undertaking which does not come within the purposes for which they were incorporated; much less are they empowered to guarantee out of their corporate funds the payment of a certain rate of dividend to parties carrying on such undertaking, and this is the law, although such undertaking may be calculated to increase, and may increase, the proper business of the corporation, and although the vast majority of the corporators may approve of such application of the corporate funds, and although the object of the undertaking be in no respect contrary to the public interests.^(h) Here again we recognise the presence of the principle, that the majority, or the whole, of the corporators existing at a given moment are not the corporation, which is eternal; and therefore that neither they, nor any succeeding body of corporators, can, as a corporation, act inconsistently with the purposes of the corporation, or be allowed to do that which would place their successors in a different position from that in which the institution of the corporation intended them to stand.

Where the directors of an incorporated railway company proposed to guarantee, with the sanction of the great body of the corporators, the dividends of a steam packet company, which was intended to run steamers to and from one of the termini of the railway, it was held that any one of the corporators was entitled to "sue on behalf of himself and all the other shareholders, except the directors," who were made defendants; notwithstanding that some of those shareholders had taken shares in the steam packet company; and although in fact he was suing at the instigation, and with the support of a rival steam packet company; and an injunction to prevent the railway company from entering upon such course of proceeding was made perpetual.⁽ⁱ⁾

There may be considerable difficulty in ascertaining the line beyond which a trading corporation cannot pass, without being liable to interference in this way by an injunction; each case must be decided upon its own peculiar circumstances; but we are authorized in concluding that the courts of equity are not likely to relax the above general rule, that each corporation will be kept strictly within the limits of the purposes of its institution.^(k) Any other rule would in fact alter the law of corporations in one of its fundamental and best established parts. It must always, therefore, be borne in mind, that the powers given by a statute of incorporation extend no further than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned; and [*292] that there is no authority for saying that one of these bodies has power to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided

that of others, he cannot sue in equity for relief in his own individual right; *Illingworth v. Manchester, &c.*, 2 *Railway Cases*, 209.

^(h) *Colman v. Eastern Counties Railway Company*, 10 *Beav.* 1. ⁽ⁱ⁾ *Ibid.*

^(k) For the statutory power (vested now in the commissioners of railways) of preventing deviations from the provisions of acts of parliament incorporating railway companies, and infringements of the common law of corporations, *vid.* 5 & 6 *Vict. c. 55*, and the act for constituting commissioners of railways, 9 & 10 *Vict. c. 105*; *et vid.* *Walford, Law of Railways*, 337, 2d edit.

the object of that liability is to increase the business to be done by the corporation, and thereby to increase the profits of the corporators.^(l) Again, where an incorporating statute contemplates every shareholder paying in the same proportion when calls are made upon the shares of the common stock of the corporation, and nevertheless the corporation has made calls upon some shareholders and not upon others, equity will interfere to put all upon an equal footing.^(m) So an illegal forfeiture of shares forms a good ground for relief in equity.⁽ⁿ⁾ So equity will relieve against a demand for a call on a shareholder, where the undertaking, owing to subsequent circumstances, becomes impossible; or where the corporator was entrapped into entering the corporation by means of its fraud or misrepresentation; or where the particular call was fraudulently made.^(o) But the mere fact of the appointment of the directors making the call being invalid, or of the party having become a corporator, and taken the shares for the accommodation of the corporation, are neither of them alone grounds of relief in equity.^(p) Even though it should appear that the concurrence of parliament, in the incorporating statute, had been obtained by false and fraudulent representations as to the number of shares subscribed for, the Court of Chancery will not interpose to relieve any corporator from the obligations of the statute, or the consequences of acts duly performed under it by the corporation; for to give such relief would, in fact, be saying that the statute was vitiated, and rendered null, by reason of the fraud practised upon the legislature, which courts of justice are not competent to do. The legislature can alone grant relief;^(q) and the act is equally binding on all parties with any other statute, until it be repealed. Again, where a statute erects a corporation for the making and maintenance of particular works, and they enter upon land without arranging as to the price, and paying it to the owner, he may have relief in equity.^(r) So equity will prevent such a company from taking land which their statute does not authorize them to take.^(s) So if they interfere, or threaten to interfere, with any road or highway, without setting out a substitute, according to the requirements of their statute, or obstruct a canal, brook, or mill-stream, *to a greater extent than is authorized, or than is necessary, for the purposes of their undertaking.^(t) [*293]

(l) *Colman v. Eastern Counties Railway Company*, 10 Beav. 14, 15.

(m) *Preston v. Grand Collier Dock Company*, 11 Sim. 327.

(n) *Jones v. Re*, 4 Hare, 52.

(o) *Mangles v. Grand Collier Dock Company*, 10 Sim. 519; *Richardson v. Larpent*, 2 Y. & Col. C. 507; *Thorpe v. Hughes*, 3 My. & C. 742.

(p) *Mangles v. Grand Collier Dock Company*, 10 Sim. 519; *Playfair v. Bristol, &c., Junction Railway Company*, 1 Railw. Cas. 640.

(q) *Preston v. Grand Collier Dock Company*, 11 Sim. 328; *Playfair v. Birmingham, &c., Junction Railway Company*, 1 Railw. Cas. 640.

(r) *Hyde v. Great Western Railway Company*, 1 Railw. Cas. 278; *Robertson v. Great Western Railway Company*, id. 459; *Tomlinson v. Manchester, &c., Railway Company*, 2 Railw. C. 104.

(s) *Webb v. Manchester, &c., Railway Company*, 4 My. & C. 120.

(t) *Manser v. North, &c., Railway Company*, 2 Railw. Cas. 380; *Illingworth v. Manchester, &c., Railway Company*, 2 Railw. Cas. 207.

There are cases in which the operation of an injunction has a nearly identical effect with a mandamus. Thus, where a railway company had built walls in such a way as to prevent another railway company from crossing their line with carriages, &c., an injunction was granted restraining the company from maintaining such a state of things, and so, in effect, compelling them to pull the walls down(*u*). So where there was a mill belonging to the crown, at which all the inhabitants of a manor were bound by custom to grind their corn, they were decreed to do so(*x*); and, with an operation nearly similar, an injunction has been issued against all the members of a corporation, commanding them to abstain from doing a certain thing, which must, in effect, compel them to do a certain other thing(*y*). Courts of equity will, in like manner, restrain other incorporated bodies within the limits of their institution, and the above rules are by no means confined to cases of incorporated trading bodies. Thus, where the corporation of the Attorneys and Solicitors Society had come to a resolution to surrender their charter, with a view to obtain a new one modifying the objects and constitution of the corporation, a court of equity granted an injunction until the hearing, at the prayer of a dissentient minority of the corporators, (*z*) thus adhering to the principle, that a corporation cannot act contrary to the objects of its institution. But if the crown had granted the new constitution, which had been duly accepted by a majority of the corporation, the minority would have been too late to impeach the transaction and must have acquiesced, for, as we have seen, any charter becomes binding on all by a regular acceptance. Nevertheless, the court will not, either in order to restrain within the limits of the charter, or to enforce its provisions, allow a bill of discovery at the suit of some members of the body to oblige the corporation to discover particulars of breaches of the charter alleged to have been committed by the head or directors or wardens(*a*). But where a college refuses a copy of its statutes (which in some respects, correspond to the charter of an ordinary corporation,) relief may [*294] be had by a bill in equity(*b*), and so a corporation whose charter was not enrolled would probably be obliged to produce a copy of it under the operation of a similar bill.

In equity a corporation may be held to be bound by a contract made on their behalf before they were fully constituted a corporate body, if

(*u*) *Great North of England, &c., Railway Company v. Clarendon Railway Company*, 1 Coll. 507; *vid. Spencer v. London and Birmingham Railway Company*, 1 Railw. Cas. 170; *Att.-Gen. v. Manchester, &c., Railway Company*, *id.* 451.

(*x*) *Currier v. Cryer*, Hardr. 21; 2 Com. Dig. 135; *White v. Carter*, Hardr. 177.

(*y*) 4 Burr, 2315; *Carter*, 89.

(*z*) *Ward v. Society of Attorneys, &c.*, 1 Coll. 370. As to granting the injunction in cases of urgency, *Bell v. Hull, &c., Railway Company*, 1 Railw. Cas. 623, 624; of nuisance, *Semple v. London and Birmingham Railway Company*, 9 Sim. 209; *Warburton v. London and Blackwall Railway Company*, 1 Railw. 558.

(*a*) *Att.-Gen. v. Reynolds*, Eq. Cas. Abr. 131. Bill of discovery to compel clerk of the Skinners' Company to show books and documents, which he was bound by oath not to show without consent of the company, refused. *hanc. Rep.* 24.

(*b*) *R. v. Archbishop of Canterbury*, Ridgw. R. 81. No injunction against the publication of college statutes; *Magdalen College, Oxford v. Ward*, Coop. Sel. Cas. A. D. 1846, p. 265.

they have had the benefit of it as a corporation; thus an agreement made by the projectors of a railway company, on behalf of the projected company, was held to bind the corporation, they having enjoyed the benefit of it(c).

On the other hand, where a contract has been entered into by an authorised agent of the corporation on their behalf, which they afterwards repudiate, there never having been any contract in writing sealed with the common seal the person contracting with such agent is neither entitled to obtain from them the execution of the contract, nor the reimbursement of expenses incurred by him in preparing for the performance of the contract on his part.(d) So a contract, not under seal, by a corporation to execute a legal assurance of corporate property will not be executed by equity, so as to compel the corporation to perform it, unless valuable consideration for the contract be expressly proved, or evidence given of acts done, or omitted to be done, by the contracting parties, on the faith of the corporate resolution to enter into the contract.(e)

A corporation sued in equity may have the benefit, in general, of the Statute of Limitations by pleading it, as well as at common law(f). But the statute cannot be pleaded in equity by a corporation to a bill of discovery.(g) We shall speak hereafter of the operation of Statutes of Limitations with respect to charitable corporations and corporations seised to charitable uses.

A question of some importance remains. How is a corporation, sued in a court not having jurisdiction of the subject-matter, to have remedy? At common law all pleas to the jurisdiction must be pleaded in person,(h) so that a corporation cannot *so* plead; it must therefore, it is submitted, move for a prohibition, or allow judgment to go by *nil dicit*, and bring error. In equity the difficulty does not arise.(i)

*DISSOLUTION.

[*295]

THE proceedings against corporations which have been hitherto discussed have for their object, either the correction of erroneous and faulty conduct on the part of the corporation, or the prohibition and prevention of such conduct when threatened by them. We shall next proceed to inquire by what means the corporators in existence at any given time may lose altogether, for themselves and their successors, the rights and

(c) *Edwards v. Grand Junction Railway Company*, 7 Sim. 337; S. C. 1 My. & C. 650.

(d) *Jackson v. North Wales Railway Company*, 18 L. J. (N. S.) Chanc. 91.

(e) In case of a contract to mortgage, *Wilmot v. Mayor, &c., of Coventry*, 1 Y. & Col. (Exch.) 518; *vid. Dean and Chapter of Ely v. Stuart*, 2 Atk. 44.

(f) *Wych v. East India Company*, 3 P. Wms. 309.

(g) *Dean and Chapter of Westminster v. Cross*, Bunb. 60.

(h) *Gilb. Hist. C. B.* 187; 2 W. Bla. 1094. 1097; 1 Chit. Plead. 457, 7th edit.

(i) *Curs. Canc.* 107. 174; 16 Vin. Abr. 374, pl. 6.

privileges of incorporation, and be returned to the general mass of individuals without any common bond of union, or power of acting in concert under a common name and with common rights. The law has been thus laid down.

Where a body of persons, whose title to be a corporation is indisputable in law, and who are in a situation to be capable in all respects of acting as a corporation, are guilty of any abuse of the powers entrusted to them by their charter, *scire facias*, it is said, lies to repeal the charter and deprive them of the corporate character, and that is the appropriate remedy in such case.^(h) Indeed, it is laid down generally that a writ of *scire facias* lies whenever the grantee of a franchise has neglected his duty.⁽ⁱ⁾ The proceedings, judgment, and its effect, have been sufficiently explained above.^(k) We may observe, however, that the proceeding by *sci. fa.* appears to be the only adverse legal proceeding by which the corporation can be finally annulled; for, as we shall see, the effect of a judgment of seizure into the hands of the crown of the liberties, franchises, &c., followed by actual seizure accordingly, does not, *of itself*, operate to annihilate the corporation, which may be at any time restored and revived by the crown, provided the new charter contain apt words to show such to be the intention of the crown.

The general principle on which forfeiture of the charter rests is this, that a corporation cannot be allowed to take a grant and repudiate the conditions on which it is made,^(l) and, therefore, a breach of the conditions *is punished by withdrawing the grant. But, it is said, [296] when there is a body corporate *de facto*, taking upon themselves to act as a body corporate, but from some defect that has grown up in their constitution not being able to exercise legally the powers they affect to use, then the proper mode of depriving such body of the pretended powers which they assume is by an information in the nature of a *quo warranto*, calling upon them to prove themselves legally entitled to act as they do in a corporate character; the effect of which is, upon its appearing that their right is defective, to strip them altogether of the

(h) Per Ashhurst, J., 3 T. R. 244; *vid. Reg. v. Mayor, &c., of Bewdley*, 1 P. Wms. 207; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 385. A charter cannot be attacked by means of *quo warranto* informations against individual corporators; *Reg. v. Taylor*, 11 A. & E. 949. As to bill in equity to discover particulars of breaches of charter, *Att.-Gen. v. Reynolds*, Eq. Cas. Abr. 131, sup. p. 293. *Vid.* an ancient case of *sci. fa.* to repeal a charter granted under a deception practised upon the crown, *Case of the City of Wells*, A. D. 1342, M. & Steph. Hist. of Boroughs, 680—683. A charter may be repealed by *sci. fa.* if its operation is found to be contrary to law, though the corporators having only acted according to its provisions; *Reg. v. Arnaud*, 16 L. J. (N. S.) Q. B. 55. And in such case a *sci. fa.* is a writ of right; *Vincent v. Atwood*, 10 Mod. 260. 354.

(i) *Peter v. Kendal*, 6 B. & C. 703; *Mayor, &c., of London v. Vanacre*, 12 Mod. 271; *Viner. Abr. Franchise*, E. pl. 17.

(k) *Vid. sup. p. 42.* The judgment not only orders that the letters-patent should be cancelled, and the enrolment of them vacated, but also that the liberties, &c., be seized into the hands of the crown; *vid. 8 Rep. 31.*

(l) *Mayor, &c., of Lyme v. Henley*, 2 C. & F. 331; *R. v. Ward*, 4 A. & E. 384; *R. v. Inhabitants of Kent*, 13 East, 220; *Priestly v. Foulds*, 2 Sc. N. R. 205. 225; *Att.-Gen. v. Corporation of Shrewsbury*, 6 Beav. 220.

power of acting and of being a corporation.^(m) From what has been said above, it will appear, therefore, that *sci. fa.* is the remedy where a legal corporation in full possession of its powers abuses them; an information in the nature of *quo warranto* is applicable where the corporation, from a defect in its constitution, arising mostly from the lapse of time, as by the death of a majority of members of an integral part of the corporation under such circumstances that their places cannot be supplied, becomes an imperfect body, but, nevertheless, continues to act as a corporation by assuming the exercise of the powers and privileges given by its charter or other constitution. It follows, apparently, that there is no mode of removing the corporate character from a corporation not injured in any of its parts by lapse of time, which has a valid claim to be a corporation *by prescription*; for neither of the above remedies, as the law is stated, apply in that case, however it may abuse its powers. This is certainly a startling conclusion to arrive at; and would of itself suggest a doubt as to the soundness of the doctrine above stated, which appears, however (looking at the recent decisions only,) to be the established doctrine. But the old authorities do not support the distinction stated. Thus, in the reign of Edw. 1, we find a *quo warranto* brought against the mayor and burgesses of Nottingham to show why they claimed (among other things) to take tronage, within the borough, of merchandizes, consisting of things to be weighed; to have coroners to themselves; to be free of toll throughout England; to have return of writs, &c.; to have a mayor elected annually from among themselves; and to have two fairs every *year, &c., &c. They pleaded various charters and grants of different kings by way of answer, &c. But the judgment of the [297] court was, “*Et quod videtur curiæ quod prædicti major et burgenses abusi sunt aliquibus libertatum prædictarum et aliquas libertates sibi usurpârunt, &c.*”, *consideratum est quod libertates villæ prædictæ capiantur in manum domini Regis, &c.*”⁽ⁿ⁾ Now, according to the distinction

(m) Per Ashhurst, J., 3 T. R. 244; *vid. Reg. v. Mayor, &c., of Bewdley*, 1 P. Wms. 207; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 385. “The proceeding by *quo warranto* supposes the party in actual, though not in legal possession, and, therefore, judgment of ouster is necessary to dispossess him;” per Bayley, J., in *Peter v. Kendal*, 6 B. & C. 710. Perhaps the true meaning of what is cited in the text as to *quo warranto* is this, that the learned judge above mentioned (Mr. J. Ashhurst), who first enounced the distinction, had in his mind the idea, which he did not express very clearly, of several *quo warranto* informations against the several officers and members of the corporation who continued to act as with legal corporate authority, notwithstanding that the constituent parts of the body were in a defective state; as was the fact with regard to the corporation of Helston, in the case of *R. v. Passmore*, 3 T. R. 244, where his remarks occur; *vid. 3 T. R. 210*. The judgment of ouster applies to the case of an information against one or more individuals who fail to show title to the offices they exercise; *vid. tam. Co. Entr. 529, B., 530*: a judgment of seizure, to the case of a corporation who is found, on an information, to have abused one or more of its liberties or franchises: or usurped liberties or franchises; or both; unless the franchises, &c., be of such a nature as cannot exist in the crown, but only in a grantee from the crown, 7 Q. B. 384, where the judgment of ouster is proper, per Holt, C. J., *R. v. Mayor, &c., of London*, 1 Show. 280. That a *quo warranto* lies in this last case, *vid. R. v. Staverton*, *Yelv. 192, Form. Co. Entr. 527*.

(n) *Placita de Quo Warranto*, published by the Record Commission, pp. 618—621; *vid. other cases where a quo warranto was brought where liberties had been exceeded and others usurped*; *The case of the Mayor, &c. of Lancaster*, *id. p. 384*;

above laid down, this was a case in which the writ of *sci. fa.* was properly applicable; for there was a corporation *de jure* in the full possession of its powers, but acting beyond the limit of those powers and usurping fresh powers. The king retained in his hands the liberties of the borough upwards of three years, and then restored them by charter, containing an *inspeximus* of all the former charters, and granting the liberties challenged in the above *quo warranto*, all which was notified to all the justices by the king's writ close directed to them, and commanding the justices in eyre in Nottinghamshire to observe the said charter, and to cause the said vill and its liberties to be delivered to the said mayor and burgesses, &c. The entry proceeds, *Ideo prædicti major et burgenses habeant libertates prædictas, &c., et eis allocantur, &c., juxta tenorem cartæ et brevis prædictæ, &c., and so concludes;*(*o*) which shows the mode by which a restoration of liberties was effected in those times, by a judgment, namely, abrogating the former judgment of *quod capiuntur*. In like manner we find a *quo warranto* against the master and brethren of the hospital of St. Bartholomew, of Smithfield, London, to know by what warrant they claimed various privileges and exemptions, &c., therein particularized. The corporation plead charters, &c., and confirmation by Edw. 1, and have judgment of *eant sine die, &c.,*(*p*) [**298*] their charters being held to support their claim to the privileges, &c., in question; which also is a case for *scire facias*, according to the doctrine before stated. The judgment in the great case of the City of London, temp. Car. 2, was virtually the same as that given in the case of Nottingham,(*q*) and there also the information was brought

of Preston, *id.* p. 385; The Weavers' Company of London, *id.* p. 465; the Mayor, &c., of London, *id.* p. 473; *R. v. Corporation of Maidenhead*, *Palm. R.* 76; *R. v. Corporation of Hertford*, *Carth.* 503; *R. v. Mayor, &c. of Northampton*, 4 *Burr.* 2260; *R. v. Hertford*, 2 *Show.* 678; *R. v. Ponsonby*, 1 *Ves. Jun.* 8. Upon the judgment a writ of seizure issued, *vid.* 3 *Inst.* 118; which was executed by the sheriff; *R. v. Amery*, 2 *Bro. P. C.* 365; *vid.* cases cited 2 *T. R.* 528; form of writ, *Co. Entr.* 540, B.; *Rast. Entr.* 494, B.; *vid.* case of Bristol, *M. & Steph. Hist. of Boroughs*, 587. Though in one case this was said by Holt, C. J., to be unnecessary; 1 *Show.* 275; *vid.* *Ryl. Plac. Parliament*, 277, *acc.*; *Com. Dig. Quo. Warr. C. 7, cont.* And a *custos* was appointed, who held the liberties, &c., for the crown, and appears to have discharged singly the duties of the corporation with regard to the government and police of the jurisdiction, the administration of justice, levying of tolls, &c., making leases, &c., 2 *T. R.* 543, 544; and to have been suable in equity for the old debts, *Naylor v. Cornish*, *Vern.* 311. So in the case of seizure of the franchise of the shrievalty of Westmoreland; *Maynard's Edw. 1, Memor. Scacc. fol.* 16. 28.

(*o*) *Placita de Quo W.* 620, 621. It appears that the new charter was granted to the same mayor and burgesses who had been defendants in the *quo warranto*; for no names are mentioned in the charter, but the mayor and burgesses are spoken of as *prædicti major, &c.*, all along. This would seem to show that judgment of seizure, and even actual seizure accordingly, was not held to *dissolve* the corporation. So *R. v. Mayor, &c., of London*, 1 *Show.* 274, 280; *S. C.* 4 *Mod.* 52. *R. v. Amery*, 2 *T. R.* 553, where the contrary was held, was reversed in *Dom. Proc.* 4 *T. R.* 122; *vid.* the distinction, 2 *Inst.* 222; *Jenk. Cent.* 141, 142. It seems not to be an objection to a new charter, that it abridges the old privileges of the corporation; for in the cases of the corporation of Cambridge and Oxford, the franchises have been seized on forfeitures respectively; the new charters respectively granted much restricted powers, the remainder of the old powers being transferred to the universities in each case; 4 *Inst.* 228; *vid.* *Madox, Firm. Burg. cap.* 1, sec. 5, note (*x*). (*p*) *Placita de Q. W.* 501, 502.

(*q*) *Quo. Warr. Cas.* p. 120. *Consideratum est, quod libertates, privilegia et*

for an abuse of some liberties, and for an usurpation of others, and the Court of King's Bench (which had been re-constituted at the Revolution) evidently doubted, in a case brought before them in Trin. Term, 3 Will. & Ma., whether that judgment was not effectual when given, notwithstanding it had been afterwards reversed by act of parliament.^(r) It is true, most of the above cases were cases of the original writ of quo warranto, for which the information in the nature of quo warranto has been substituted; but this does not affect the question we have been endeavouring to elucidate; as the principal distinction between the two forms of proceeding appears to be, that in quo warranto the process to bring the defendant into court was summons; in the information in the nature of quo warranto the appropriate process is venire facias (continued, if necessary, to alias and pluries writs) and distringas.^(s) There is also a distinction, which it is necessary to bear in mind, because the neglect to do so has in former times led to errors, between an information against an individual for the abuse or usurpation of franchises, and against a corporation. In the first case, if the individual did not appear, on judgment of seizure of the franchises, they were held to be for ever gone.^(t) Also, where a *man* continues in the possession of a liberty by tort, the judgment of ouster is proper; but when he had once a title, but loses it, the judgment shall be seizure into the hands of the crown; though where he does not appear, and it is not known to the court whether the alleged liberty or franchise began wrongfully or of right, judgment of seizure is the only one that can be given.^(u) But there is no instance in a court of law where it has been adjudged that *a corporation is dissolved, or the right of being a corporation lost, on an in-formation in the nature of quo warranto, for default of appearance^(v) [299]

franchesia prædicta fore de seipsis unum corpus corporatum et politicum in re, facto et nomine, per nomen, &c., capiantur et seisiuntur in manus domini regis, et quod præfati major et communitas, &c., capiantur ad satisfaciendum dicto domino regi de fine suo pro usurpatione libertatum privilegiorum et franchisesiorum prædictorum. That this judgment did not *dissolve* the corporation, vid. 1 Show. 278; the franchise only, not the metaphysical being, of the corporation were seized, id. 279, 280; R. v. Grosvenor, Ridgw. R. 41; R. v. Ponsonby, 1 Ves. jun. 8; Mad. Firm. Burg. 291.

^(r) R. v. Mayor, &c., of London, 1 Show. 280; vid. per Buller, J., R. v. Amery, 2 T. R. 353; 2 Will. & M. c. 8. Perhaps the explanation may be in the maxim, summum jus summa injuria, vid. instances, Anon., Lofft's R. 327. However, that the franchise of being a corporation *may* be seized, besides the authorities below, the stat. 28 Edw. 3, c. 10, is an express authority, as well as the Quo. War. Cas.; Merew. & Steph. Hist. Boroughs, 1788. 1791; R. v. Ponsonby, 1 Ves. jun. 8, in Dom. Proc. Pending a rule to show cause why the information should not be granted, a rule to inspect the corporation books may be had; R. v. Mayor, &c., of Nottingham, 1 W. Bla. 59; Bull. N. P. 210; R. v. Hollister, Cas. T. Hardw. 245, if the applicant be a corporator; aliter if a stranger, R. v. Babb, 3 T. R. 579.

^(s) R. v. Corporation of the Trinity House, 1 Sid. 36. Award of venire facias, Co. Entr. 527. 544. 561; of distringas, Co. Entr. 536; vid. Carth. 503; 3 Salk. 104, Anon.

^(t) Yearb. 15 Edw. 4, fol. 7, B., by eight judges to two; vid. 2 Bro. P. C. 365; Maynard's Edw. 2, fol. 530.

^(u) Yearb. 15 Edw. 4, fol. 7; per cur. 2 Bro. P. C. 365; Bro. Abr. Quo. Warr. pl. 5; Quo. Warr. Cas. Att.-Gen. Arg. 17.

^(v) 2 Bro. P. C. 364; 3 Salk. 104; vid. R. v. Chester, 2 Show. 366. The contrary is stated in a note by the reporter on the case of R. v. Trinity House, 1 Sid. 86. Non. pros. by crown to part, and judgment for the crown on demurrer, Co.

merely. The attorney-general, at his discretion, may file informations of this nature, as well for the protection of the public interests as for the protection of the franchises of the crown; the court grants the information to a private relator for the protection of the public, as regards matters of government and the administration of justice, in respect of corporate offices in corporate places,^(w) though not exclusively for offices in such places,^(x) provided the offices are of a public nature. Where, however, the corporation appears, but makes default at the day, and does not claim the franchises, &c., judgment of seizure is proper.^(y)

If the corporation relies in pleading on a charter, and claims liberties by colour of it, which in fact are not granted in such charter, both the liberties which are falsely claimed, and those which the corporation have by right, shall be seized.^(z)

If the corporation plead a charter as a grant *and* as a confirmation, the plea is bad on demurrer, for duplicity.^(a)

If the corporation disclaim a particular franchise (independent of corporate franchises), for the alleged exercise of which (as holding a market, &c.), the information is brought, judgment is of ouster.^(b)

With respect to the issues: if any one material issue be found for the prosecutor, judgment must be given for the crown;^(c) in other words, the corporation must make out a complete title in all respects, or must disclaim. The crown, by its prerogative, may waive a demurrer at pleasure, but the defendants can only do so by consent.^(d) The prerogative [*300] of the crown is also, that it may plead double in **replying*,^(e) and otherwise; and probably leave would be granted to demur to one part of the plea, and traverse the rest, as in *mandamus*.

Entr. 543, B.; confession of plea, Co. Entr. 531; other particulars of pleas, Com. Dig. Quo. Warr. C. 4. As to what franchises may be claimed by prescription, and what must be claimed by charter, 9 Rep. 27 b; Bull. N. P. 212. Information for holding market, Bull. N. P. 212; court leet, 2 East, 308; 4 Leon. 105; Bull. N. P. 212; court baron, 2 Barnard, 221; Yelv. 196; Cro. Jac. 259. For form of judgment for a defendant in *quo warranto*, vid. Co. Entr. 549; for mayor and commonalty of London respecting the conservancy of the Thames, on *quo warranto* in the Court of Exchequer, Co. Entr. 537; other forms, Co. Entr. 564.

^(w) 3 Burr. 1815; Cas. Temp. Hardw. 261; Co. Entr. 527. 543, B.; 5 B. & C. 643; Reg. v. Mousley, 8 Q. B. 946.

^(x) R. v. Highmore, 5 B. & A. 771; Bull. N. P. 211; R. v. Boyles, Stra. 836; vid. 5 B. & C. 642; Darley v. Reg., 12 C. & F. 520. But the mastership of a hospital is not an office for which the information will be granted, Reg. v. Mousley, 8 Q. B. 946.

^(y) Maynard's Edw. 2, fol. 530; Brigg's case, 2 Rol. R. 46; R. v. Mayor, &c., of Wiggmore, 2 Rol. R. 92; Keilw. 152, pl. 3, 139, pl. 5. As to the effect of such judgment, which is called judgment of seizure *quousque*, vid. Quo. Warr. Cas., Att.-Gen. arg. 16; 2 Bro. P. C. 365.

^(z) Case of Corporation of Dublin, Palm. R. 8; Lib. Ass. 22 Edw. 3, pl. 34; vid. tam. 2 Inst. 222. To an information in the nature of a *quo warr.* a corporation cannot plead double, R. v. Newland, Sayer, R. 96; R. v. Archbishop of York, Willes, R. 534; R. v. Foley, Parker, R. 10; for such an information is not within 9 Ann. c. 20; R. v. Carmarthen, 2 Burr. 869; vid. 5 B. & A. 771; Palm. R. 7, 8.

^(a) R. v. Trinity House, 1 Sid. 86; Anon., Keilw. R. 142. Pleas claiming various liberties, Co. Entr. 444. 541; 9 Rep. 24. ^(b) Co. Entr. 527. 530.

^(c) R. v. Leigh, 4 Burr. 2146; 9 Rep. 28 b; Bull. N. P. 211; R. v. Herle, Stra. 582; S. C. 2 Ld. Raym. 1447.

^(d) Co. Entr. 528; R. v. Tyrer, 2 Barnard, 417.

^(e) As to *replying*, R. v. Blayden, Gilb. R. 145; vid. 6 T. R. 733.

Where a body of persons take upon themselves to act as a corporation, as by using a common seal, suing or appearing to a suit by a name, exercising franchises or liberties usually belonging to corporate bodies or otherwise, the strictly regular mode of proceeding is by information, in the nature of quo warranto, against some of such body, naming the persons, *(f)* and a judgment of ouster may be the proper judgment. *(g)* But the quo warranto may be brought against all the inhabitants of a vill, where the inhabitants claim to be a corporation, *(h)* to have right to certain franchises, as a court of record, election of aldermen (who were to be justices of the peace), and clerks of the market, assize of bread, gaol, and holding fairs, and on failing to make out their title, judgment of seizure of the liberties may be given; *(i)* the difference in the two cases apparently being, that in the first, no such liberties existed at all; in the second, the title to liberties, which it sufficiently appeared were in actual existence, was not adequately established. But it also appears clear, that the practice has frequently been adopted of bringing the information against the pretended corporation by the name which they assume, *(k)* and though ingenious objections have been raised against this mode of proceeding, yet where the pretended corporation consists of many persons, as they cannot appear, as inhabitants may, by some of their number, and as if they could so appear, they could not be designated in the information by a common appellation such as inhabitants, other than the name of the corporation which they assume, it seems impossible to suppose that the court would in all cases insist upon all the pretended corporators being named in the information.

From the foregoing remarks, the following principles appear to be deducible :

1. That the proper proceeding, in case it is desired to annul a corporation, *the members of which have abused their liberties as granted in their charter, is by scire facias to repeal the charter. [*301]

2. That for the purpose of punishment short of annihilation, the proper proceeding, where a corporation either abuses its undoubted liberties,

(f) Co. Entr. Quo. W. 527; Wentw. Prec. vol. 6, p. 154; and Pleas, id. 155. Such an information must be brought by the attorney-general, it will not be granted to a private relator, *R. v. White*, 5 A. & E. 618; *R. v. Ogden*, 10 B. & C. 230; vid. 3 Burr. 869; and so it must be by the attorney-general if the usurpation be of a private franchise, as to have a fair, *Cas. T. Hardw. 261*. Also a quo warranto writ (and therefore an information) only lies for claim of franchises, and not to question a man's trade, or his selling goods out of a market; *R. v. Bradley*, Trem. P. C. 449. As to form of judgment in an information in the nature of quo warranto against a person for presuming to hold a court of record belonging to a corporation, *R. v. Williams*, 1 Burr. 404; vid. pleadings and judgment, *Reg. v. Grimshaw*, 5 D. & L. 256. Form against a person claiming franchises and jurisdiction over a district lying within a corporate jurisdiction, Co. Entr. 529, B., 530. *(g)* Co. Entr. 527, B. As to assuming to act as a trading corporation, vid. sup. p. 282; and 3 B. & C. 646, note.

(h) Co. Entr. 537. Where two of the inhabitants appeared and pleaded, id. 537, B. The judgment, id. 539, B.

(i) Co. Entr. 539, B.; vid. the distinction, Yearb. 15 Edw. 4, fol. 7.

(k) Vid. cases cited 2 T. R. 547—549; especially the case of New Malton, which was disincorporated by a judgment on a quo warranto of this kind, Bull. N. P. 212; *R. v. Mayor, &c., of Brecon*, 8 Mod. 201; Com. Dig. Quo. Warr. C. 2, C. 3; Sayer, R. 239, 240; Quo. Warr. Cas., Pollexfen's Arg. 69, 70, 71; 1 Kyd. 44.

franchises, &c., or usurps new liberties, &c., not granted in its charter, or authorized by prescription, is an information by the attorney-general, in the nature of *quo warranto*, where the judgment for the crown will be judgment of seizure into the hands of the crown, with or without a fine on the corporators who have, under colour of corporate rights, so misconducted themselves, as the case may be.^(l) This is to be adopted where the object is punishment by deprivation of corporate rights for a time, not the total and final deprivation of those rights, and the information need not be exhibited or filed within six years of the cause of forfeiture, or of the usurpation, &c., &c., charged in the information,^(m) for it is not within the latest statute on this subject, and the time of limitation appears to be within the discretion of the court, who, however, would probably not allow of a longer period than six years.

3. That the misuse or abuse of only some of the legal attributes of a corporation, or the usurpation of fresh liberties, &c., are either of them, when proved, ground for a judgment of seizure of *all* the liberties, &c., and, therefore, of the amoval from the corporators, during the pleasure of the crown, of the corporate character in all its parts.

4. That such seizure does not operate to dissolve a corporation, but only to suspend its regular operation during the pleasure of the crown.

5. That judgment of ouster of all the corporators upon informations against them does not dissolve the corporation, but only suspends its operation.

6. That in either of the two last cases the corporation may be reviewed by a new charter, which operates by relation, so as to make the new body in all respects identical with the old one, as regards prescriptions, choses in action, rights of common, &c., and also as regards debts, liabilities, &c., and the same of a writ of restitution.⁽ⁿ⁾

[*302] *7. That the usual practice upon seizure has been for the crown to appoint a *custos*, who appears of himself to have discharged all the functions, duties, &c., of the corporation, until the restitution of the liberties, or revival of the corporation.

Nothing that has been said is to be taken as implying any power in

(l) A *quo warranto* is a remedy both in rem and in personam; 2 Inst. 495. It must be by the attorney-general, such informations not being within the statute of Anne; 2 Burr. 869; 10 B. & C. 233. (m) 32 Geo. 3, c. 58; 9 East, 410.

(n) Though the name and the constitution of the body politic be altered by the new charter, still all the prescriptions belonging to the old corporation attach unbroken to the new one; for the alteration of the name or quality of all the body in which a prescription resides, does not destroy the prescription, *R. v. Knight*, 4 T. R. 425; *Lutterel's case*, 4 Rep. 87 b; *Hadock's case*, 1 Vent. 355; S. C., T. Raym. 435; nor is the prescription destroyed by a grant of the same franchises within the time of memory, though the contrary is stated in *Com. Dig. Prescription, G.*; *v. Earl of Carnarvon v. Villebois*, 13 M. & W. 313; *Mayor, &c., of Colchester v. Brook*, 7 Q. B. 339; *Goodson v. Duffield*, Cro. Jac. 313; *Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866; for every prescription supposes a grant from the crown, and the crown cannot derogate from its own grant, and therefore, it should seem, that the second grant cannot alter the title; *vid.* 1 M. & Scott, 280, 281, 289; *Dyer*, 279, B. pl. 10. As to the nature of prescription generally, *vid.* Co. Litt. 113, 4 Q. B. 344. That a prescription is not determined by interruption of the possession merely for a time, Co. Litt. 114; *Dyer*, 114, pl. 61; *R. v. Johns, Lofft*, R. 76. That it is entire, *Lovelace v. Reynolds*, Cro. Eliz. 563; *Paddock v. Forester*, 1 Dowl. N. S. 537; *Rogers v. Brenton*, 10 Q. B. 26.

the crown by any direct means, or *ex mero motu*, to dissolve a corporation; (*o*) for no new prerogative of the crown enables it to do so without the free consent of the corporators, expressed by means of a formal surrender under the common seal. This position is in accordance, it will be observed, with the principle, that the crown cannot derogate from its own grant; and consequently, if it be desired to annul a corporation, no other modes are available for the crown than the judicial proceedings above detailed; for though to call a corporation into existence by charter is in the discretion of the sovereign, a forced extinction of it, when once established, can only be effected in the Court of Queen's Bench, or by act of parliament. The latter mode was more frequently resorted to in former times (*p*) than of late; indeed it has fallen nearly into disuse.

The previous observations have shown, that the corporate character may be taken, wholly and finally, from a body of individuals, by forfeiture of their charter of incorporation upon a *sci. fa.*; and also, taken to a certain extent, by judgment of seizure of their franchises by information in the nature of *quo warranto*. But there is also another mode by which the corporate character may be lost, but this not only partially, but for ever; and the invisible entity, the metaphysical being of the corporation be annihilated, and that happens in this way: every corporation is intended to have perpetual succession; therefore, every corporation must have the means of preserving that succession: hence, wherever all the members of a corporation die off without successors having been elected, or otherwise appointed or admitted, the corporation is necessarily at an end for want of members to inhere in. Again, whenever a corporation is so far reduced in numbers, by accident or negligence, as to be inadequate to the purposes of its institution, *ex. gra.* if a corporation consisting of three integral parts loses, without the power of replacing, a majority of the members constituting one of such integral parts, and the concurrence or presence of such integral part is requisite for the due constitution of every corporate meeting, and therefore, for the performance of corporate acts, it is plain that the business of the corporation cannot go on, and the purposes of its institution must therefore remain unaccomplished. Such a corporation is therefore, in this event, until restoration by a new charter, virtually dissolved and dead; for it is no longer capable of answering the end of *its institution. Again, if there be a corporation having a head, who by the constitution is to be [*303] annually elected on a certain fixed day, and they neglect or omit to elect a head on the proper day, such a corporation is virtually dead, or at least dormant; for in the vacancy of the head, such a corporation, as we have seen, can do no corporate act; and in such a situation, they can only be renovated or restored by a fresh charter, or by an act of parliament.

A corporate body, then, may be dissolved in three ways, besides surrender duly accepted and enrolled, and act of parliament.

I. By the total loss of all its members.

(*o*) Bro. Abr. Corporations, pl. 78; Extinguishment, pl. 35. Per Whitlock, J., in *Fulcher v. Hayward*, 2 Palm. 501; *vid.* Francis's case, 8 Rep. 92; 2 Inst. 47.

(*p*) *Vid.* besides the statute for dissolving the monastic corporations, chauntries, &c., the stat. 32 Hen. 8, c. 24, dissolving the Knights of St. John of Jerusalem.

II. By the total loss of one or more of its integral parts, without power of removal.

III. By the loss of a majority of the members of one of the integral parts, where the constitution of the corporation is such that the minority cannot supply the deficiency of such integral part by filling up the vacant places, and the rest of the corporation cannot interfere. In fact, this is but a modification of the second mode; and whatever is true of the second mode, is true of this also.

I. Now the effect of dissolution in the first way is, that the lands and real property of the corporation revert to the donors or their heirs, *(g)* and the franchises become revested in the crown; *(r)* and there is no means of reviving the old corporation by a new charter. The corporation is wholly gone, and with it are also lost and avoided all its claims, debts, and liabilities of all kinds.

Nor is any legal proceeding necessary to ascertain the fact, or to effect the complete annihilation of the body politic. Indeed, any such proceeding would be both useless and absurd; for it is obvious that there is nothing in existence upon which any proceeding could operate, there being no longer an aggregate body either in law or in fact. *(s)* Both the property, choses in action, and other rights of the corporation, as well as its liabilities, ipso facto pass from it, on the event of dissolution. *(t)*

The principle has been broadly stated, that a corporation may be [*304] dissolved for some purposes, and remain for others; *(u)* but the subject at present requires judicial illustration.

The personal estate of a dissolved corporation seems to vest in the crown as *bona vacantia*. *(x)*

II. The total loss of all the members, we have seen, operates as an absolute dissolution; but the total loss of a necessary integral part, without the corporation having by their constitution the power of renewal, operates only to this extent—that it is an absolute dissolution unless the

(g) Co. Litt. 13 b; vid. Harg. note, (71); Chamberlain's case, Ryl. Plac. Parl. 409; Yearb. 11 Edw. 4, fol. 4; Marriott v. Mascal, And. 210. Consequently, leases granted by the corporation are avoided, Hob. 121; Highmore, Mortmain, 144.

(r) R. v. Pasmore, 3 T. R. 199. On forfeiture there is a distinction between such franchises as may exist in the crown, and therefore be capable of regnant; and such as cannot exist in the crown, but only in a grantee from the crown, and therefore becomes extinct upon forfeiture, 7 Q. B. 384, 385; and the same distinction holds in case of dissolution, Dean of Windsor's case, Godb. 211; 3 Inst. 21; Co. Litt. 13 b. Where the liberties revert to the crown as donor, without any judgment of ouster or seizure, which is necessary in case of forfeiture to revest them in the crown, 7 Q. B. 384, whether they can revest without office found, is questionable; sem., they cannot. Things previously granted over by the corporation do not escheat or revert; Vin. Abr. Escheat, A., pl. 1. 2. *(s)* 3 T. R. 245.

(t) A church appropriated to a corporation becomes, on dissolution of the corporation, ipso facto disappropriate; Grendon v. Bishop of Lincoln, Plowd. Com. 501; vid. Hob. 308. Whitton v. Weston, J. Bridg. 33. Rent-charges and annuities payable to the corporation are lost; Vin. Abr. Rent, B. b. pl. 4; Yearb. 20 Hen. 6, fol. 7, pl. 17. Annuities payable by them, Bishop of Rochester's case, Owen, 73.

(u) Vid. Guardians Woodbridge Union v. Guardians Colnies Union, 18 Law, J. (N. S.) Q. B. 133, 134.

(x) Vid. 1 Bla. Com. 299. Corporation dissolved by statute which goes on to vest its property in the crown, 1 & 2 Geo. 4, c. 28.

crown chooses to revive the corporation by means of a new charter.^(y) Many boroughs^(z) have in times past lost their incorporation by this means; new charters having been withheld by the crown, or perhaps in some cases not having been sought for. But if such charter or revival be granted (which it may be to a new set of persons, and although the minority, or even though all, of the members of the old corporation object to a new charter), that is if the rights of the old corporation be granted over again in the new charter to a fresh set of grantees, they must take the incorporation with all the debts and liabilities and rights of action of the old one, of which the new is in fact only a revival or continuation,^(a) although there may be additional powers and regulations contained in the new charter. Whether if a wholly new scheme were adopted in the new charter, so that the new corporation could not be said to be a mere repetition, revival, or continuation of the old one, and no express provision were made for the liabilities of the old corporation, those liabilities would attach to the new, is a question not yet settled. In fact, there seems to be a difficulty *in reconciling the doctrine of dormancy, or dissolution for some purposes only, with strict principles of corpora- [*305] tion law; on the other hand, however, the inconvenience of holding that a corporation in such circumstances is wholly dissolved, so that their leases would be disturbed, because the lands themselves would revert to the original owners; lands given for charitable purposes would be lost; and persons having debts due to them from the corporation could not recover them: the corporators would lose their rights of common, &c.; is manifestly so great, that the doctrine, though it has been treated lately

(y) *R. v. Pasmore*, 3 T. R. 199. 242. 249. So though all the members be ousted by judgments in quo warranto informations, the metaphysical being of the corporation is not extinct, but a new body of men may be invested with it by a new charter. This rests on the principle that a corporation aggregate is not the aggregate of its members; *Bligh v. Brent*, 2 Y. & Col. 295. *Society of Pract. Knowledge v. Abbott*, 2 Beav. R. 559.

(z) *Ex Gra. Maldon*, 1 B. & A. 699; *R. v. Smart*, 4 Burr. 2241; *vid. R. v. Morris*, 3 East, 213; 4 East, 17. So *Taunton*, 3 East. 119; 4 T. R. 822; 1 Peckw. El. Cas. 416. *Minehead and Aylesbury*, 1 Peckw. El. Cas. 418. New charters were granted on this account to *Bewdley*, *Tiverton*, *Radnor*, *Maidstone*, *Colchester*, *Saltash*, *Maldon*, *Stafford*, *M. & Steph. Hist. of Boroughs*, *Introd.*, p. lvi. *Cowp.* 537; *Sayer*, 211. It is no objection to a motion for an information in the nature of quo warranto, that the consequence of judgment for the crown against the defendant might be the loss of an integral part of the corporation, and so of the whole; *R. v. White*, 5 A. & E. 613. 619; *R. v. Parry*, 6 A. & E. 810. If a corporation in this defective state continues to act as if they were a perfect corporation, a quo warranto information lies against them; *R. v. Hughes*, 7 B. & C. 720.

(a) *R. v. Pasmore*, 3 T. R. 247; *vid. id.* 202. In such case a revival of an old corporation which had lost its vitality or power of doing corporate acts from any cause, but was not actually dissolved, even though there had been proceedings against the members terminating in a judgment of ouster of the members, a bond given to the old corporation may be sued on by the new one, the new charter incorporating by the same name (it is said, 7 Q. B. 383), and giving the same constitution; *Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866; *S. C.* 1 W. Bla. 591; *et vid. R. v. Mayor, &c., of Colchester*, 2 Dougl. El. Cas. 59, note (D.), 2nd edit.; *Com. R.* 265; 7 Q. B. 383; *Dyer*, 279, B. that a new name makes no difference, *vid. Bull. N. P.* 213. The new charter must of course be adopted by a majority of those to whom it is addressed; 3 T. R. 211. 242; 8 M. & W. 1. Debts would continue though the new charter incorporated by a new name; *per Buller, J.*, 3 T. R. 247; *vid. tam. Hutt. R.* 87.

with some degree of doubt,(b) must probably be considered as almost established; and that such a revival operates by relation, so as to prevent the destruction of prescriptive rights vested in the corporation, and not to interfere with the operation of Statutes of Limitation, either for or against them.(c)

Whether, after a seizure of liberties, a writ of restitution is necessary to replace the corporators in the same position as they were before, is a question respecting which some difficulty arises, as the practice is nowhere distinctly laid down.(d) But it probably will be found correct to say, that where it is intended to make modifications in the original constitution of the corporation whose franchises have been seized, there a new charter must be granted; but where it is only intended to restore them to such franchises as they were legally possessed of before the seizure, a writ of restitution is the proper proceeding.(e)

Whether in the interval between the time at which a corporation falls into this dormant state from any cause, and the time at which the crown grants a new charter of revival, the corporators may exercise rights of common, &c., which they prescribe for through the corporation; and indeed, most questions respecting the exact condition of the corporate rights and privileges during that interval, are wholly unsettled, never having, as far as appears, come before any of the courts for decision. Nor is it decided whether a writ of *quo warranto*, if the corporation be a prescriptive one, or a *sci. fa.*, if it be a corporation by charter, ought to be brought, and judgment given for the crown, and executed upon the franchises of the corporation, before the lands, &c., can revert to the donors, &c., but it would seem that such course is the proper one; and that without some formal proceedings of this nature, the donors, &c., [306] could not enter or bring ejection upon the tenants of *such lands, &c. But it appears to be intimated, that if a corporation be reduced by any means so as to be incapable of acting, *quo warranto* information is the proper mode of dissolving the corporation;(f) but this has not been decided, and it may be a question whether after such *quo warranto* information and judgment of seizure, there ought not to be *sci. fa.* to repeal the letters-patent, if the corporation is entitled by

(b) Vid. 7 Q. B. 383, and the Banbury case, cited 3 T. R. 221, 222; *R. v. Mayor, &c., of Tregony*, 8 Mod. 129. Perhaps it may be worthy of notice, that in the Colchester case (*Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866), it was not an integral part of the corporation, but the magistrates that were lost without the power of restitution. This appears by comparing that case with the case of *R. v. Mayor, &c., of Colchester*, Com. R. 265; Dougl. Elect. Cas. note (D.), p. 59. As to rights of common, vid. per Buller, J., 3 T. R. 247. As to other prescriptive rights, vid. 2 T. R. 543, cases cited showing that they are not destroyed by seizure provided the liberties of the corporation be restored.

(c) Vid. per Grose, J., 3 T. R. 249; et vid. 2 T. R. 543; *Hayward v. Fulcher*, Palm. 491; 18 Law J. (N. S.) Q. B. 133, 134.

(d) Vid. 2 T. R. 528; case of *Bristol, M. & Steph.* 587.

(e) Wherever there is a transfer of an incorporeal hereditament, there is a writ to give possession; *Staunf. Prerog. Regis*, 77, B.

(f) Vid. *R. v. Hughes*, 7 B. & C. 717. The meaning of incapable of acting seems to be, that their acts, with respect to strangers, are void; ex. gra. making a lease; *Manwood v. Lovelace*, Dyer, 282, pl. (27). So are acts of their officers; *R. v. Saunders*, 3 East, 119; for *sublatâ causâ tollitur effectus*, vid. *R. v. Howard*, Hutt. 87.

charter, or whether the proper course may not be to proceed at once by *sci. fa.* to repeal the charter as for a breach of the condition of keeping up the succession effectively.

There is mention made in the books of still another mode in which a corporation may be dissolved, which may be thus stated. Where the crown has erected a corporation, solely for the purpose and with the object of having a service, annuity, or rent performed or paid to itself, by a perpetual body, and afterwards releases or grants the rent, &c., the corporation is *ipso facto* dissolved.^(g) Thus, it is said, that if the crown grant lands by letters-patent to the good men of Islington, rendering rent, this, as we may remember, incorporates the inhabitants of Islington for the purpose of paying the rent, and for no other purpose; and it is perfectly in accordance with principles, that where the rent is released, the corporation should be gone, because then the end and object of its institution is gone.

Having thus discussed the circumstances under which a corporation may be lost to the corporators and their successors without any voluntary act contemplating such an event on their part, it remains to notice shortly the only mode in which corporators can get rid, for themselves and successors, of the corporate character, which is by surrendering their charter, if they are a chartered corporation, into the hands of the crown, when, upon the acceptance inrolled of such surrender, the corporators are stripped altogether of the corporate character. Sufficient has already been said on the subject of surrender to render unnecessary any lengthened statement here.^(h) But we must observe, that there ^{*ap-} [307] appears to be no mode in which a corporation, solely by prescription, can throw off the corporate character, except by neglecting to fill up vacancies, and so allowing the corporation to die for want of a succession.

It is obvious that parliamentary corporations can only be relieved

(g) Anon., Dyer, 100, pl. 70; Vin. Abr. Corporations, F. pl. 4; 2 T. R. 672; per Tanfield, C. B., *St. Saviour's case*, Lane R. 21; *vid. M. & Steph. Bor. Introd.* xxxvii.

(h) *Vid. sup.* pp. 21. 46. The proclamation of James 2, issued immediately before the Revolution, operates, where it was accepted, as a revival of the old charters, which various corporations had surrendered to Charles 2, by whom also new ones had been granted, and overturns their new charters; *Newling v. Francis*, 3 T. R. 189. The proclamation operated like a writ of restitution after a seizure of liberties; *vid. 2 T. R. 528*. There were in all eighty-one *quo warranto* informations brought against corporations by Charles 2 and James 2; 2 *Chandl. Com. Debs.* 316. The offence of putting the common seal, without consent of the corporation, to a deed of surrender, publishing it as the deed of the corporation, and causing it to be enrolled in chancery, is an indictable misdemeanor; *Trem. P. C. 228*. It has been strongly asserted that corporations cannot dissolve themselves by surrender of their charters; but the law seems to be, that if the crown chooses to accept the surrender, and it is enrolled in chancery, that amounts to a dissolution of the body politic; *vid. Protest of several Peers*, 23 January, 1689, 2 *Tor-buck's Debates*, 469, 470. The surrender of the charter has been considered to effect so complete a dissolution, that although the corporation should be restored by a charter giving it a new name, all the old offices, it is said, are determined; *Howard's case*, *Hutt. 87*. The surrender must be the act of the majority of the whole corporation, not merely of the governing body; *Quo. Warr. Cas., Pollexf. arg.*, 91, 92; *vid. Ward v. Society of Attorneys, &c.*, 1 *Colly. 370*. Form of surrender, *M. & Steph. Hist. Bor. 1795*.

from the responsibilities which they entered into towards the state, in their constituting statute (which, as has been frequently observed, is looked upon as a contract between them and the public,) by means of another act, repealing that or former acts in their favour. On the other hand, it may be doubtful if an information in the nature of *quo warranto* can be brought against such bodies for the usurpation of powers not intrusted to them, or for the abuse of those which they possess; as such usurpation cannot, it is apprehended, be considered to be an usurpation on the crown, which did not and could not grant the powers they possess, or those which they are likely to usurp, which are always analogous to the powers given by their constituting statutes, and mostly extensions of them; and it follows that there is no means (where a *mandamus* is, from the nature of the case, inapplicable) at common law for the coercion of such corporations on their assuming undue powers, and that recourse must be had to the courts of equity.

The above is submitted as the present state of the law on this subject, there being, it is apprehended, no authority to be found in the books pointing to a different conclusion. It is true there is a decision of the highest tribunal, determined after lengthened and elaborate arguments, to the effect that an information in the nature of *quo warranto* will lie against an *individual* for usurping any office, whether created by charter of the crown alone, or by the crown with the consent of parliament, provided the office be of a public nature and a substantive office, and not merely a function or employment of a deputy or servant held at the will and pleasure of another.⁽ⁱ⁾ But that decision proceeded entirely on the ground that the preponderance of authority (the cases on the subject being irreconcilable) was in favour of the determination to [*308] which the House of Lords came; and with respect to the *view of the law above submitted, there appear to be no decisions whatever touching the point or question of bringing *quo warranto* against a parliamentary corporation in either of the cases specified, and it does not appear to be clear that the authority just cited would altogether apply even to the case of a parliamentary corporation invested with an office (as we have seen it is competent to a corporation to be,) for the cases on which that authority is founded are all cases of individuals filling or pretending to fill offices of the kind specified. But however this may be, no principle, it is apprehended, can be deduced from that case in support of the general proposition, that an information will lie against a corporation created by the crown, with the assent of parliament, for misuser or abuse of their powers, or for the usurpation of new powers. The old law seems still to apply in case of a corporation created by the crown,

(i) *Darley v. Reg.*, 12 C. & Fi. 520. The office of a director of a public company, as the Bank of England, South Sea Company, &c., has been said to partake of the nature of a public office, but not to be an office affecting the public government; *Charitable Corporation v. Sutton*, 2 Atk. 405. But since the decision in *Darley v. Reg.*, it would seem unquestionable that a *quo warranto* information would lie for such an office, although in *R. v. Ogden*, 10 B. & C. 233, it was said, there is no instance of its being granted against persons for usurping a franchise of a mere private nature and not connected with public government; *vid. R. v. Hanley*, 3 A. & E. 463, note.

in consequence of an act of parliament authorizing the crown to grant the charter; for if the crown have the power to grant the particular charter, it does not appear to be material for this purpose whether such power were part of the prerogative at common law, or were conferred by the legislature; and the usurpation would in either case equally be an usurpation upon the crown.

Parliamentary corporations cannot surrender; nor can they, it would seem, shrink from the obligations imposed upon them by their constituting statutes, on the faith of the performance of which their rights and privileges were granted to them; consequently they will not be permitted to let the corporation die out by omitting to provide for the succession,^(k) or by ceasing to act upon their powers.

Nevertheless a parliamentary corporation may become dissolved in the same manner that a chartered corporation may, by the actual loss of an integral part from any cause;^(l) at least this appears to be the law from the only case in which the question is reported to have arisen; and perhaps it may be thought that the possibility of such an occurrence, in many cases of modern parliamentary incorporations, might deserve the attention of the legislature with a view to prevent the inconvenience and loss that must accrue to the creditors of such bodies upon their dissolution. There can be no doubt that the Court of Queen's Bench would always be ready to interfere by mandamus, upon its being made clear that it was the intention of the corporation to allow themselves to become extinguished as a body politic in this way, and that the constituting statutes would be construed most strictly, if need were, in order to effect the purpose of prevention; for the established rule is, that statutes incorporating companies, conferring privileges, and professing to give the public certain advantages in return, *are to be construed strictly [*309] against the corporation, and literally in favour of the public.^(m)

Joint stock companies registered and incorporated by act of parliament may be dissolved by means of the Joint Stock Companies Winding-up Act, 1848;⁽ⁿ⁾ but the statute does not apply to incorporated railway companies, which are expressly excluded by a later act.^(o)

(k) *Vid.* *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 472; *vid. tam. per* Cresswell, J., 3 C. B. 937.

(l) *Reg. v. Mayor, &c., of Colchester*, 2 Dougl. El. Cas. 59, note D, where the corporation being a poor law corporation had been established under an act of parliament.

(m) *Parker v. Great Western Railw. Co.*, 7 M. & Gra. 263.

(n) 11 & 12 Vict. c. 45; *vid. Re Tring, &c., Railw. Co.*, 18 L. J. (N. S.) Chanc. 242. As to what corporations are within the act, *vid. per* Lord Cottenham, C., in *re* London, &c., Independent Railw. Co., 18 L. J. (N. S.) Chanc. 242.

(o) 12 & 13 Vict. c. 108; in *re* Direct London, &c., Railw. Co., 19 L. J. (N. S.) Chanc. 163.

[*310]

*EVIDENCE.

SOME of the principle points in the law of evidence, in actions and suits by and against corporations, may perhaps fitly be stated in this place, after we have gone through the several forms of proceedings respecting corporations.

As to evidence of being a corporation, it has been held that a deed of grant to a prescriptive corporation is evidence against those claiming under the grantor that they were, at the time of the grant, a corporate body by the name given them therein.^(p)

It has been held that entries of admission into trades or separate corporations are evidence to go to the jury of the existence of an aggregate corporation, compounded of the various separate corporations, and named the company of the Carpenters, Painters, &c. (including all the separate corporations,) although there was no proof of admissions into the aggregate body, and it had no common seal;^(q) the question whether a body is a corporation, or a voluntary society, being for the jury, as it was said.

The style of a borough as given in the schedules to the Municipal Corporations Act and Boundary Act, is not evidence to prove that the borough lies in the county named therein;^(r) but such insertion is *prima facie* evidence that the place has a municipal corporation,^(s) though not of the place being a borough before the act.

It is no longer necessary to prove a corporation seal, or the signature of an officer of a corporation, but documents bearing such seal, &c., prove themselves.^(t)

With respect to the *means* of evidence, derivable from corporation documents, other than charters (of which we have spoken already,) and other than the burgess rolls, freemen's rolls, &c., in municipal corporations (of which we shall speak immediately,) it must be observed, that [*311] ^{entries in the books of public corporations, that is to say, bodies} incorporated to serve some public purpose, and not merely companies of traders incorporated for their own purposes of pecuniary emolu-

(p) Mayor, &c., of Carlisle v. Blamire, 8 East, 487. The courts do not take judicial notice, that a body claiming to be or calling themselves a corporation is not one, Cooch v. Goodman, 2 Q. B. 580; but they do take notice of a corporation constituted by act of parliament, Church v. Imperial Gas Co., 6 A. & E. 846. The want of a common seal is some evidence that a body is not a corporation; R. v. Lord Dacres, Dyer, 81, A.; 6 M. & Gra. 139. As to proof by a foreign body suing here as a corporation, 2 Ld. Raym. 1535; seal of foreign corporation, 1 A. & E. 695.

(q) Company of Carpenters, &c., v. Hayward, Doug. 359.

(r) Reg. v. Mitchell, 2 Q. B. 636.

(s) R. v. Green, 1 Nev. & P. 631; 6 A. & E. 548.

(t) 8 & 9 Vict. c. 113, s. 1. Persons forging such seal or signature guilty of felony; id. s. 4; 1 A. & E. 695; Skin. R. 2; 5 B. & Ad. 866. Where the records of the Court of Record are destroyed, exemplification under common seal is admissible; Com. Dig. Evidence, A. 2; vid. 4 A. & E. 410. The common seal of the corporation of London was held to prove itself before the passing of the statute; Doe v. Mason, 1 Esp. 53. If it appear that the seal was affixed without authority, the document is invalid; Anon., 12 Mod. 423.

ment, may be inspected for the purposes of evidence by parties sufficiently interested in them, provided the entries relate to public matters, and not merely to the private interests of the corporation and the party, and provided the evidence is required in a civil action. In a criminal prosecution the courts will not grant a rule for such inspection.^(u) But it is usual to grant it in civil actions, where franchises are contested, and in other cases where the corporation can be regarded as a depository of a trust for the public, and the party applying being directly interested in the entries or other documents which he seeks to inspect, and the matters contained in them having direct reference to the questions at issue in the cause.^(x) Therefore, on an information in the nature of quo warranto, which is now considered as a civil action, where the right claimed or challenged is supposed to be granted by the crown, the public books and muniments of a corporation are the proper sources of evidence on both sides, and a rule to inspect will always be granted in such case upon proof of refusal by the corporation;^(y) and that whether the relators be corporators or foreigners, unless the matter in dispute be of a private nature,^(z) there being no practical difference in the two cases in this respect; and for this reason corporators have always, on showing a good reason, though not for curiosity's sake, a right of access to, and inspection of, all the books, muniments, and papers belonging to the corporation;^(a) and if this general right be denied or obstructed, a mandamus to inspect may be had on proof of refusal, of the right to, and the reason for, the inspection, &c.;^(b) but where the court grants a rule to inspect, pending an action, it can only be framed with respect to the matter at issue therein; and, therefore, whether it be granted to a corporator or a foreigner, it must be limited to the inspection of such papers, &c., as relate to the subject-matter in dispute.^(c)

The rule has been sometimes differently laid down, and it has been *said that inspection can only be granted to a member of the corporation, and not to a stranger^(d) to the corporation; but it will [*312]

(u) *R. v. Heydon*, 1 W. Bla. 351; *R. v. Purnell*, 1 W. Bla. 37; *R. v. Mead*, 2 Ld. Raym. 927. The rule will not be granted whether the corporation be a party to the criminal proceeding or not; *R. v. Antrobus*, 2 A. & E. 789; *R. v. Holland*, 4 T. R. 691.

(x) Inspection of the charters ought not to be asked, because, as they must be enrolled, copies may be obtained at the office of the Rolls; for which purpose a rule will be granted on the officer having the custody of them; *R. v. Hughes*, 1 Barnard. 41; *R. v. Tinker*, id. 28; vid. *Chit. Arch. Pract.* 1249, note (g), 8th edit.; *Wood v. Morewood*, 9 Dowl. 669. As to the effect of non-production of charter proved to be enrolled of record, vid. 4 Q. B. 543.

(y) *R. v. Purnell*, 1 Wils. 242. The rule is absolute in the first instance; *R. v. Shelley*, 3 T. R. 141.

(z) *R. v. Bridgman*, Stra. 1203.

(a) *Phill. Evid.* 810; *Roe v. Aylmer*, Barnes, 236. As to what are sufficient reasons for the application, *Gas Company v. Clarke*, 7 Bing. 95; *R. v. Clear*, 4 B. & C. 899; *R. v. Merchant Tailors' Company*, 2 B. & Ad. 115. What a sufficient demand, *Ex parte Hutt*, 7 Dowl. 690; vid. 3 A. & E. 477. What a sufficient refusal, *R. v. Wilts, &c., Canal Company*, 3 A. & E. 477; vid. 1 Q. B. 282.

(b) 3 T. R. 580; *Phill. Evid.* 815; *R. v. Mayor, &c., of Beverley*, 8 Dowl. 140; *R. v. Master, &c., of Merchant Tailors' Company*, 2 B. & Ad. 115; *Young v. Lynch*, 1 W. Bla. 27; *R. v. Hostmen of Newcastle*, Stra. 1223.

(c) *R. v. Bebb*, 3 T. R. 580; *Foster v. Governor, &c., of Bank of England*, 8 Q. B. 699.

(d) *Phill. Evid.* 811; 2 Ves. 620; vid. *Burrell v. Nicholson*, 1 My. & K. 680.

be found on examination that the law is as stated above; and that the rule to inspect entries in corporation books, papers, and muniments, will be granted to a foreigner (or person not a member of the corporation,) provided he is directly interested in the subject-matter of the inspection, and the entry is of a public nature, and it has immediate reference to the question at issue in the cause. Thus, where the action was brought for breach of a bye-law affecting every one within the corporate jurisdiction, the defendant not being a corporator, was allowed a rule to inspect and copy the bye-law in the corporation books.^(e) The entry of the bye-law was manifestly a public entry, in which the defendant had a direct interest. The plaintiff, in a *qui tam* action against a custom-house officer, for bribing A. B., freeman of a corporation, at an election for members of parliament for the corporation, had a rule to inspect and take copies of such part of the corporation books as contained the admissions of A. and B., although plaintiff was a foreigner, and there was no affidavit that the right of election was in the freemen.^(f) He was considered to be sufficiently interested in such entry by having brought this action. In a previous case, where the College of Physicians brought an action against a person for practising as a physician without a license, Lord Hardwicke, C. J., and the Court of King's Bench, refused the rule, on the ground that the defendant was a stranger to the corporation.^(g) But there, it may be observed, the application seems to have been made "upon an imagination of the defendant that he might find some entry in the books in his favour,"^(h) and therefore amounted to a fishing claim to inspect *all* the books of the corporation, and not to inspect a certain specified entry, which last is all that even a person directly interested can claim, unless he be a corporator. On this ground, therefore, it may be considered that the rule was refused, and so the decision may be distinguished from that of the case of the bye-law. Another decision seems to confirm this distinction. Where an act of parliament incorporated certain persons as surveyors of highways, the defendant, as one of them, was proceeded against for not having taken oaths to qualify, &c., and an application was made on behalf of the

[*313] *prosecutor to inspect all the corporation books in order to see whether there was an entry of the defendant's having taken the oaths or not, it was refused;—a decision apparently coinciding with the above distinction, for the prosecutor, though a foreigner, claimed as much

(e) *Harrison v. Williams*, 3 B. & C. 162. The interest in the entry or document must be direct, or the rule will not be granted to a stranger. Thus, in an action by corporation against strangers for petty customs, application to inspect corporation books refused; 2 Ves. 620. In action for tolls, application "to inspect all the corporation books, papers, writings, and orders in council touching the matter in question," Mayor, &c. of Southampton v. Graves, 8 T. R. 590, which, in fact was a bill of discovery of the plaintiff's title, and was rightly refused; but an application by a person, liable to pay tolls, for an inspection of a specific entry relative to the question in issue, would probably be allowed since *Harrison v. Williams*, although the party were not a corporator. But where the applicant would not be entitled as a stranger, his becoming a corporator after the cause of action arose will not entitle him; Mayor, &c., of Bristol v. Visger, 8 Dowl. & Ry. 434.

(f) *Richardson v. Pattison*, Com. R. 555.

(g) *College of Physicians v. West*, cited 1 W. Bla. 41, and 1 Wils. 240. A fishing claim will never be allowed; 1 Q. B. 287, 288.

(h) 1 Wils. 240.

in effect as he would have been entitled to if a corporator, and claimed more than the court had the power of granting a rule to inspect for, even in a civil action; the power of the court being confined to an inspection of such parts of the papers, &c., of the corporation, as are shown to them upon affidavit to have direct reference to the subject-matter of the action, &c., depending before them.⁽ⁱ⁾ However, the ground which the court is reported to have rested their decision on was that no man shall be bound to accuse himself,^(k) and this decision, though often cited as affecting the rule in civil actions, may be laid aside altogether as not being made in a civil action; for the inspection was rightly refused, according to the practice that the court will in no case of a criminal prosecution grant such a rule. But nothing that has been laid down extends to entitle a party, not a corporator, when suing a corporation, to a disclosure of the evidence of the corporation, or a discovery of the like deeds or documents on which they ground their defence; for a corporation is no more liable than an individual to be compelled to disclose the grounds of the claim or defence;^(l) the right of inspection is confined to an entry in the books concerning the party himself,^(m) and being of a public nature,⁽ⁿ⁾ and touching the matter in issue.

As has been shown, every corporator has a general right to inspect the books, &c., of his corporation, for the purposes of evidence; and upon showing a sufficient ground for requiring the inspection, and a proper demand, and a refusal by the corporation, he will have a mandamus, or a rule to inspect, according to the circumstances of whether there is not, or is an action pending; but it will not be considered that there is sufficient ground for an inspection, if the object being of a merely private nature, may be equally well attained by giving notice to the corporation to produce the books at the trial, and on its non-production, adducing secondary evidence to prove the things intended to be shown from the books. Therefore, in an action against a corporation by an attorney, a member of the corporation, for the costs of performing certain business for them as an attorney, it was held that he was not entitled to an inspection,^(o) in order to prove his retainer by the corporation, this being a merely private claim against the corporation *made by the plaintiff, quâ attorney, not quâ corporator; and the entry of the retainer being the register of a merely pri- [314] vate transaction between the corporation and the individual, and not an entry of a public character, as in the case of a bye-law. The inspec-

(i) *R. v. Bebb*, 3 T. R. 580.

(k) *Reg. v. Mead*, 2 Ld. Raym. 927, cited 1 Wils. 241.

(l) *Mayor, &c., of Southampton v. Graves*, 8 T. R. 590.

(m) *Crew v. Saunders*, Stra. 1005.

(n) 3 B. & C. 162.

(o) *Stevens v. Mayor, &c., of Berwick*, 4 Dowl. 277; *vid. R. v. Bridgman*, Stra. 1203; *R. v. Tower*, 4 M. & Selw. 62; *Charitable Corporation v. Woodcraft*, Cas. Temp. Hardw. 130. The motion for rule to inspect cannot in general be made until issue has been joined; 2 W. Bla. 877. It can never be made before action brought; *R. v. Sheriff of Chester*, 1 Chit. R. 476; *vid. Charnock v. Lumley*, 5 Scott. 438. And if an inspection be required, where there is no action pending, a mandamus is proper: *R. v. Tower*, 4 M. & Selw. 162; *Ex parte Hutt*, 7 Dowl. 690; *vid. 1 W. Black. 59*; *R. v. Justices of Surrey*, Sayer, 144.

tion must, in general, be asked for a specific purpose of evidence; (*p*) not for the furtherance of some object which the party desires to effect by the instrumentality of such inspection. Therefore an inspection will not be granted of the books of a trading corporation, though of a public nature, and though the applicant is a corporator, in order, that he may subsequently procure a dividend to be declared; (*q*) nor in order to fish out a defence to an action; but it will be to enable a party who has a real defence to put it on the record in proper terms in pleading, (*r*) in an action between the corporation and the applicant; and therefore the rule was refused in an action for railway calls, where the application was to inspect the minute books, &c., "particularly with respect to the calls sued upon;" for the application was regarded as made for the purpose of fishing for a defence in the books, and not to enable the defendant to avail himself of a really good defence. (*r*) So in an action against the Bank of England for refusing to pay dividends on stock, where the defence was, that the stock had been transferred by the plaintiff before the dividends claimed became due, on which the plaintiff joined issue, an inspection was granted of the entry in the corporation books relating to the stock in question, for the purpose of taking an examined copy, the plaintiff making affidavit of her belief that such entry would substantiate the allegations in her declaration, &c., and stating a due demand and refusal. (*s*) Here again, it will be observed, the entry was of a public nature, having relation to the public stocks of the realm, and the corporation standing in the situation of parliamentary book-keepers, of those funds on behalf of the nation, and the application was for the purpose of evidence, sworn to be indispensable to the plaintiff's case. So an inspection of the transfer book of the East India Company's stock has been granted (*t*) in an action between two corporators. The principle is nearly the same as is applied in the case of court rolls of a manor, which are not considered as the evidence of the lord; for if they were so, a party, an adverse party at any rate, [*315] *could not be permitted to look into them; (*u*) but as public books, for the benefit of the tenant, as well as the lord, they are allowed to be inspected. (*x*) In the case of the Bank, the corporation

(*p*) In equity a party has a right to the production of such deeds only of a corporation as either sustain his own title exclusively, or sustain it jointly with that of his adversary; *Bolton v. Corporation of Liverpool*, 1 Coop. Sel. Cas. 19.

(*q*) *R. v. Governor, &c., of Bank of England*, 2 B. & Ald. 620.

(*r*) *Birmingham, &c., Junction Railway Company v. White*, 1 Q. B. 282. In an action by Secretary v. Provisional Committee-man of a projected Railway Company, an order was granted for plaintiff to inspect the minute books of the projected company; 3 C. B. 952. So an allottee of shares of a railway company was allowed to inspect and copy the subscribers' agreement and parliamentary contract in an action against a director, to recover a deposit, &c., 15 M. & W. 385; *vid. Ley v. Barlow*, 1 Exch. 801, S. P., these documents being necessary to enable the plaintiff to prove his case.

(*s*) *Foster v. Bank of England*, 8 Q. B. 689.

(*t*) *Geery v. Hopkins*, 7 Mod. 129.

(*u*) *May v. Gwynne*, 4 B. & Ald. 301; *R. v. Justices of Bucks*, 8 B. & C. 375.

(*x*) *Warriner v. Giles*, Stra. 954. And the same exception holds in cases of criminal prosecutions as with respect to corporation books; *R. v. Earl of Cardigan*, 5 B. & A. 902.

has a certain interest in the books, which however, it holds as trustee for the nation on the one hand, and the individual stockholders on the other.(y) The rule would undoubtedly have been granted, had the plaintiff been a corporator suing for non-payment of dividends on bank stock instead of stock in the public national funds; though the ground of the decision might have been different, for the plaintiff, in the principal case, claimed as a stockholder in a public fund; in the latter case he would claim as a corporator entitled to have inspection, for just cause, of the corporate books, in respect of matters not private, between himself and the corporation, as in the case of the attorney's retainer, but in which every member of the corporation, the creditors, and all such of the public as fall within the operation of the powers of the corporation, are more or less interested.

Where two corporations are as issue in a cause, a rule to inspect will be granted reciprocally as to so much of the corporate books of either as relate to the matters in issue between them.(z)

With respect to the effect of admissions by corporators and others as against their corporations, the general rule seems to be, that an admission by a corporator does not bind the corporation;(a) but the admission of an officer, or authorized agent, or servant of the corporation, on a matter within the scope of his authority, agency or service, does bind them. Thus the admission of the surveyor of a corporation, respecting a house of the corporation, is admissible as evidence against the corporation,(b) such admission being made in the ordinary course of his function and duty. In like manner notice to a member of a corporation is no notice to the body politic, as notice to one of a co-partnership is notice to all; but the notice to be operative as notice to the corporation, must be brought home to some authorized agent, or the head of the corporation, in a formal manner, and ought to be given to him as such; and, as it seems, at the place where the corporation is locally domiciled, or where it carries on its business.(c)

The operation of the late act for improving the law of evidence,(d) upon the admissibility of corporators as witnesses, where their *corporations are parties to the cause, it is submitted, may be [*316] thus represented:

That where the corporation are lessors of a plaintiff in ejectment, a corporator may now be a witness; although it is expressly provided by the statute that the evidence of a lessor of a plaintiff is not admis-

(y) *Vid. Sloman v. Bank of England*, 14 Sim. 475. But a corporation, being trustees of a charity, will not be obliged to produce their books relating to the charity trust, although in their answer they submitted to produce as the court should direct; *Att.-Gen. v. City of Coventry*, Bunb. 290.

(z) *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bla. 206; *Mayor, &c., of Southampton v. Graves*, 8 T. R. 592.

(a) *Mayor, &c., of London v. Long*, 1 Campb. 68.

(b) *Peyton v. St. Thomas's Hospital*, 3 C. & P. 363.

(c) *Vid. Powles v. Page*, 3 C. B. 31; per Parke, B., 12 M. & W. 664; *Thompson v. Spieres*, 14 Law J. (N. S.) Chanc. 453; *Edwards v. Grand Junction Railway Company*, 1 My. & C. 659.

(d) 6 & 7 Vict. c. 85.

sible ;(e) for the fact is that the corporation, and not the aggregate of the corporators, is lessor.

So where the corporation are tenants of premises sought to be recovered in ejectment.(e)

So where a defendant in replevin, makes cognisance in right of the corporation.(e)

But where the corporation sues on behalf of a corporator, (ex. gra. in trespass, for assaulting an officer in the execution of his duty,) the officer could not be a witness, as it seems, for he would be "a person in whose immediate and individual behalf the action would be brought."(e)

The statute leaves as they were witnesses who were admissible at common law. On a trial of an information in the nature of quo warranto, in which one question was, whether the corporation of London was entitled to a certain port duty, it was held that a freeman of London might be a witness partly on account of the difficulty of getting other evidence, and partly that the individual interest of each freeman is extremely small and remote in London.(f) The same would be held at the present day, as it seems. In a subsequent case, where the same corporation sued for an import due against certain merchants, not members of the corporation, it was held that freemen might be witnesses for the defendants.(g) Where the question was, whether the corporation of Bridport were entitled to stallage, for setting up tubs to sell corn in, a burgess was held not admissible.(k) In many cases respecting corporations, the members are admissible ex necessitate ; thus, in case of an information in the nature of quo warranto, for an act done at a corporate assembly, the corporators there present are the only witnesses that can be had, and therefore admissible.(i) The practice of disfranchising by quo warranto information, for the purpose of making corporators admissible witnesses, has been already referred to.(k) In an action for acting as assistant (one of the officers of an [*317] *incorporated company of the city of London), the clerk to the company is a competent witness for them, though he be entitled to a fee for swearing in every assistant ; for although the event of the

(e) 6 & 7 Vict. c. 85, s. 1 ; vid. *Smith v. Rawlins*, 2 Keb. 126, pl. 79. In an action by a corporation, it is a principal challenge to a juror that he is akin to a member ; *Mellor v. Spateman*, 1 Wms. Saund. 344.

(f) *R. v. Carpenter*, 2 Show. 47 ; *Bull. N. P.* 290 ; *R. v. Bray*, *Bull. N. P.* 290, 291 ; *S. C. Cas. Temp. Hardw.* 358 ; vid. 4 *Burr.* 2254 ; 3 *T. R.* 27 ; *Anon.*, *Ventr.* 212 ; *Cook v. Baker*, 3 Keb. 12. So a corporator admitted as witness for a corporation suing for the penalty on a bye-law ; 12 *Vin. Abr.* 19, pl. 32. By 1 *Ann. c.* 10, a corporator is admissible as evidence on indictment for non-repair of highways or bridges within the corporate jurisdiction.

(g) *Mayor, &c., of London v. The Unfree Merchants*, 2 Show. 146.

(h) *Per King, C. J.*, 12 *Vin. Abr.* 20 ; vid. *id.* 16, pl. 10, 11.

(i) *Per Lord Hardwicke, C. J.*, in *R. v. Bray*, *Cas. Temp. Hardw.* 360 ; *R. v. Phipps*, *Bull. N. P.* 289 ; 12 *Vin. Abr.* 19, pl. 34.

(k) *Vid. sup. p.* 268. Corporator admissible as witness for corporation in action against corporation ; *Weller v. Governors of Foundling Hospital*, *Peake, N. P. C.* 153 ; vid. 3 *East*, 10. But not when the action is against them for the negligence of the very person whom it is sought to produce as a witness for them ; 4 *T. R.* 589 ; vid. 5 *Sc. N. R.* 566.

action might be to cause the defendant to be sworn in, that was not the direct object of it, nor a necessary consequence of a verdict for the plaintiff.^(l)

The circumstances under which corporation books are admissible in evidence, are these :

They must be shown to have been publicly kept as the corporation books.^(m)

They must come out of the proper custody,⁽ⁿ⁾ and, therefore, books have been refused to be admitted in evidence when they came from the chest of a deceased clerk instead of the muniment chest of the corporation,^(o) and a book produced from such muniment chest is in general evidence of a custom, even against a stranger to the corporation.^(p)

To prove corporate acts, the court, after granting a rule that a party shall take copies of all corporation books and records, will not admit a copy of a letter found in the muniment chest,^(q) that not being, in terms, within the rule, and also not being of a public nature, and, therefore, a copy of it not being admissible at all.^(r) For it is only where the originals are evidence, being of a public nature, as court rolls, parish registers, and corporation books, that copies are allowed in evidence.^(s) But it is not by copies only that such entries may be made available in evidence. Thus, it may be proved by the oral testimony of a witness who has inspected the books of the Bank of England, that there is an entry in one of them of the transfer of certain stock to A. B., followed by an acceptance of the same in the handwriting of A. B.^(t) Strictly this evidence is produced to attest the regularity of the entry rather than to prove the subject-matter of the entry ; but the decision is mentioned to show, that there may be circumstances in which oral testimony may be resorted to and relied upon in a matter concerning an entry in a corporation book, without producing either a copy, or the book itself, and obliging the witness to swear to the handwriting, upon its being laid before him, in the face of the court.^(u)

The entries must have been made by the proper officer of the corporation, *whose duty it is to make them ; or if made by another person, in his absence or sickness, &c., that must appear.^(x) [*318]

Copies of public books of public corporations are made admissible in evidence on the ground of the impossibility of removing the books themselves, in many cases, without causing great and material inconvenience

(l) *Company of Gold and Silver Wire Drawers v. Hammond*, cited 2 Stark. Evid. 745, 1st edit., from Mr. Ford's MSS.

(m) *R. v. Mothersell*, Stra. 93 ; *Thetford case*, 12 Vin. Abr. 90, pl. 16.

(n) *R. v. Mothersell*, Stra. 93 ; 12 Vin. Abr. 90, pl. 16 ; 2 Burr. 766.

(o) *Mercers of Shrewsbury v. Hart*, 1 C. & P. 114.

(p) *Bruin v. Knott*, 12 Sim. 436.

(q) *R. v. Gwynne*, Stra. 401. A rule to produce corporation books is never granted, as the copies are evidence of themselves, *R. v. Smith*, Stra. 126 ; unless it appears necessary to inspect them in consequence of a rasure or fresh entry, *Gunsmiths' Company v. Turville*, Stra. 307 ; *The Marlborough case*, id. 308.

(r) *Brocas v. Mayor, &c., of London*, Stra. 307, 308.

(s) *Lynch v. Clerke*, 3 Salk. 154.

(t) *Mortimer v. McCallan*, 6 M. & W. 58 ; vid. 7 M. & W. 106, 107.

(u) Vid. the case of writing upon a wall, put 6 M. & W. 68.

(x) *R. v. Mothersell*, Stra. 93 ; *The Thetford case*, 12 Vin. Abr. 90, pl. 16.

and loss.(y) This must obviously be the case as regards the great corporations engaged in business, as the Bank of England, the East India Company, the railway companies, and others. The rule is, therefore, laid down generally that the public books of all public corporations, being originals in themselves, may be made available in evidence by means of sworn copies of public entries made therein, and that the corporations shall never be compelled to produce their books, except the court sees reason to consider that a rasure has been made or a fresh entry fraudulently inserted, when the book must be produced at a trial for inspection by the jury.

We may next proceed to consider to what purposes entries in corporation books are applicable as evidence.

Now an entry in the public books of a corporation, in order to be evidence for the corporation, or for a defendant justifying in right of the corporation, must be of a public nature; and, therefore, the corporation will not be allowed to make evidence for itself by entries in the public books of facts going to support its title, in any case, to any claim or demand, even though the entry be made in a formal style and be signed by the corporate officer whose duty it was to make such entries. Thus, a statement made with great formality, in a public book of the corporation, purporting to be the account of a seizure made by the corporation, nearly 300 years previously to the trial, of certain ships, on account of tolls claimed from the masters and refused to be paid by them, was looked upon as a mere private memorandum of the corporation, which, although entered in a public book and signed by the proper officer, was no more admissible for the corporation than the entry of a tradesman in his books would be evidence for him.(z) This seems a strong instance to show with what complete strictness the doctrine of the continuous identity of a corporation is adopted by the courts, for, except in that view, it is scarcely possible to suppose anything less like the case of a man's making evidence for himself to profit by in his lifetime, than that of corporators 300 years ago entering a statement tending to support the interests of the body politic. Even where the constituting statute enacts [*319] that the clerk of the corporation is to keep a book, to *be provided by the corporation, in which he is to keep an account of acts, proceedings, and transactions of the body, and that all members shall have liberty to inspect and take copies, &c., it was held that entries of the proceedings, in the book so kept by the clerk, were not admissible in evidence on behalf of the corporation against one of their own members suing them(a) on a contract; for that a member entering into a con-

(y) *R. v. Smith*, Stra. 126; *Lynch v. Clerke*, 3 Salk. 154; *Mortimer v. McCallan*, 6 M. & W. 67; *Marsh v. Collnett*, 2 Espin. 665; *vid.* 7 M. & W. 106, 107. Formerly the books themselves were brought up; *ex. gra.* transfer books of East India Company, *Geery v. Hopkins*, 2 Ld. Raym. 851; 7 Mod. 555.

(z) *Marriage v. Lawrence*, 3 B. & A. 142; 2 Phill. Evid. 122, 9th edit.; *Att.-Gen. v. Mayor, &c.*, of Warwick, 4 Rus. 222; *Mayor, &c.*, of London v. *Mayor, &c.*, of Lynn, 1 H. Bla. 214; *Brett v. Beales, M. & Malk.* 29. But such evidence might be received by consent, 1 H. Bla. 214, note (s).

(a) *Hill v. Manchester, &c., Waterworks Company*, 5 B. & Ad. 866: Where a book is made by statute *prima facie* evidence of proprietorship of shares in the corporation, it is admissible as such, though it has been irregularly kept; *London*

tract with the corporation must be deemed a stranger as far as regards that, and could not be affected by any entry made under orders from the entire body, and that this was not like the case of partnership books, where the entries are evidence against a partner by way of admission. Entries of the transfer of shares, made in the transfer book of a railway company, according to the requirements of an act of parliament, are not, by themselves, evidence of proprietorship of shares in an action between strangers.^(b)

There appears to be one exception to the rule, that private entries in a corporation book are not admissible for them, namely, where ecclesiastical corporations aggregate, or parsons or vicars, sue for tithes, when entries in the corporation books are evidence for the corporation,^(c) and have always been received as such. But the exception is strictly confined to this case; an entry in the public books of a corporation, showing that the appointment of a curate had always been made by the corporation, cannot be received to establish their right against the vicar.^(d)

*CUSTOMS AND PRESCRIPTIONS. [*320]

MANY questions arise, in cases connected with corporations, respecting the proof of customs, to which it is desirable to invite the reader's attention; for although the Municipal Corporations Act has abolished a great variety of customs in municipal corporations, yet many questions of great importance still remain respecting customs both in those and other local corporate bodies.

The law is well known to hold, that in general customs and prescriptions must be pleaded, and put in issue, and tried by a jury.^(e) And proof of a regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding an immemorial custom, provided the custom be not against any known rule or principle of law;

Grand Junction Railway Company v. Freeman, 2 M. & Gra. 606; *Birmingham, &c., Railway Company v. Locke*, 1 Q. B. 267; and is evidence for the company in an action for calls, *London and Brighton Railway Company v. Fairclough*, 3 Scott, N. R. 69; *London and Grand Junction Railway Company v. Graham*, 1 Q. B. 271. But where such books are made *prima facie* evidence they are not necessarily the only evidence; *Miles v. Bough*, 3 Q. B. 845.

(b) *Hart v. Waring*, 3 M. & W. 379.

(c) *Short v. Lee*, 2 Jac. & W. 477; per Lord Kenyon, C. J., *Outram v. Morewood*, 5 T. R. 123; *vid.* 12 Vin. Abr. 255, pl. 3; *Anon.*, Bunb. 46.

(d) *Att.-Gen. v. Mayor, &c., of Warwick*, 4 Russ. 222.

(e) *Hodson v. Atkinson, Comyns*, 603. Even in the case of the corporation of London, where the corporation is interested, the custom must be put in issue and tried by a jury; *Day v. Savadge*, Hob. 87. The courts do not take judicial notice of the customs of any city or town; *Hunt v. Hargill*, Fortesc. 347; *Hodges v. Steward*, 1 Salk. 125; 3 Salk. 69. *Vid.* 3 Burr. 1857; *Cro. Car.* 516; *Stra.* 1187; 4 Burr. 2032; 5 Rep. 83 b; *Cro. Jac.* 68. Custom of London, how to be tried, *Crosby v. Hetherington*, 4 M. & Gra. 935.

for if it is, then, some decisions say, it cannot stand, however great its antiquity may be. *(f)*

So if it be in contradiction to a charter. *(g)* But a custom may be good though inconsistent with the common law, or though it be of such a character as that it could not have arisen by charter. *(h)*

Where a prescription is pleaded, the plea will be supported by proof of a more extensive right than that pleaded, provided it be of such a nature as to include that pleaded; *(i)* but if a prescription be made absolutely, and the evidence show that it was qualified in any way, the party prescribing fails. *(k)*

A custom cannot be pleaded by inhabitants of a corporate town to have an interest or profit à prendre out of another's soil; *(l)* they ought to prescribe in the corporation. *(m)* Nor can the corporation prescribe for common for them and their tenants, belonging to ancient houses in the corporation. *(n)*

*[*321]* *A person who has acted in breach of an alleged custom, is not a competent witness to disprove the existence of the custom. *(o)*

A decree in equity may be evidence of a custom per se, as prima facie having relation to the matter in issue; for all matters having a tendency to prove the custom are receivable in evidence for that purpose. *(p)*

As proof of an usage for twenty years last past may support a verdict of immemorial custom, so, on the other hand, a custom proved to have existed in a corporation from time immemorial up to A. D. 1689, must be taken to exist still, if there be no further evidence one way or the other; *(q)* and a verdict that the custom existed till that date is therefore a verdict for the party alleging the custom. This is another instance of the principle of presuming in favour of corporate bodies, on which the courts generally act. A further instance is supplied by the following case: Where the founder of an eleemosynary corporation gave power to

(f) R. v. Joliffe, 2 B. & C. 54. Three requisites of a good custom; 10 Q. B. 39; 6 T. R. 760, 764. Thus an usage making one judge of his own wrong is bad; Litt. s. 212. This rule, however, seems not to be unquestionable in its generality, vid. inf.

(g) R. v. Grosvenor, 7 Mod. 198.

(h) 6 T. R. 760, 764; 3 Burr. 1780, 1785; Co. Litt. 113 a; Noble v. Durell, 3 T. R. 274. Thus, though the law is that a judicial officer cannot make a deputy, yet there may be a usage to appoint a judicial officer, with power to exercise the office by himself or deputy; Com. Dig. Officer, D. 2.

(i) Bailey v. Appleyard, 8 A. & E. 161.

(k) Gray's case, 5 Rep. 78 b, per Popham, C. J.

(l) Hardy v. Holiday, cited 4 T. R. 719; vid. 3 Mod. 246; 10 Q. B. 35; 5 D. & L. 784. As to alleging the right where the boundaries of the borough have been altered by the Municipal Corporations Act, Beadsworth v. Torkington, 1 Q. B. 782.

(m) 1 Saund. 339, 343; White v. Coleman, Freem. 134, 135; Parry v. Thomas, 19 L. J. (N. S.) Exch. 198.

(n) R. v. Rippon, 2 Keb. 25.

(o) Carpenters' Company v. Hayward, Dougl. 359; vid. Davis v. Morgan, 1 C. & J. 587.

(p) Laybourne v. Crisp, 4 M. & W. 326, 327; vid. 6 M. & W. 244; 2 Bulstr. 206; Dav. R. 31, B. 32.

(q) Scales v. Key, 11 A. & E. 819. Usage uninterruptedly enjoyed from 1790 to 1837 may be sufficient for a jury to find it to be immemorial; 4 M. & W. 330. But a custom cannot be *pleaded* to have existed for any less than time whereof, &c.; R. v. Worral, Skin. 108.

the governors to alter his statutes, an alteration long acquiesced in will be presumed to have been made by them, although the precise order by which it was made does not appear.^(r) The presumption is, that every thing is regularly done in a corporation. But it will not be presumed that there has been an immemorial usage to pay a fee to an officer for doing a certain act, if it be known that such act was not required by law to be done till within time of legal memory; although it has been proved that the usage has been to pay the fee for sixty-five years last past.^(s) Nor can a custom be urged for a thing that had its beginning since Richard I., if a record can be shown to the contrary.^(t)

On questions respecting a right claimed by a corporation to take tolls on a public road, in which the public, that is a large number of persons, are concerned,^(u) common reputation, and the declarations of deceased persons, are admissible in evidence.^(x) So where the claim is to a farthing a quarter on malt imported, a verdict against others similarly situated with defendant is evidence.^(y) In prescribing for toll, the particular kind of toll must be stated, for if it be toll-thorough, ^{*a} consideration must be laid; but if a toll-traverse a consideration [^{*322}] is implied.^(z)

With respect to the operation of statutory enactments on customs in municipal and other corporations, the general principle is, that an affirmative statute does not take away a custom;^(a) or perhaps it is more correct to say, that a statute made in the affirmative, without any negative, expressed or implied, does not take away a custom.^(b) But now, by the Municipal Corporations Act, all such usages as are inconsistent with or contrary to the provisions of the act, are, in municipal corporations under it, annulled,^(c) and particularly all exclusive rights of trading in shops, &c., in boroughs are abolished.^(d) Nevertheless, subject to these restrictions, all usages and customs remain good, provided they are not either expressly or impliedly abrogated by some other statute; and, moreover, such usages or customs being reasonable and beneficial to the

(r) *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 492.

(s) *Morgan v. Palmer*, 2 B. & C. 733.

(t) *Per Rolle, C. J.*, in *Pilkington v. Bagshaw*, Styl. 450; *vid. Snelling's case*, 5 Rep. 82; *Perceivall v. Crispe*, 2 Show. 175; which do not in reality oppose the rule.

(u) *Per Bayley, J.*, 1 M. & Sel. 690; *vid. Crease v. Barrett*, 1 C. M. & R. 931.

(x) *Brett v. Beales*, 1 M. & Malk. 416; *vid. per Lord Kenyon, C. J.*, 1 East, 357.

(y) *City of London v. Clerke*, Carth. 181; *vid. 1 East*, 357; *Cro. Car.* 561; *R. v. Wheldale*, 2 Keb. 222. Evidence of reputation not admissible to prove a custom that the sheriff of a county of a city, being the assize town of the county at large, was exempt from executing, or the corporation bound to execute, criminals from the county at large; *R. v. Antrobus*, 2 A. & E. 793.

(z) *James v. Johnson*, 2 Mod. 143. What kind of consideration must be laid, *vid. sup. p. 165.* and *Truman v. Walgham*, 2 Wils. 296; *Pelham v. Pickersgill*, 1 T. R. 660; *vid. 5 Q. B.* 782. How to lay it, 4 D. & L. 582.

(a) *Co. Litt.* 115 a; *R. v. Pugh*, Dougl. 181; *Com. Dig. Parliament*, R. 24.

(b) *Harg. note* (153) on *Co. Litt.* 115 a; *Mayor, &c., of Leicester v. Burgess*, 5 B. & Adol. 246; *Simpson v. Moss*, 2 B. & Adol. 543.

(c) 5 & 6 Will. 4, c. 76, s. 1.

(d) *Ibid.* s. 14. The City of London is exempted from the operation of the statute. *Vid. as to exclusive rights of trading by custom there*, 1 B. & Ad. 92; 9 B. & C. 52; 2 B. & Ad. 465; 7 Dowl. & Ry. 597; 2 A. & E. 312; 4 M. & W. 320; 6 Dowl. 749; 11 A. & E. 326.

subject, shall prevail even against the common law.(e) Such a custom as the following is not in restraint of trade, or prohibited by the Municipal Corporations Act, or any other statute, and having been adjudged good before that statute would appear to remain so; viz. that the town crier shall have the exclusive privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction.(f) So the custom of foreign bought and foreign sold, which obtains in the city of York (as well as in London), whereby one foreigner is restrained from selling or buying goods for or of another foreigner within the city, has been held good;(g) and if the goods be not sold, &c., in a shop, &c., is not within the Municipal Corporations Act,(h) and remains good. The same custom holds at Lynn Regis,(i) and at Colchester,(k) and Boston.(l) A custom to elect by ballot has been held good in an Irish corporation;(m) but such custom is inconsistent with the Municipal Corporations Act for England, and abolished by the operation of the first section.

*Against a statute a custom cannot be prescribed,(n) unless [*323] the prescription or custom be saved by another statute.(o) It seems that where a statute is introductory of a new law, it shall take away all contrary customs, though there be only affirmative words.(p) However, a statute merely affirmative of the common law does not take away a custom,(q) or even a prescription, as it seems.(q)

An ancient usage will be totally upset by the acceptance of a charter inconsistent with it;(r) and indeed this proposition might perhaps have been supposed to follow from the former; for the reason why statutes bind all the subjects is, because every one is held impliedly to have assented to them; à fortiori, therefore, shall a corporation be bound by a charter to which they have expressly assented by acceptance. But a prescriptive right is not destroyed by a circumstantial variation in the thing to which the prescription is annexed;(s) even although that alteration in the circumstances or character of the thing has been effected by act of

(e) *Noble v. Durell*, 3 T. R. 271; Litt. s. 169; Co. Litt. 33 B., 113, A.; vid. *Rogers v. Brenton*, Q. B. Mich. Term, 1847; 7 Vin. Abr. 179—186.

(f) *Jones v. Waters*, 1 C. M. & R. 713.

(g) *Com. Dig. Trade, D. 2*; *Dyer*, 279, B. pl. 10.

(h) 5 & 6 Will. 4, c. 76, s. 14; vid. 8 Rep. 127, A, as to custom that butchers shall sell in open market, &c. (i) *Harwich v. Twells*, 12 Vin. Abr. 19, pl. 33.

(k) *Clearywalk v. Constable*, Cro. Eliz. 110.

(l) *R. v. Corporation of Boston*, W. Jon. 162.

(m) *Adcock v. Mayor of Dublin*, Batty, Ir. Rep. 628.

(n) Co. Litt. 115 a; *Grisling v. Wood*, Cro. Eliz. 85; *Com. Dig. Prescription, F. 3*; *R. v. Hogg*, 1 T. R. 728. As to distinction between declaratory and negative statutes, 17 Vin. Abr. 266; 4 *Com. Dig.* 432; *Anon.*, *Freem. R.* 203; 2 *Mod.* 39; Co. Litt. 115 a; *R. v. Pugh*, Dougl. 180; 3 T. R. 272.

(o) Co. Litt. 115 a; 2 *Inst.* 21. Where there was a custom that deeds of grant of lands should be enrolled before the recorder, chamberlain, or such officer, the statute of enrolments does not alter the custom, but estates pass by the custom, and not by the statute; *Dalison*, 63, pl. 24. As to London, *Chibborne's case*, *Dyer*, 229, A.; vid. 4 C. B. 60; *Mene's case*, 9 Rep. 133 b.

(p) *Anon.*, 1 *Freem.* 203; *Mayor, &c., of London v. Gatford*, 2 *Mod.* 39.

(q) Co. Litt. 115 a; 3 T. R. 272; *R. v. Pugh*, Dougl. 180.

(r) *Powell v. Reg.*, 2 *Bro. P. C.* 298; *Tomkin v. Jourdin*, *Styl.* 131.

(s) *Cowper v. Andrews*, *Hob.* 39; *Com Dig. Prescription, G.*

parliament; (t) nor by a variation in the name or other outward circumstances, or even the internal constitution of the corporation prescribing; (u) nor by the suspension of the functions of the corporation from loss of members or other cause, provided it be not wholly dissolved or destroyed. (x) When various statutes in different reigns have passed to enforce uniformity of practice in a matter of national importance, ex. gra., weights and measures, a custom in a corporate town to sell by other than the statutory weights and measures is bad; (y) and as an immemorial custom cannot be good, that is in direct opposition to a statute, so an usage in a borough, nearly coeval with a statute, to do things that it enjoins in a different manner from its provisions, cannot be supported. (z)

We shall proceed to subjoin here some miscellaneous cases relating to usages in corporations as well as to customs and prescriptions. The operation of statutes on customs and usages in corporations has just been discussed; the question naturally follows, as to the operation upon customs or prescriptions of charters accepted by corporations.

1. It may perhaps be laid down with positiveness, that where a corporation has a prescriptive right of a greater extent, and accepts [*324] a charter as a matter of record to a less extent, the former right is merged; for every prescription presumes or supposes, if not necessarily a grant or charter, at least a legal origin, of the thing prescribed for, (a) which charter has been lost at some time, of which no evidence remains; and if this original charter had been preserved and in existence in the custody of the corporation, and they had subsequently accepted the charter conveying the right to the less extent, that acceptance would have been held to estop them to assert that after it they had the right to the original extent. (b) That being the case, in such circumstances there appears to be no valid reason why the acceptance of the second charter should not have the same effect on a liberty which is supposed to originate in a grant, as it has on a liberty which is actually enjoyed under the original grant still being in existence. But if the prescription related to two descriptions of subjects, ex. gr., copyhold and freehold lands, then the acceptance of a grant respecting the freehold lands, though it might

(t) *R. v. Tippetts*, 3 B. & A. 193.

(u) *Luttrell's case*, 4 Rep. 86; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339; *vid. Bull. N. P.* 213; *Dyer*, 279, B.; 4 T. R. 425; 1 Wms. Saund. 344, note (1).

(x) 7 Q. B. 339; *Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866.

(y) *Noble v. Durell*, 3 T. R. 271; 2 Inst. 702; 3 Keb. 331.

(z) *R. v. Gordon*, 1 B. & A. 524.

(a) *Dictum per Mallet, J., Langham's case*, March, 185, 186; *vid. acc.* 3 T. R. 248; *Bailiffs of Tewkesbury v. Bricknall*, 2 Tau. 138; *Com. Dig. Franchise*, A. 1; *Anon., Lofft. R.* 556. "We do not say that prescription necessarily implies a grant or charter, but it necessarily implies some legal origin, and a charter would be a legal origin;" *Opinion of all the judges*, 2 C. & F. 354, 355, *Mayor, &c., of Lyme v. Henley*; *vid. Harland v. Cooke, Freem.* 319, 320. Nothing may be good by prescription but what may have had beginning by grant; per *Coke, C. J.*, 2 Brownl. 198. But that in some cases a thing may be good by prescription, which the crown could not grant at present, *vid. per cur. Yearb.* 1 Hen. 4, fol. 4, pl. 6; *Lockwood v. Wood*, 6 Q. B. 64, *cont.*

(b) *Per Gascoyne, J.*, 8 Hen. 4, fol. 19; *Earl of Carnarvon v. Villebois*, 13 M. & W. 340.

merge the prescription as to them, would leave it untouched as to the copyholds.(c)

2. But a good deal of difference of opinion will be found among the authorities on the question of the effect of a charter purporting to grant precisely the thing which the corporation already prescribed for. Where a corporation prescribed for an ancient court of record called a *Pie Poudres Court*, the objection, that having subsequently accepted various grants of the same court, the prescription was thereby determined, was overruled; for the Court of Queen's Bench held that the corporation might use a subsequent charter, either as a grant or as a confirmation,(d) and that the prescription remains, unless it be altered and varied by the charter;(e) and it remains, if the grant makes an addition to the thing prescribed for, for then both may stand together.(f) This is the case especially [*325] where the charter recites the *prescription, for then it is plain that the meaning of the king was to confirm it,(g) and this would be the case though words of grant or gift only were used; for the *dedimus et concessimus* have in some cases the same effect as *confirmavimus*;(h) and where a charter uses only the words of grant and creation, it may be proved by parol testimony that the corporation was a prescriptive one.(i) Still less does an ancient grant, without date, necessarily determine a prescription, for it may be either prior to time of memory, or the charter may be in confirmation of the prescriptive right;(k) nor a charter dated before time of legal memory.(l)

The proper mode of putting the question in a course to be tried is not by merely traversing the prescription alleged, but by pleading the subsequent charter with a special traverse of the prescription; for the party cannot take advantage of such charter, though it were produced, without so pleading; and the same is the case where the subsequent charter is an actual grant of the thing prescribed for by the predecessors of the defendant to the predecessors of the plaintiff, who sets up the prescription, such grant being within time of memory.(m)

(c) *Earl of Carnarvon v. Villebois*, 13 M. & W. 340. A charter dated before the time of legal memory clearly does not destroy a prescription; *Mayor, &c., of Lyme v. Henley*, 2 Cl. & F. 355. All Ancient boroughs are said to be of record in the Exchequer; 40 Assiz. pl. 27, *Abbot of Westminster's case*.

(d) *Goodson v. Duffield*, 2 Bulst. 25; S. C. Cro. Jac. 313; Co. Litt. 301 b; *Wild v. Wiggett*, Freem. 321. A corporation incorporated within time of memory of course cannot prescribe for a court time whereof, &c.; *R. v. Bailiffs of Aldborough*, 1 Keb. 308. A grant of Edw. 4, may be evidence of ancient court; Cro. Car. 127.

(e) *Moor*. 830; 2 Bulst. 21. 24; *vid. Yearb.* 8 Hen. 4, fol. 19; *Bro. Abr. Prescription*, pl. 35; *Dyer*, 153, B.; 21 Hen. 7, fol. 5; 34 Hen. 6, fol. 36; 13 M. & W. 335, 336; *Powell v. Reg.* 2 Bro. P. C. 298.

(f) 17 Vin. Abr. 278. So of a common of turbary; *Crew v. Vernon*, *Moor*. 818. This is the case of almost all corporations by prescriptions, who have subsequently accepted charters; *vid. per Wilmot, J.*, 3 Burr. 1871; *Luttrell's case*, 4 Rep. 86.

(g) *Finch*, Law, 59; *Yearb.* 21 Hen. 7, fol. 5; *Haddock's case*, T. Raym. 435; *Earl of Carnarvon v. Villebois*, 13 M. & W. 323, where observe the form of the charter; *Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339; *Vin. Abr. Prescription*, M. pl. 1.

(h) Litt. s. 531; 1 H. Bla. 212, note (i), sup. p. 37.

(i) *R. v. Mayor, &c., of Stratford*, 14 East, 348.

(k) *Addington v. Clode*, 2 W. Bla. 989.

(l) *Mayor, &c., of Lyme v. Henley*, 2 Cl. & F. 355.

(m) *Prior of Tikeford v. Prior of Caldwell*, *Yearb.* 34 Hen. 6, fol. 36, pl. 7; *per Littleton*, 33 Hen. 6, fol. 27, 28.

It is the general rule, that in pleading a prescription in a corporation, it must be shown that the corporation is a prescriptive corporation.(*n*)

Another fundamental rule of prescription is, that no one shall prescribe for that which the law of common right gives him;(o) though, on the other hand, that which by the law is common to all may be prescribed for as appropriated to an individual or a corporation.(*p*)

A prescription cannot stand which is contrary to common right. Thus a corporation cannot prescribe to imprison upon a suggestion of the party's guilt.(*q*)

On the other hand, there are authorities expressly declaring that a grant determines a prescription (the subjects of the grant and prescription being identical), as an obligation determines a contract;(r) and the only mode of reconciling these with the former authorities is by supposing that the grants to which they relate were intended, on the face *of them, not to operate as confirmations, but as original [*326] grants. The reasons assigned, that a matter in writing determines a matter en fait, and that a matter of a higher nature determines a matter of lower nature,(s) do not appear to be satisfactory; for the first reason wears too much the air of a rule made pro re natâ; the second assumes that a prescription, which generally, though not necessarily, supposes a grant, must necessarily be of a lower nature than an actual grant, which is a proposition that requires proof; because it is a maxim that, whatever might have had a good beginning by grant may be good by prescription.(t) But a plea claiming a right of pasturage by immemorial usage of the party's ancestors, whose estate he had, is disproved by showing a grant of the same subject-matter eighty-one years before, for a valuable consideration, to the party's ancestor, and the plea is not aided by 2 & 3 Will. 4, c. 71, s. 1;(u) the consideration being valuable, excluded the supposition that the grant was one of confirmation.

In this condition of the authorities, the question cannot be regarded as being settled, especially as in a late case,(x) in which it was discussed at the bar, the Court of Exchequer found it to be unnecessary to pronounce an opinion, remarking, however, that it was clear that the doctrine of the grantee being estopped to prescribe, was not applicable to a case where the subject-matter of the grant and the subject-matter of the prescription were different.

Every prescription for a thing of a profitable nature must be alleged

(*n*) *Pitts v. Gaince*, 1 Ld. Raym. 558; *vid. Master, &c., of Macclesfield v. Pedley*, 4 B. & Ad. 403.

(*o*) *Bro. Abr. tit. Prescription*, pl. 71; *Pell v. Towers*, Noy, R. 20; *Ward v. Cresswell*, Willes, 265.

(*p*) *Carter v. Murcot*, 4 Burr. 2162; *Mayor, &c., of Orford v. Richardson*, 4 T. R. 437.

(*q*) *Jerom v. Neal*, 1 Leon. 105; *Vicars v. Wharton*, 1 Brownl. 206.

(*r*) *Brooke's Reading on Stat. of Limit.* 39; *Com. Dig. Prescription*, G.: *Hayward v. Fulcher*, Palm. 494; *Finch, Law*, p. 22, pl. 23; *Higgin's case*, 6 Rep. 45 a; *Jenk. Cent.* 5, cases 4. 31.

(*s*) *Finch, Law*, 22; 6 Rep. 45; *Jenk. Cent.* 5, cases 4. 31.

(*t*) *Sparke's case*, *Winch*, 6; *Pitt v. Chick*, Hutt. 45.

(*u*) *Welcome v. Upton*, 5 M. & W. 398; *S. C.* 7 Dowl. 475; *vid. S. C.* 6 M. & W. 536. 538.

(*x*) *Earl of Carnarvon v. Villebois*, 13 M. & W. 342.

to be in the owner of the inheritance, *(y)* that is to say, tenant in fee simple must allege it to be in himself, &c.; tenant for life, years, or at will, must allege it in the name of him who hath the fee; *(z)* to plead a custom to the same effect for inhabitants, &c., of a borough, is not allowed. Therefore a custom for all the inhabitants of Newcastle to walk or ride over a close of arable land belonging to A., at all seasonable times of the year, seems to be bad; *(a)* and therefore a prescription for common or other profits in alieno solo cannot be in general alleged to be in the inhabitants of a town or borough, or in the inhabitants of the ancient houses thereof by reason of their residence; for the inhabitants are not necessarily seized of the inheritance in their houses. *(b)* Nor can such [*327] matter ever be alleged to be by custom in the inhabitants generally, *(c)* but the party must either prescribe in the corporation, or else that he and all those whose estate he has in a house in the borough have used to have common, &c., *(c)* for their beasts, levant and couchant, in the messuage, &c. *(d)* Whether a custom can be alleged for inhabitants to wash their clothes in a person's close has been left doubtful. *(e)* So a custom cannot be alleged that the inhabitants of a vill should take sand in alieno solo, for that is a profit a prendre; *(f)* though perhaps in a borough incorporate it might be different, *(g)* but this is far from certain. It is certain, however, that in London, where the customs have been frequently confirmed by parliament, it is a good custom to elevate old walls to a height that may obstruct a neighbour's lights, so as to injure his inheritance, which is something analogous to a profit in alieno solo. But perhaps inhabitants of a borough might claim an exemption (ex. gra.

(y) Co. Litt. 113 b; Com. Dig. Prescription, H.; Scoble v. Skelton, 2 Mod. 318; S. C. Skin. 36; Dorn v. Gachford, Com. R. 44; Pepyn v. Bustin, 1 Show. 81.

(z) Gateward's case, 6 Rep. 59 b.

(a) Bell v. Wardell, Willes, 102. A custom for all inhabitants of Coleshill to have and enjoy the privilege of playing at any rural sports or games on plaintiff's close every year, at all times of the year, at their will and pleasure, is bad for uncertainty; Millechamp v. Johnson, Willes, 203; vid. tam. Pitch v. Rawlings, 2 H. Bla. 393, contra; vid. 2 T. R. 758.

(b) Com. Dig. Prescription, H. Another reason against allowing such claim by way of custom is, that it cannot be released, as it may be if annexed to the fee; 1 Wms. Saund. 341, note (3). Another reason is, that they could not have had the common by grant, not being a corporation, and therefore cannot claim by prescription, which supposes a grant; Cro. Eliz. 362. But a prescriptive corporation may prescribe for common in gross for the cattle of their members, levant and couchant, in the borough, but not for common in gross without number; Mellor v. Spateman, 1 Wms. Saund. 343, overruling City of Coventry's case. Yearb. 15 Edw. 4, fol. 29, B.; vid. Anon., March, 83, pl. 137. Prescription for metage, 4 M. & W. 324; for estovers, Freem. 134.

(c) 1 Wms. Saund. 341, note (3); Fowler v. Dale, Cro. Eliz. 362. Vid. an exception in the case of copyholders stated 10 Q. B. 61; and of miners, id. 61, 62; vid. 4 B. & C. 755. Custom to cut rushes in alieno solo to strew the Church, March, R. 16.

(d) Yearb. 22 Hen. 6, fol. 43. Prescription by corporation; Boteler v. Bristowe, 15 Edw. 4, fol. 29, pl. 7, fol. 32, pl. 16. *(e)* Bawtis, v. Norris, 1 Rol. R. 216.

(f) Blewit v. Tregonning, 3 A. & E. 554. Nor does evidence of immemorial user by the inhabitants of the right support a plea of a grant by owners in fee of the land made to the inhabitants; S. C. vid. Thompson v. Roberts, Fortesc. 339; vid. 2 Lutw. 1344.

(g) Vid. Mayor, &c., of Lynn v. Taylor, 3 Lev. 160; et vid. 10 Q. B. 37; Hinckes v. Clarke, 1 Show. 78.

from toll) by a modern grant, and of a private individual even; (*h*) and at all events they might prescribe for matter of discharge, ex. gra., to be quit of toll, according to old authorities; (*i*) but since the abolition by the Municipal Corporations Act of all *chartered* exemptions from tolls in boroughs, it seems doubtful whether in that particular instance the plea would be good. And right of way, or other mere easement, in alieno solo, may be claimed by way of custom in a borough that the inhabitants should enjoy, and from time, &c., have used the same. (*j*) So a plea of discharge by freemen generally must, it has been held, be by way of custom, not prescription, (*k*) or they may prescribe in the corporation. (*l*)

Prescription and custom, therefore, it is very material to observe, are very different things; for though it has been said that they are all one, (*m*) yet in truth they are so far different, that it is a question whether there can exist contemporaneously, in respect of the same land a *prescription and a custom entitling to the same easement, &c.; [**328*] and the evidence, which shows such a custom, is not evidence of [**328*] a prescription, and vice versâ; (*n*) for prescription must originate in a legal source, as has been frequently shown above; whereas a custom "in fact comes at last to an agreement, which has been evidenced by such repeated acts of assent on both sides, from the earliest times, beginning from the time of memory, down to our own times, that it has become the law of the particular place" (*o*) where it prevails. From the different sources in which the two things originate, it might well be supposed that the evidence requisite to support a claim founded on the one must needs be of a very different character from that which may suffice to establish a title alleged to rest on the other. No prescription can have a legal origin where no grant could have been made to support it. (*p*) A cus-

(*h*) *Lockwood v. Wood*, 6 Q. B. 63.

(*i*) *Baker v. Brereman*, Cro. Car. 418, cited 6 Q. B. 63; *vid.* 8 Hen. 6, fol. 4; *Wise v. Green*, Freem. R. 468; 18 Edw. 4, pl. 3; *Paine v. Partridge*, 1 Show. 257; *vid.* Cro. Car. 419; *R. v. Pugh*, Dougl. 180.

(*j*) *Fowler v. Dale*, Cro. Eliz. 363; 1 Wms. Saund. 341, note (3); *Abbott v. Weekly*, 1 Lev. 176; *Fitch v. Rawling*, 2 H. Bla. 393; *Manning v. Wasdale*, 5 A. & E. 758; *Gooday v. Michell*, Cro. Eliz. 441; *Bond's case*, March, 17; *vid.* 6 Q. B. 62, 64; Cro. Car. 419; Co. Litt. 56 a; Cro. Eliz. 664; *Bolus v. Hinstocke*, 2 Keb. 686.

(*k*) *Day v. Savage*, Hob. 85, commented on 10 Q. B. 60, 61; *vid.* 1 Vent. 390.

(*l*) *Beadsworth v. Torkington*, 1 Q. B. 782.

(*m*) *Per Anderson, J.*, in *Fowler v. Dale*, Cro. Eliz. 363.

(*n*) *Blewitt v. Tregonning*, 3 A. & E. 554; *vid.* *per Coke, C. J.*, in *Rowles v. Mason*, 2 Brownl. 198.

(*o*) 3 Salk. 112; *Tyson v. Smith*, in err., 9 A. & E. 425, 426; *vid.* *tam.* 10 Q. B. 635, *semb. cont.*; *Lockwood v. Wood*, 6 Q. B. 64, *acc.*; cannot originate in the king's grant, *Case of Tanistry*, Dav. R. 31 b, 32 a; *per Coke, C. J.*, *Hix v. Gardiner*, 2 Bulst. 206. Though a custom is the law of the place, the infraction of it is not matter for indictment; *R. v. Gorge*, 3 Salk. 189; i. e. as against individuals violating it; but there may be circumstances in which a corporation, who are bound by a custom, may be liable to indictment for the neglect to observe it: *Griffith v. Williams*, Sayer, 56; or to an action on the case at the suit of an inhabitant injured by such neglect; *Mayor, &c., of Lyme v. Henley*, 2 C. & F. 354; *Anon.*, Lofft's R. 556.

(*p*) 17 Vin. Abr. 279, pl. 6; *James v. Trollop*, Skin. 239; *vid.* *tam.* Yearb. 1 Hen. 4, fol. 4, pl. 6; 6 Q. B. 64.

tom may deviate from the course of the general law of the realm,^(q) and yet be valid and binding as the law of the place to which it extends. It is necessary, therefore, to look out for a possible and legal origin of the former, but a party is not bound to prove any thing respecting the mere origin of the latter,^(r) or to find a reason for it,^(s) or to show that it is conformable to the common law.^(t) On the other hand, that which is the general or common law of England must not be pleaded as a custom of a place.^(u)

A prescription claiming a right to levy money as toll, or the like, to be good, must *in general* show a quid pro quo, or some profit, advantage or benefit derived by the subject, or some expense, outlay or liability thereto, on the part of the corporation. Thus it has been decided to be a good prescription to claim threepence in the pound on all merchandizes brought into a port, in consideration that the corporation are [*329] *owners of the port, maintain perches in the river to guide vessels entering the port, and maintain a quay and crane.^(x) A corporation may prescribe to take three bushels of barley as for keyage out of every ship's cargo of barley brought upon their quay to be exported;^(y) for the coming on the quay is an easement, and a damage to the corporation. The rule does not extend to prevent a corporation entitling themselves by prescription to an annuity; so a corporation may be bound to pay an annuity by prescription;^(z) so they may entitle themselves by prescription to have a farthing on every quarter of malt brought by cer-

(q) 3 Salk. 112; Paul v. Knight, 2 Kelynge, 223; Fisher v. Lane, 3 Wils. 302.

(r) 6 Q. B. 64; per Coke, C. J., Hix v. Gardiner, 2 Bulst. 195, 196; 2 Inst. 664; Litt. R. 103. If a legal commencement of a custom were possible, it will be presumed; Cocksedge v. Fanshaw, Dougl. 114. A custom must not conflict with the prerogative; 3 Salk. 113.

(s) Archer v. Bokenham, 11 Mod. 160, 161; Potter v. North, 1 Ventr. 383, 386.

"The customs of borough-English and gavelkind are no reasonable customs; and reason to be showed of the beginning of them is impossible;" per Coke, C. J., in Hix v. Gardiner, 2 Bulst. 196.

(t) Horton v. Beckman, 6 T. R. 760, 764. As to the questions for the jury, Bastard v. Smith, 2 M. & Rob. 129; Cocksedge v. Fanshaw, Dougl. 127; Laybourne v. Crisp, 4 M. & W. 330. A custom which is general, and may extend to strangers, if also contrary to the common law, is bad; Sherborn v. Bostock, Fitzg. 51. A custom to oblige freemen to swear not to sue any freeman out of the borough at common law is bad; R. v. Mayor of Bristol, 1 Keb. 690; Hirman v. Cook, 1 Keb. 795. As to judicial notice of a formerly certified custom of London, Piper v. Chappell, 14 M. & W. 649. Case lies against the Mayor and Aldermen for false certificate by party injured, Hob. 87. Form of certificate, 7 Vin. Abr. 217.

(u) Combe's case, 9 Rep. 75 b; R. v. Tooley, 2 Bulst. 186; Kennycott v. Bogen, 2 Bulst. 250; Horselow's case, Yearb. 22 Hen. 6, fol. 21, pl. 38.

(x) Anon., 17 Vin. Abr. 264, pl. 5; vid. Prideaux v. Warne, 2 Lev. 96; Crisp v. Belwood, 3 Lev. 434; Vinkensterne v. Emden, 1 Ld. Raym. 384; 2 Rol. Abr. 265; Willes, 111; Warrington v. Mosely, 4 Mod. 323; Com. Dig. Prescription, E. 4.

(y) Serjeant v. Read, 1 Wils. 91; S. C. 2 Stra. 1228. A custom that all goods landed on an ancient wharf should pay a certain duty, and all goods coming down the river and passing by the staith, should pay one half that duty, is bad as to the latter part, and being an entire custom is therefore bad altogether; Hasborn v. Wells, 2 Keb. 624, 625; vid. tim. S. C. 1 Siderf. 454, pl. 24, who reports it to have been a bye law, not mentioning a custom.

(z) Prior of Shene v. Prior of St. John of Jerusalem, in England, 22 Edw. 4, fol. 43, pl. 6; vid. acc. 11 Hen. 6, fol. 18, pl. 11; 34 Hen. 6, fol. 36, pl. 7; 39 Hen. 6, fol. 13.

tain descriptions of vessels into the port; (*a*) so to have the twentieth part of every bushel of grain sold, or brought to be sold, in the borough by any one. (*b*) In one case, which is singular, a corporation has been allowed to prescribe to have and to distrain for toll of all boats that pass by the river that runs by the vill with any merchandize, without alleging a consideration. (*c*) A corporation may prescribe *tenere placita*; but that is not sufficient to support a claim to consuance of all pleas, &c., (*d*) and a grant of consuance applies only to such forms of action as were in esse at the time of the grant. (*e*)

On the other hand, a custom may be good even to seize *goods* as forfeited, without showing any *quid pro quo* or advantage to the public given by the corporation in return; and although a bye-law imposing forfeiture of goods would be bad, and though even the crown has no power to forfeit goods without the intervention of a jury, to do so being directly contrary to *Magna Charta*, and, as far as aliens were included in it, against 9 Edw. 3, stat. 1, c. 1. Thus the custom of forfeiting goods foreign bought and foreign sold, which prevails in York, Lynn, and other places, has been repeatedly held to be good; (*f*) and such custom may, perhaps, be considered still to remain, for it is not touched apparently by the terms used in the Municipal Corporations Act in abolishing customs and bye-laws giving exclusive rights of trading. (*g*)

Analogous in some degree to the above customs as regards the point of seizure of goods, is the custom prevailing in London and other places, of foreign attachment; by which, if A. owes B. a debt, and also has *goods or money in the hands of C., within the jurisdiction, then, [*330] in certain circumstances, B. may seize A.'s money or goods in C.'s hands and repay himself therefrom. This custom is not affected by the statute for abolishing arrests on mesne process, (*h*) as was once contended, (*h*) nor does it appear to be touched by the Municipal Corporations Act in the towns and cities within that statute in which it was established previously. In London it continues, however this may be, because London was expressly exempted from the operation of the act. It is used (besides London) in Bristol, Liverpool, and Chester. In Oxford and Exeter it has fallen into disuse, (*i*) both these cities having formerly practised it. The disuse of so convenient a remedy seems to be remarkable, especially as in case of Exeter there is ample proof that the custom was acted upon from an early until a late period; (*k*) and it may

(*a*) *City of London v. Clerke*, Cath. 181; *Fanshawe v. Cocksedge*, Dougl. 114.

(*b*) *Thoms. Entr.* 386.

(*c*) *Mayor, &c., of Gloucester's case*, Yearb. 21 Hen. 7, fol. 16, pl. 25, vid. *Smith v. Sheppeard*, Cro. Eliz. 711; vid. inf. n. (*o*).

(*d*) *Neal v. Dennis*, 1 Keb. 473.

(*e*) *Mayor, &c., of Bristowe's case*, 14 Hen. 4, fol. 20, pl. 24; *Plowd. Com.* 129.

(*f*) *Guston v. Shittington*, Bendl. 21, pl. 36; *Dyer*, 279, B.; vid. *Cro. Eliz.* 110, *Com. Dig. Trade*, D. 2; 1 *Ld. Raym.* 386, per *Holt*, C. J.; *Simpson v. Bithwood*, 3 *Lev.* 307, 308.

(*g*) *Municipal Corporations Act*, s. 14.

(*h*) *Day v. Paupierre*, 18 L. J. (N. S.) Q. B. 270, 272. Form in which the custom has been certified, vid. 1 *Wms. Saund.* 67, note (i); 1 *M. & Gra.* 39; 4 *M. & Gra.* 944.

(i) 1 *M. & Gra.* 41, note.

(*k*) *Hals v. Walker*, 1 *Rol. Abr.* 552, 553, 554; 7 *Vin. Abr.* 232, pl. 3; vid. 1 *M. & Gra.* 26; *Brown's case*, cited 2 *Show.* 374; *Michill v. Hore*, 1 *Leon.* 132.

even be a question whether the practice might not be revived there, because all the customs of Exeter, it is said, have been confirmed by statute,^(l) and a statute is never obsolete. The debt need not have accrued within the jurisdiction of the corporate court to which the process belongs,^(m) nor need the parties be resident within it.⁽ⁿ⁾

Again : a custom without a quid pro quo to have twopence for every hide of every sheep, cow, or ox that is killed or sold within a borough, &c., is good.^(o) So the custom of York, that a feme covert may take land purchased by her baron, in gift from him, &c.^(p) A custom in a borough that an infant may devise was held good before the Statute of Wills;^(q) but it seems doubtful whether a custom to demise by parol an incorporeal hereditament, as a right of common, is good;^(r) though a custom to devise gavelkind lands held in socage was decided to be good, temp. Car. I.^(s) However, it is a known rule, that customs are to be construed strictly, especially where they derogate from general rights of property.^(t) Yet the customs of borough-English *and gavelkind, as is well known, have always been held good; and so a custom in Nottingham, that the widow should have dower of the moiety, &c.^(u) So a custom in Lichfield, where the corporation have an immemorial market, and ought to repair the way to it, and to appoint a bellman whose duty is to sweep the market-place, and in recompense thereof, that the bellman should have from those that brought grain to sell in the market and untied their sacks, a pint of grain, &c.^(z) though generally goods are not liable to toll unless they are sold in the market. So a custom that the lord of the fee of Chipping Sodbury should have one penny for every hundred of cheese pitched for sale in the market place of the town.^(y) So customary rights to port dues.

(l) Temp. Eliz. 1 Rol. Abr. 554, l. 35.

(m) *Harington v. Macmorris*, 5 Taunt. 228; vid. tam. *Traub v. Schmidt*, Mann. Nl. Pri. Dig. 351, cor. Lord Eldon, C.; *Bruce v. Wait*, 1 M. & Gra. 1; *Anon.*, 2 Show. 374; *Com. Dig. Attachment*, D. Vid. as to pleading payment under foreign attachment, 2 H. Bla. 362; 4 M. & Gra. 944; 4 D. L. 824; 4 C. B. 287; 4 B. & A. 646; 5 Taunt. 234. Replication, 6 Dowl. 749. Practice, 9 M. & W. 790; 15 Law J. (N. S.) Q. B. 332.

(n) *Harington v. Macmorris*, 5 Taunt. 228; *Mallum v. Hern*, cited 2 Show. 507; *Jenk. Cent.* 139; *Comb.* 109; *Lucas v. Cotton*, Moar. 79; *Dyer*, 196, B.; qu. tam. 1 Esp. 327; 2 Lutw. 977. 984; *Latch*, 208; 3 Lev. 23.

(o) *Duncomb v. Reeve*, Cro. Eliz. 173. A custom that the corporation should have toll on all boats passing the river which runs by the city is good; *Yearb.* 21 Hen. 7, fol. 16; recognised *Hill v. Hanks*, 2 Bulst. 203.

(p) *Vin. Abr. Customs*, H. pl. 10.

(q) *Yearb.* 37 Hen. 6, fol. 5. 9. A custom that all the houses on the south side of the highway of a vill should be devisable is bad; 40 Assiz. pl. 27, *Abbot of Westminster's case*.

(r) *Lathbury v. Arnold*, 1 Bing. 219.

(s) *Lauder v. Brooks*, Cro. Car. 561. A custom that all leases granted for more than six years are void ipso facto is bad; *Dyer*, 357, B, *Salferde's case*. So that a feme covert should make a will; *Force v. Hambling*, 4 Rep. 60.

(t) 10 Q. B. 57; *Zuizan v. Talmash*, 2 Jo. 142; *S. C. Pollexf.* 561; 2 Show. 131; *Freem.* 263; vid. *J. Bridgm.* 50; *Turner v. Hodges*, Litt. R. 235; *Archer v. Bokenham*, 11 Mod. 160; *King v. Dilliston*, 3 Mod. 224; vid. *Yelv.* 1; *Leon.* 1; *Carter*, 88.

(u) *Yearb.* 5 Edw. 4, fol. 8, and how to plead; et vid. *Co. Litt.* 175 b.

(x) *Hill v. Hawker*, Moor, 835; 7 *Vin. Abr.* 185; 2 *Inst.* 220; *Cock v. Vivian*, 1 *Kelynge*, R. 203.

(y) *Goodwin v. Brookes*, T. Jo. 227. A custom to take toll or dues gives a right

Again: although it is well-known law that a sale in market overt passes the property, and the custom of London is, that every shop within the city is a market overt during every day in the week,^(z) except Sunday; yet it must not be concluded that a custom that a person who has goods pledged to him in London should retain them, *to whomsoever they belong*, until he is satisfied for the sum which is due to him, and for which they are pledged is good; for such custom cannot be allowed even in London,^(a) being contrary to reason, and derogating from general right, and trenching in prejudice of the realm.^(b) Moreover, such a custom is bad, because the acknowledged custom of market overt cannot be extended, any more than any other custom, to similar cases; and, therefore, there is no market overt for pawning,^(c) and every custom, is to be strictly pursued.^(d)

All exclusive customs are not bad; thus a custom that the town crier of a corporate town shall have the exclusive privilege of proclaiming the sale of all goods brought into the borough to be sold by auction is a good custom;^(e) and where a corporation have an immemorial right to a port duty on all corn imported by non-freemen, it is a good custom that factors, free of the corporation, shall receive to their own use that part of the duty which arises from corn consigned to them as factors.^(f)

A custom that no artificers or handicraftsmen, or other shopkeepers or traders by retail, being freemen, shall be permitted to employ, hire, *or set on work in any such handicraft or manual occupation [^{*332}] within the city or liberties, any person not being free of the city, or apprentice to a freeman, has been held good;^(g) but such custom (except in London) is no longer lawful, being abolished by the Municipal Corporations Act.^(h) It is to be observed, that it is not an objection to a custom, that it extends beyond the suburbs or liberties of the city or borough.⁽ⁱ⁾ Thus it has been held that the custom of London to have metage of coals within the port of London, extended from Staines bridge to Yantlett creek;^(k) though perhaps that case may rest on the peculiar ground that the limits mentioned are those of the port of London itself,^(l) and the courts, it is said, take notice of the extent of ports.^(m) So the

to an action of debt to the corporation in general; Yearb. 20 Hen. 7, fol. 1. pl. 2.

(z) Vid. Lyons v. De Paas, 11 A. & E. 326.

(a) R. v. Grimesby, 34 Hen. 6, fol. 25, pl. 33.

(b) Yearb. 7 Hen. 6, fol. 32.

(c) Hartop v. Hoare, Stra. 1187; S. C. more fully, 3 Atk. 44; vid. 4 Vin. Abr. 9; 1 Wils. 8.

(d) R. v. Tappenden, 3 East, 187; Barker v. Beardwell, 1 Show. 4; Hartop v. Hoare, Stra. 1188; Yearb. 5 Hen. 7, fol. 41, pl. 6.

(e) Jones v. Waters, 1 C. M. & R. 713. He would be liable to an action for refusing to perform the duty; Laybourn v. Crisp, 4 M. & W. 320.

(f) Fanshawe v. Cocksedge, Dougl. 114; City of London v. Clerke, Carth. 181. Custom as to deputy day meters in London, Laybourn v. Crisp, 4 M. & W. 320, and evidence, S. C. Previous verdict against others in like circumstances good evidence of the custom; City of London v. Clerke, Carth. 181; Bull. N. P. 233.

(g) Shaw v. Poynter, 2 A. & E. 312.

(h) S. 14.

(i) Harris v. Wakeman, Sayer. 255.

(k) City of London v. Manley, 1 Rol. Abr. 557; Laybourn v. Crisp, 4 M. & W. 320.

(l) 1 Rol. Abr. 557; Calth. 115; Stra. 466; Co. Entr. 535. 537.

(m) Per Eyres, J., Stra. 469; vid. Stockton Railway Company v. Barrett, in Dom. Proc., 7 M. & Gra. 877.

same custom has been held good with respect to portorage.⁽ⁿ⁾ Another instance of a custom said to be a good exclusive custom is, that all the inhabitants should grind at the corporation mill; and in declaring in an action on the case for not following the custom, the corporation need not allege that they are bound to repair the mill.^(o)

A custom may be good, that an innkeeper may sell a horse put up without any agreement in his inn, when the horse has eaten his value, and its owner refuses or omits to pay the cost. This is the custom of London and Exeter, though the general law does not give innkeepers any such right;^(p) but this does not extend to enable an innkeeper to sell any but the same horse who has eaten, &c., for its own keep, and not for the keep of other horses;^(q) nor does it extend to enable the innkeeper to sell the horse of any person but the person who puts it to stand at livery; a stolen horse or a lent one is not within the custom.^(r) The custom called tanestry, viz., that a corporation should receive from every inhabitant of the borough a duty not exceeding twenty shillings, in consideration of the corporation keeping the bulwarks and prisons of the borough in repair, is good;^(s) and the custom of keeping the bulwarks, &c., and the custom of taxing, are to be considered as two distinct duties or customs, for the breach of either of which the corporation and the inhabitants have mutual remedies.^(s)

All customs in boroughs, that no person not being free of the municipal corporation or of certain guilds, mysteries, or trading companies [*333] *within the borough, shall keep any shop or place for putting to show or sale any or certain wares or merchandize by way of retail or otherwise, are abolished by the Municipal Corporations Act;^(t) but that, perhaps, does not affect the stat. 1 & 2 Phil. & M. c. 7, by which persons dwelling out of the boroughs^(u) within England are prohibited from selling or causing to be sold by retail (not by wholesale) any woollen cloth or linen cloth (unless of their own making,) any haberdashery wares, grocery wares, or mercery wares, in any corporate town, &c., except in open fairs, upon pain to forfeit and lose for every time so offending the sum of six shillings and eightpence, and the whole wares so sold, proffered or offered to be sold, one moiety to be to the use of the crown, the other to him that shall seize and sue for the same in any of the king's courts of record.^(v) And it may perhaps be doubted whether

(n) Fazakerly v. Wiltshire, Stra. 462; vid. Collyer v. Stennett, 4 M. & Gra. 676.

(o) Kemp v. Gord, Styl. 421; vid. Drake v. Wigglesworth, Willes, 654; and Coryton v. Lithebye, 2 Wms. Saund. 112, as to pleading; et vid. Harbin v. Greene Hob. 189, as to laying the custom.

(p) Warbrooke v. Griffith, 2 Bulst. 254; S. C. Moor. 876; vid. Anon., 1 Vent. 71; Gilbert v. Berkely, Skin. 648.

(q) Mosse v. Townsend, 1 Bulstr. 207. Semb. the horse must be put up by a guest; Binns v. Pigott, 9 Car. & P. 208, per Parke, B.

(r) Vin. Abr. Inns, B. pl. 7. (s) Griffith v. Williams, Sayer, 56. (t) S. 14.

(u) The statute extends only to country people, not to persons dwelling in market towns; Davis v. Leving, 2 Lev. 89; S. C. 3 Keb. 139. 200.

(v) It has been held that an indictment on the statute may be brought at the quarter sessions of the corporation; R. v. Davis, 3 Keb. 29. 34. 41. On the other hand, it has been laid down that on this statute an indictment does not lie; Glass's case, 3 Salk. 350. The "King's Court of Record" mean the superior courts at Westminster; Dyer, 236, A.; Anon., Moor. 421; Wilkinson v. Nethersole, Cro. Eliz.

the above cited words from the Municipal Corporations Act extend to such a custom as the following, which prevails in the city of Oxford, and which has been held good,^(x) that if a person not being a freeman expose goods for sale in the city, except in fairs or markets, he is liable to the payment of six shillings and eightpence to the two bailiffs of the city by way of penalty; for such custom does not necessarily mean exposing for sale in any shop or place kept by the party, and does not necessarily therefore fall within the above words. Also the custom has been held good, although it made no exception of the sale of victuals; and also a custom to distrain for the said penalty was held good, provided the goods distrained were not disproportioned in value to the amount of the penalty.^(y) If, however, it had appeared that the power of distraining any amount of goods of various kinds for such penalty had been part of the entire custom with respect to foreigners offering goods for sale, then, as such power of excessive distress is bad,^(z) the whole custom must have been held to be bad; for it has been decided that where a custom is entire, you cannot make one part of it good, and another part of it ill; but the whole must stand or fall together.^(a) So it would seem that a custom to the following effect would still be good, that if any person make and expose for sale ill and unserviceable goods, the chief officers of the company, within whose mystery or craft the making of such goods falls, may have used, &c., to seize them and carry to the guildhall, and empanel a jury, and, if the jury find them ill and unserviceable, to break them.^(b) Where there are two distinct customs, it is not necessary for a person, who would avail himself of one, to take notice [*334] in pleading of the other, provided the customs are of such a nature that mutual actions will lie upon them.^(c)

As customs derogating from rights of property are bad, so also customs in direct defiance of reason, and infringing the rights of personal liberty, will not be allowed. Thus, to cite the instance put by a very learned lawyer,^(d) a custom in a borough, that if any stranger came within the limits of the borough, the corporation might cause him to be beaten at their pleasure, would be wholly repugnant to reason, and therefore void. In general also a custom to take away liberty by imprisonment is not good.^(e) So a custom in a borough, that the mayor might

530; *vid. Cro. Car.* 112; 6 *Rep.* 19; 4 *T. R.* 111; 1 *B. & A.* 285. 287; *Cowp.* 369; *Willes*, 125, note (1); *Styl.* 340. (*x*) *Moir v. Munday, Sayer*, 181. (*y*) *Ibid.*

(*z*) 41 *Edw.* 3, fol. 26; *Godfrey's case*, 11 *Rep.* 44; *Hargrave v. Wood*, 2 *Lutw.* 1457; *Moir v. Munday, Sayer*, 181.

(*a*) *R. v. Corye, Styl.* 87; *Harbin v. Greene, Hob.* 189.

(*b*) *Bolton v. Throgmorton, Skin.* 55.

(*c*) *Gray's case*, 5 *Rep.* 78 b; *Griffith v. Williams, Sayer*, 56.

(*d*) *Per Littleton, Yearb.* 34 *Hen.* 6, fol. 26, B; *vid. Paramore v. Verall*, 2 *Anders.* 151; *Chambers v. Wolltston, Styl.* 78.

(*e*) *Wheeler v. Combe*, 2 *Show.* 695, 3d edit.; *Langham's case*, *March*, 185—189; *Porter v. Bond*, 3 *Keb.* 262. 365. But the custom of *Carlisle*, that if any person is sued in covenant in the court before the mayor, and any other persons be bail, if the principal do not pay the damages they are recovered against him, &c., that the bailiffs have used to take the bodies of such bail, &c., was, it is said, held good; *Collsherd v. Jackson, Freem.* 63. A custom to disfranchise for words spoken cannot be supported even in *London*; *City of London v. Clerke*, 3 *Keb.* 811,

cause to be arrested any one who was suspected of a felony committed within the borough, to put him into the borough gaol, and confine him there three days, and then to remove him to the nearest king's prison, was decided to be wholly void; for the corporation, according to the custom, could not admit the prisoner to bail within the three days, although the felony of which he was suspected might be bailable; and because, if they could have a right to imprison for three days, there was equal reason why they should imprison for three weeks or three years; and therefore the custom was adjudged to be wholly contrary to reason, and void.^(f) Generally a custom to do a wrong is void;^(g) but it is a good custom that supervisors of victuals duly appointed should seize and burn tainted meat exposed for public sale.^(h)

We have seen that it cannot be considered as a perfectly settled question, whether a grant destroys a prescription for the same thing; but this at least is certain, that where a corporation, or an individual, has a lawful easement or profit by prescription, another custom, which is likewise time out of mind, cannot take away the first; for the one is as ancient as the other.⁽ⁱ⁾

Customs in corporate towns may exist, and be enforced as against the corporation;^(k) and there is some, though scanty, authority to show that such customs will be enforced (in the absence of other adequate, legal [*335] *or equitable remedies) by mandamus; thus the custom of Norwich being that every one is a lawful freeman, and has right to be sworn in, who has served seven years' apprenticeship; on their refusal to swear the applicant, a mandamus issued to compel the corporation to do so.^(l)

For the breach of a custom a corporation may have an action on the case as the general remedy. Where the custom is to pay money, the proper remedy is frequently an action of debt, even though there is no bye-law founded on the custom; but they must set out precisely what the custom is.^(m)

As has been observed, customs differing from the general law of the realm are not necessarily on that account bad. To some instances in proof of the position, which have been already given, others may be added. Thus it has been held that a custom is good, that an executor or administrator may be bound to pay a simple contract debt due by

812. As to a custom to commit to prison in certain cases in London, *City of London v. Coals*, 2 Keb. 752.

(f) *Yearb.* 22 Edw. 4 fol. 43, pl. 4; *vid.* *Johns v. Smith*, Cro. Jac. 314.

(g) *Turner v. Denning*, 3 Bulstr. 326.

(h) *Vaughan v. Wood*, 2 Mod. 56; *Yearb.* 11 Edw. 4, fol. 6; 1 Mod. 202.

(i) *Bland v. Mosely*, cited 9 Rep. 58; *vid.* *Hughes v. Keymish*, 1 Bulstr. 116; *et vid.* 2 B. & C. 691.

(k) *Griffith v. Williams*, Sayer, 56; *Anon.*, Lofft's R. 556.

(l) *Townsend's case*, 1 Keb. 470, 659; *vid.* *Reg. v. Dalby*, 3 Q. B. 602. A father being a freeman is admissible as a witness to prove the custom under which his son claims the freedom of the corporation; *Commins v. Mayor, &c., of Oakhampton*, Sayer, 45.

(m) *Mayor, &c., of Wilton v. Wilks*, 2 Ld. Raym. 1135; *per Lee, C. J.*, 1 Wils. 236; *Mayor, &c., of Colchester v. Sympson*, 6 Mod. 21; *Mayor, &c., of York v. Wellbank*, 4 B. & A. 438. They must bring the action, and not a stranger: *Bodwic v. Fennell*, 1 Wills. 235.

his testator or intestate in the same order as if it were a bond debt ;(*n*) and although the plaintiff suing upon an obligation were a stranger to the corporation, he will be bound by the custom as much as though he were a citizen.(*n*) However, it must be remarked that this decision has been disputed by other authorities.(*o*) The custom of Bristol, that a covenant made ore tenus shall bind as strongly as if made in writing, &c., is good ; but it must be taken strictly, and shall not extend to executors ;(*p*) and it is well known that, by the custom of various boroughs and ancient towns, lands were devisable long before they were so by the general law.(*q*) A custom may enlarge an estate further than the common law allows. Thus a grant *sibi et suis* by custom may give an estate tail ;(*r*) but a custom cannot curtail an estate of the rights and powers which are inherent in it. Thus a custom, that if a tenant in fee shall lease for more than six years, such lease is merely void *ipso facto*, has been adjudged to be bad.(*s*) Though it is not generally actionable to call a woman a whore, yet in London(*t*) and Bristol(*u*) by the custom it is so ; the action lying of course in the courts of the corporations respectively.

*But customs *in opposition* to the common law, in order to be good and valid, must be reasonable and beneficial ;(*tt*) and they [*336] are *stricti juris*, and not to be extended.(*uu*) Therefore where the custom of a borough was for the bailiffs to have twopence for every hide of cattle killed within the borough, or to distrain the hide, this does not justify them in tanning the hide distrained, even to preserve it from rotting.(*x*) And though customs may deviate from the general course of the common law, yet customs repugnant to the first principles of justice will always be held bad. Ex. gra. a custom not to summon or give notice to a defendant in a suit commenced against him, is contrary to the first principles of justice, and cannot be supported,(*y*) although it could be shown that such a course had long been the practice of the inferior court of the corporation in which the custom was established.(*z*)

Customs in opposition to the common law are not always necessarily

(*n*) Snelling's case, 5 Rep. 82 ; S. C. Cro. Eliz. 409. One cannot declare at common law, and reply a custom, for that is a departure ; Bold v. Wallis, 1 Siderf. 142 ; Co. Litt. 304 a. (*o*) Per Holt, C. J., in *Masters v. Lewis*, 1 Ld. Raym. 57.

(*p*) *Wade v. Bemboe*, 1 Leon. 2.

(*q*) *Fitz. N. B.* 198, L. ; Co. Litt. 110 a ; Litt. s. 167 ; Co. Litt. 111 b, Harg. note (140) ; *Mene's case*, 9 Rep. 133 b. What not an ancient town ; *Fitz. N. B.* L. marg.

(*r*) *Newton v. Shafto*, 2 Keb. 174. (*s*) *Salford's case*, Dyer, 357, B.

(*t*) *Barker v. Beardwell*, 1 Show. 4 ; *Selw. Ni. Pri.* 1224, 6th ed. ; *Stainton v. Jones*, Dougl. 380, note ; *Brown v. Averie*, 2 Show. 25 ; *Argyle v. Hunt*, Stra. 187 ; *vid. id.* 1187, 1188 ; 2 M. & Rob. 121 ; 4 Burr. 2032 ; *Selby v. York*, Cas. Temp. Hardw. 392 ; Com. Dig. Defamation, D. 10.

(*u*) *Hind v. Thompson*, Andr. 299 ; *Power v. Shaw*, 1 Wils. 62.

(*tt*) Per Lord Kenyon, C. J., *Noble v. Durell*, 3 T. R. 274 ; Litt. s. 169 ; 6 T. R. 760. 764.

(*uu*) *Lavie v. Phillips*, 3 Burr. 1780 ; *Savage's case*, 2 Leon. 109.

(*x*) *Duncombe v. Reeve*, Cro. Eliz. 783.

(*y*) *Fisher v. Lane*, 3 Wils. 297, recognized *McDaniel v. Hughes*, 3 East, 372 ; *Bruce v. Wait*, 1 M. & Gra. 1.

(*z*) *Vid Traub v. Schmidt*, 3 Meriv. 369 ; *Andrews v. Clerke*, Carth. 25, 26.

on that account void ; though it is a good reason for considering customs void that they are opposed directly to the enactments of a statute ; and customs in borough courts, contrary to the ordinary rules of pleading, are not necessarily bad. Thus in debt on bond, in a borough court, the defendant confessed it to be his deed, but according to the custom *petiit quod inquiratur de vero debito secundum consuetudinem per patriam* ; and it was held, on error, that the custom was good.(a) So debt on a *concessit solvere*, where it lies by custom, may be brought in general (though not where the plaintiff is executor,(b)) without setting out the custom in full. But a custom that an action of covenant may be brought upon a covenant made *ore tenus* does not bind the executors of the covenantor ; for every custom is to be construed strictly,(c) and must be strictly pursued by those who would take the benefit of it,(d) it not being competent for them to extend it to similar cases.(e) Nor does a custom that a party may declare generally on a *concessit solvere* extend to relieve from the obligation to *prove* a consideration arising within the jurisdiction, though it be unnecessary by the custom to plead so.(f) Nor does debt in *concessit solv.* lie against executors or administrators in general.(g) So by custom an action may be maintained *in [*337] a borough court upon an *assumpsit solvere* and money lent, given in evidence, and without setting out the custom at large.(h)

It is a trite rule that every custom must be laid in pleading, whether in inferior or superior courts (in the former it is not in general necessary to plead the custom, because they take notice of their own customs), as a positive usage in fact. *Quod bene licuit* is not sufficiently direct and positive ;(i) the allegation ought to be that the inhabitants, &c., have been used time whereof, &c., to do the thing, &c., relied upon (or as the case may be), and the reason why it must be alleged to have been used is, that there cannot be a valid custom unless from time to time the custom is put in use or practice. Where a court is held by custom time out of mind, &c., that must appear on a judgment of the court, and also that the borough is an ancient borough,(k) and every custom must be alleged to be in *facto* and not in *feri*.(l) However, there are exceptions to this rule arising out of the nature of the custom alleged. Thus a custom may be alleged that every freeman *may* take an apprentice, &c.(m) So

* (a) *Grice v. Chambers*, Cro. Eliz. 894 ; *Anon.*, 7 Vin. Abr. 192, pl. 19. So *Rogerson v. Jacob*, Freem. 281. The custom prevails in London and Norwich, S. C. *Brightman v. Parker*, 3 Keb. 212 ; and in Bristol, 3 Keb. 251. 302. Vid. *Wheatley v. Hanson*, 2 Show. 666, 3d edit. ; *Cole v. Daniel*, 2 Show. 424.

(b) 7 Vin. Abr. 192, pl. 21 ; vid. *Anon.*, Godb. 49 ; *Twigg v. Roberts*, Styl. 145 ; *Story v. Atkins*, 2 Ld. Raym. 1427 ; vid. *Bruce v. Wait*, 1 Sc. N. R. 81 ; *Thorn v. Chinnock*, 1 Sc. N. R. 141.

(d) *R. v. Tappenden*, 3 East, 186.

(e) *Hartop v. Hoare*, Stra. 1188.

(f) *Williams v. Gibbs*, 5 A. & E. 208. What not sufficient proof, S. C.

Precedent of pleadings in *concessit solvere*, and form of a record, 1 M. & Gra. 6, note (a).

(g) *Pinchon's case*, 9 Rep. 87 b ; *Hodges v. Jane*, Styl. 199 ; *Oreswick v. Armery*, Styl. 228 ; vid. *Vaughan*, 97. 100 ; 1 Wms. Saund. 68, note (2) ; *Twigg v. Roberts*, Styl. 145.

(h) *Story v. Atkins*, 2 Ld. Raym. 1432 ; *Hontier's case*, 4 Leon. 105.

(i) 3 Salk. 113, pl. 10 ; *Clearywalk v. Constable*, Cro. Eliz. 110 ; *Brown v. Foster*, Cro. Eliz. 392.

(k) *Withers v. Wooden*, 1 Keb. 846.

(l) *Protector v. Kingston*, Styl. 480.

(m) *Windhurst v. Gibbs*, T. Raym. 4.

that every citizen may devise in mortmain.⁽ⁿ⁾ So that every person having served a seven years' apprenticeship, and having become a free-man of any trade, may use any other trade within the corporate limits.^(o)

But, probably, it is better to plead a custom of this nature thus, that if any person or persons hath or have a messuage or house in the said city, near, adjacent, or contiguous and adjoining to another messuage or house of another person, and the windows or lights of the messuage first aforesaid look over the said other messuage, &c., although such messuage first aforesaid, and the windows thereof, be and were ancient, yet such other person, being the owner of such other ancient messuage, by and according to the custom of the said city, from time whereof, &c., used and approved, well and lawfully *may, might, and hath and have used*, at his and their will and pleasure, by building, to exalt or erect his or their house, &c., to such height as the said owner or owners shall please, against and opposite to the said lights and windows, &c., unless there be or hath been some writing, instrument, or record of an agreement or restriction to the contrary thereof, &c.^(p)

Customs in borough courts, in contradiction to the established rules of practice, seem mostly, though not always, to be bad on that ground. Thus, where in an action in the court of Salop, the defendant was essoigned, and had day per essoign, and the plaintiff had the same day, *on [*338] which the defendant, being demanded, did not appear, et habuit [*338] diem per default secundum consuetudinem villæ prædictæ given him by the court to such a day, on which the parties appeared and judgment was given against the defendant per nihil dicit; it was held that the custom was altogether bad, for the defendant had made discontinuance and was therefore out of court, and after that no day could be given him.^(q) If, however, the judgment of the borough court had been given *on a verdict*, the discontinuance would have been aided by the Statute of Jeofails of Hen. 8, which extends to inferior courts, and is to be favourably construed to give a remedy.^(r) If a court in a borough is held by letters-patent, a custom time out of mind of such a court cannot be alleged.^(s) If it be held by immemorial custom, then in error on a judgment in such court stating the custom, &c., it is not competent to the party to assign for error that there is no such custom; for such assignment is directly contrary to the record.^(t) We may observe that a dis-

(n) Yearb. 21 Edw. 4, fol. 28; Cro. Car. 347.

(o) R. v. Bagshaw, Cro. Car. 347.

(p) The Salters' Company v. Jay, 3 Q. B. 109. The above is an abbreviated form of stating the custom of London respecting ancient lights, now abrogated, in all cases where the access of light has been enjoyed for twenty years without interruption,^f by 2 & 3 Will. 4, c. 71 S. 3; S. C. There was a similar custom at York; Bland v. Moseley, cited 9 Rep. 58.

(q) Peplow v. Rowley, Cro. Jac. 357. The continuance may be taken until an uncertain day by custom; Jesson v. Laxon, Cro. Car. 254; Rowland v. Veale, Cowp. 21; 1 Wms. Saund. 90, note (1); 3 B. & A. 605; Stra. 563.

(r) Philor v. Boson, 3 Salk. 130; 32 Hen. 8, c. 30, s. 1. But a discontinuance after verdict is helped by no statute; Cro. Eliz. 320, pl. 8; vid. 2 Keb. 448. 626.

(s) Bringate v. Bohun, Freem. 361; Long v. Nethercote, Cro. Car. 143; Tomkin v. Jourden, Styl. 131.

(t) Whistler v. Lee, Cro. Jac. 359.

continuance is never aided by the appearance of parties, though it is otherwise of a miscontinuance.^(u) There is one case in which error may be assigned on a record of a judgment in a borough court, contrary to the record, viz. where the judge is only judge de facto, being disabled to sit as judge, strictly speaking, for want of compliance with some statutory requirement.^(x) Still it was held that a custom to take out capias without summons previously issued might be good.^(y) But that could only be the case where the customs of the borough or city are confirmed by parliament.^(z) Upon writ of error of a judgment in a borough court, it has been said the Court of Queen's Bench is to take notice of the particular laws and customs of the court where the judgment was given; though it was held that on habeas corpus the inferior jurisdiction must, in their return, set forth the particular law or custom whereby they justify the commitment, otherwise the court above is not to take notice of them.^(a) A custom to bring dower by plaint is bad, except in London and Oxford, where customs to that effect have been confirmed by parliament.^(b) Except in London, a custom for the mayor to take recognizances would formerly have been held bad,^(c) but now, as by the Municipal Corporations Act every mayor *is a justice of the peace for [339] the borough virtute officii, he may take recognizances like any other justice of the peace,^(d) every justice of the peace being by himself a judge of record,^(e) and as such empowered to take recognizances, which none but judges of record can do.^(f) The custom of Bristol, that in debt on bond the defendant may have a writ of inquiry after a cognovit actionem, has been recognized and allowed in the superior courts,^(g) and so a custom in Norwich to the same effect,^(h) although it has been distinctly stated that there is no writ of inquiry of damages in debt;⁽ⁱ⁾ the rule, however, if it is one, has not been by any means closely observed, and in very many cases writs of inquiry have been allowed in the superior courts in direct opposition to it.^(k)

There is some difference of opinion amongst the authorities as to whether a custom in a borough court to try by six jurors is good or not; but

(u) *Bradley v. Banks*, Cro. Jac. 283, 284; vid. *Cowp.* 21.

(x) *Hippesley v. Tuck*, 3 Salk. 249; vid. another case, *Walsh v. Collinger*, Cro. Eliz. 320; vid. *Stra.* 639; 9 Vin. Abr. 486.

(y) *Harland v. Cooke*, Freem. 319, 320.

(z) *Hed v. Brown*, 2 Keb. 846; vid. *Moravia v. Sloper*, Willes, 38; *Read v. Wilmot*, 1 Ventr. 220; *Hall v. Booth*, 1 Mod. 236; 2 Rol. R. 277; *Smith v. Boucher*, 1 Kelynge, 144. In *Earl of Leicester's case*, Plowd. Com. 384, it is said that a void custom cannot be set up by statute.

(a) *Redham v. Waters*, Salk. 269; vid. 3 M. & Gra. 202; 3 A. & E. 324; 2 D. & L. 68.

(b) *Armorer v. Barns*, 3 Keb. 421; vid. id. 326.

(c) *Chamberlaine v. Thorpe*, Cro. Eliz. 186; vid. 2 Wms. Saund. 71 c, note.

(d) Vid. 5 Chit. Burn. Just. 689, 29th edit.; 7 Geo. 4, c. 64.

(e) 9 Edw. 4, fol. 3, pl. 10; *Lambard's Eirenarch.* 61; 14 Hen. 8, fol. 16.

(f) *Yearb.* 7 Hen. 4, fol. 34, pl. 22; *Lamb. Eiren.* 62.

(g) *Brightman v. Parker*, 1 Mod. 96.

(h) *Grice v. Chambers*, Cro. Eliz. 894; *Smith v. Watson*, 7 Vin. Abr. 192.

(i) *Belbin v. Butt*, 2 M. & W. 422; *Roche v. Champain*, 1 Exch. 11, 12; vid. 2 B. & P. 446.

(k) *Anon.*, 1 Ventr. 330; *Jones v. Shiel*, 3 M. & W. 433; *Arden v. Connell*, 5 B. & A. 885; 2 Wms. Saund. 107 a. note (b); 7 Vin. Abr. 289, pl. 58; *Yearb.* 42 Edw. 3 fol. 25, 26; Cro. Jac. 415; 5 Dowl. 403; 7 Dowl. 616; 8 & 9 Will. 3, c. 11, s. 8; 2 Cro. & J. 673.

upon the whole the better opinion seems to be, that a custom to try by more or fewer than the general law appoints is bad.(*l*)

It is also a doubt, or rather there is a decision both ways on the question, whether it be good in pleading to state a borough court to be held by custom *and* by charter.(*m*)

The customs of a corporate city or borough will extend, in general, to affect all the corporations constituted for trade, &c., and domiciled in the jurisdiction, just as if they were individuals; and it is not at all clear but that a customary right of lien may belong to such a corporation for the purpose of enforcing the payment of debts, even where by statute specific remedies are given it for the recovery of such debts :(*n*) on the other hand, customs of corporate boroughs or cities may avail against such corporations domiciled within them; thus it seems that in the city of London, &c., the custom of foreign attachment applies to debts of corporations in the hands of persons within the city as well as to debts of individuals ;(*o*) for although in one case we find it intimated that foreign attachment does not apply to the case of a corporation, "because there ought to be three capias and non est inventus returned, &c.,(*p*) yet this ground appears to be no longer, if ever it was, available; for [*340] *foreign attachment is not a proceeding against the person, but against the goods, of the debtor,(*q*) and, therefore, the objection that a capias does not lie against a corporation seems not admissible, especially as it had been held, as we before observed,(*r*) that trespass might be brought against a corporation, though there capias is part of the process; and, besides, there is the consideration, that by 1 & 2 Vict. c. 110, arrest on mesne process is abolished in all cases where the plaintiff used to sue out a writ for that express purpose.

*MUNICIPAL CORPORATIONS. [*341]

WE now proceed to the subject of Municipal Corporations, the law relative to which depends very much, though not exclusively, on the provisions of the late acts, and some decisions of the courts, in explanation thereof. The rest of the law affecting this description of corporations affects them in common with other corporations, and will be found principally in the foregoing pages, where the general principles of the law of corporations have been discussed.

(*l*) *Helier v. Gray*, 1 Keb. 189; *Tomkie's case*, Freem. 322, acc.; *Rogerson v. Jacob*, Freem. 318, cont.; vid. Cro. Car. 259; 7 Vin. Abr. 191; Rol. Abr. 564; 2 Kelynge R. 224.

(*m*) *Radford v. Taylor*, 1 Show. 393; *Samders v. Viger*, id. acc.; *Briggs v. Collinson*, 6 Mod. 60, cont.

(*n*) *Green v. St. Katherine's Dock Company*, 19 L. J. (N. S.) Q. B. 53.

(*o*) *Case of the Hamburgh Company*, 1 Mod. 212; S. C. Freem. 207. In this particular case of foreign attachment the custom would apply, it is conceived, though the corporation were not domiciled within the city.

(*p*) *Anon.*, 2 Show. 373.

(*q*) *Day v. Paupierre*, 18 L. J. (N. S.) Q. B. 272; vid. 5 Taunt. 852.

(*r*) Vid. sup. p. 278.

On the 9th of September, A.D. 1835, "An Act to provide for the Regulation of Municipal Corporations in England and Wales" received the royal assent. This important statute, the principal object of which seems to have been to reduce all the municipal corporations in England and Wales to an uniform model, having been modified and altered by subsequent enactments, we shall, instead of setting forth the whole of it, including those parts which are no longer applicable, endeavour to present at once a correct view of the law as it stands at present, after all the variations which have been introduced into the scheme and policy of the Mutual Corporations Act by the subsequent statutes.

The first section of that act(s) is as follows:—"Whereas divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs(t) of England and Wales, to the intent that the same might for ever be and remain well and quietly governed; and it is expedient that the charters by which the said bodies corporate are constituted should be altered in the manner hereinafter mentioned; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of all laws, statutes, and *usages*,(u) and so much of the royal and other charters,(x) grants, and letters-patent, now in force relating to the several boroughs named in the schedules (A.) and (B.) to this act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act, shall be and the same are [*342] hereby repealed and annulled." The *result of this enactment is to sweep away so much of all usages, customs, charters, grants, and local and other acts of parliament, as are contrary to or even inconsistent with the enactments we are about to survey; but it also seems to confirm so much of such charters, whether royal or otherwise, and so much of such grants, whether royal or otherwise, as are not in the above predicament as respects the boroughs mentioned in the schedules to the act.(y) For the purpose of uniformity, the Municipal Corporations Act carefully provides for the name of each municipal corporation under the new system, thus (s. 6): "And be it enacted, that after the first election of councillors under this act in any borough, the body or reputed body corporate, named in the said schedules in connexion with such borough, shall take and bear the name of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable in law, by the council hereinafter mentioned of such borough, to

(s) 5 & 5 Will. 4, c. 76, s. 1.

(t) As to the meaning of borough, compare Co. Litt. 109 a, with Mad. Firm. Burg. p. 2; Fortesc. De Laud. cap. 24, and the note on this chapter in the English translation, A. D. 1775; et vid. Du Cange, Gloss. in voce Villa; Com. Dig. Burrough. A. Meaning of town, 2 Exch. 725; Mayor of Colchester v. Goodwin, Carter, 118. Hamlet, Dyer, 142, B., note. City, county of city, suburbs, liberties, &c., vid. Index.

(u) Vid. sup. 322.

(x) This is a legislative recognition of the principle that corporate privileges might spring from other than royal charters.

(y) Vid. these schedules, Index, in voc.

do and suffer all acts which now lawfully they and their successors respectively may do and suffer by any name or title of incorporation; and the mayor of each of the said boroughs shall be capable in law to do and suffer all acts which the chief officer of such borough may now lawfully do and suffer, so far as the same respectively are not altered or annulled by the provisions of this act." On this enactment, it is necessary to observe, that the courts have fully settled, that although the name of the corporation be changed, as in many cases it is, by the operation of this section, yet the effect of the statute is not to create a new corporation in any case, but merely to continue the old corporation, so that all the rights, claims, franchises, privileges, prescriptions, and customs, as well as all the debts, liabilities, and duties of the corporation, as it stood on the day the statute passed, remain and inhere in the remodelled corporation, so far as they are not contrary to, or inconsistent with, the provisions of the act.^(z) There never was for a moment any interruption in the identity of the remodelled corporations with those named in the schedules to the act. Now inasmuch as since the above enactment, the corporations mentioned in the schedules can only sue and be sued, accept and grant, by their proper statutory name, it is obviously a most important object to find the true statutory name in every case of a corporation within the state. The result of the decisions is this:—In all boroughs within the state, i. e. mentioned in the schedules (A.) and (B.), the proper style of the corporation is "Mayor, Aldermen, and Burgesses of the Borough of ——" In all cities within the statute, the proper style is "Mayor, Aldermen, and Citizens of the City of ——" ^(a)

*All municipal corporations mentioned in the schedules of the Municipal Corporations Act, are thereby made public corporations. [*343] tions, and the courts will take judicial notice of them; whether or not they take judicial notice of other municipal corporations not included in either of those schedules, some few of which class are still in existence,^(b) has not been decided, any more than it has whether they will take notice of the corporations which have been created by the crown in Manchester and other places by virtue of the Municipal Corporations Act, and other subsequent statutes.

But though municipal corporations are public bodies, statutes exclusively relating to them are not, in general, public statutes to be noticed by the judges as such, but merely private acts to be pleaded as in other

(z) Att.-Gen. v. Wilson, 9 Sim. 30, per Patteson, J., in Mayor, &c., of Ludlow v. Taylor, 7 C. & P. 537; Att.-Gen. v. Kerr, 1 Beav. 420; Doe d. Governors of Bristol Hospital v. Norton, 11 M. & W. 928. But the new *boroughs* are not the same exactly as the old ones; vid. inf. p. 346, note (k).

(a) Att.-Gen v. Mayor, &c., of Worcester, Ld. Chanc. T. T. 1846, 2 Phill. 3. That the crown, temp. Jac. 1, assumed the right of creating a place into a city, vid. 1 Dyer's Privil. U. of Cambr. 345. 489, where a letter of that king is cited, assuring the university that he would not, as he had been desired, constitute Cambridge a city. As to the common law definition of citizen, vid. Palmer v. Pendlebury, Andr. 276; R. v. Hall, 1 B. & C. 132; Merew. & Steph. Hist. of Boroughs, 1157. 1185; of London, 16 Vin. Abr. 556, 557. Anciently, the terms citizens and burgesses were, in effect, synonymous, as well in England as in France; Madox, Firm. Burg. 3, reference to page 52, note (u).

(b) Ex. gra. Malmesbury, 3 Q. B. 577; 4 C. B. 41; Saltash, 1 Dowl. & L. 851; Holt, 19 Law J. (N. S.) Exch. 198.

cases of private acts. Thus the stat. 13 & 14 Car. 2, c. 5, for regulating the manufacture of stuffs in the city of Norwich, is merely a private statute, and must have been pleaded.(c) But the statute of 1 & 2 Will. & Ma. for reversing the judgment in quo warranto temp. Car. 2, against the city of London, is a public act in every clause of it.(d)

Though nothing in the Municipal Corporations Act operates to destroy, suspend, or infringe the identity of the corporations on which it operates; yet the effect of it and subsequent statutes has altered very materially, in some cases, the local limits over which the municipal jurisdiction of the corporation extended respectively. The seventh section of the act stands thus(e) :—"And be it enacted, that, after the passing of this act, the metes and bounds of the several boroughs named in the first section of the said schedules, and for the purposes of this act, shall be the same as the limits thereof respectively settled and described in an act passed in the second and third year of the reign of his present majesty, intituled *An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in England and Wales, so far as respects the Election of Members to serve in Parliament* ;" and the metes and bounds of the several boroughs named in the second section of the said schedules for the purposes of this act shall be and remain as the same are now taken to be, until such time as parliament shall otherwise direct: provided [*344] nevertheless, *that notwithstanding anything herein contained, no parish or place, or part of any parish or place, which is detached from the main part of such borough, or county of a city, or town corporate, shall, after the passing of this act, be included within any such borough or county; and, subject to this provision, the metes and bounds of every such borough and county shall include the whole of the liberties(f) of such borough or county, by land and by water, as the same now are or are taken to be."

The effect of this was to give to the boroughs mentioned in the *first sections* of the schedules (A.) and (B.) the parliamentary election boundaries for municipal purposes, and to continue to the boroughs mentioned in the *second sections* of those schedules the boundaries they had before the act for the same purposes. But the last paragraph of the proviso,

(c) *Adcock v. Gill*, Sayer, 60; *R. v. Wild*, 2 Keb. 686; *vid. Anon.*, 2 Show. 318.

(d) *R. v. City of London*, Skin. 294.

(e) 5 & 6 Will. 4, c. 76, s. 7. The proviso is repealed by 6 & 7 Will. 4, c. 103, s. 1. The statute mentioned in the body of the section is 2 & 3 Will. 4, c. 64. The new boroughs are not the same, in legal contemplation, for all purposes, as the ancient ones; *Beadsworth v. Torkington*, 1 Q. B. 791.

(f) Meaning of liberty, *Lever v. Hosier*, 2 Mod. 47; *Mayor, &c., of London v. Gifford*, 2 Mod. 39. 41; *Baker v. Johnson*, Hutt. 106; *prima facie* the town and liberties are the same, per *Bridgman, C. J.*, *Carter*, 122; *vid. Att.-Gen. v. Mayor, &c., of Rochester*, Finch, R. 193; *R. v. Ricard*, 1 Keb. 626. As to distinction between liberties and suburbs, *Jones v. Walker*, Cowp. 624; 4 Inst. 228; *Sayer*, 255; 1 Rol. Abr. 557; *vid. Carter*, 115; 1 B. & Ad. 100; 2 Keb. 743. The latter part of the section met the inconvenience, that frequently there were precincts locally situated within the limits of the corporate authority, but exempt from its jurisdiction, usually originating either in ecclesiastical privileges, or as having been the site of the castle of the lord of the borough; 1 Munic. Corpor. Commiss. Rep. 31; *vid. Merew. & St. Hist. Bors. Index*, "Castle;" *Thomas's case*, Cro. Eliz. 137; *Madox, Firm. Burg.* p. 14; Co. Entr. 528, A.; *Anon.*, *Dyer*, 279, B. pl. 10.

by operating to include within the borough the liberties of it, had the effect of annexing certain large tracts of land lying beyond the limits of the towns, which the legislature had never intended should be brought within the boroughs for municipal purposes; consequently it became necessary to repeal the obnoxious clause, which was done thus(g):—
 “Whereas by the provisions of an act passed in the last session of parliament, intituled *An Act to provide for the Regulation of Municipal Corporations in England and Wales*, the boundaries of certain boroughs named in the schedules (A.) and (B.) to the said act annexed were made to include all the liberties of such boroughs, and large tracts of land lying beyond the limits of the towns, and which ought not to be included therein; be it therefore enacted, &c., that so much of the said act for regulating corporations as provides that the metes and bounds of every borough and county named in the said act shall include the whole of the liberties of such borough and county by land and by water, is hereby repealed; and that notwithstanding anything in the said act contained, no part of any county, or of the liberties of any borough, town or city named in the first sections of the schedules (A.) and (B.), &c., which before the passing of the said act was not part of such borough, town or city, or within the parliamentary boundary of such borough, town or city, shall be taken to be within the metes and bounds of any such borough, town or city, or within the county of such borough, town or city, or to be within the jurisdiction of the justices of such borough, town or city,* or county of a borough, town or city, and that no part of any county, or of the liberties of any borough, town or city, [*345] named in the second sections of the said schedules (A.) and (B.), and which was not part of such borough, town or city, before the passing of an act passed in the third year of his majesty, intituled *An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in England and Wales, in so far as respects the Election of Members to serve in Parliament*,(h) shall for the purposes of the said act passed in the last session of parliament, be taken to be within the metes and bounds of any such borough, town or city, or within the county of any such borough, town or city, or to be within the jurisdiction of the justices of such borough, town or city, or county of a borough, town or

(g) 6 & 7 Will. 4, c. 103, s. 1, (Royal Assent 20th August, 1836).

(h) 2 & 3 Will. 4, c. 64. Where the style of a borough in Schedule (A) of the Municipal Corporations Act was given as mayor, aldermen and burgesses of Stamford, in the county of Lincoln, and in Schedule (O) of the stat. 2 & 3 Will. 4, c. 64, the same borough was classed as in the county of Lincoln, it was held not to prove that the whole borough was in that county, nor to operate to transfer any part of it from Northamptonshire (in which county a part of it lies) to Lincolnshire: *Reg. v. Mitchell*, 2 Q. B. 636. That act has no effect to alter the jurisdiction over any part of a county added by it to a borough; its operation is expressly restricted to other purposes; 2 Q. B. 643.

As to evidence of jurisdiction of a county of a city, *Rogers v. Wood*, 2 B. & Ad. 245; *R. v. Antrobus*, 2 A. & E. 738.

Evidence of general reputation is admissible as to the boundaries of a town, but not of houses having stood in a particular spot; *Ireland v. Powell*, Peake, Evid. 13, 5th edit.; per Williams, J., 2 A. & E. 795.

When compensation jury under a railway act is to be taken from the county of the city, *In re Cooling*, 19 L. J. (N. S.) Q. B. 25; 8 Vict. c. 18, ss. 39. 50.

city, but every such part, until parliament shall otherwise direct, shall be taken to be within and to be subject to the same jurisdiction as the county, riding, parts or divisions of a county, other than a county of a borough, town or city wherein such part is situated, or with which it has the longest common boundary; provided also, that all the provisions of the said act for regulating corporations concerning the liability of the rate-payers of any place or precinct which, under the provisions of this act, shall not be included within any such borough, town or city, or county of a borough, town or city, to any debt to which the rate-payers of such borough, town or city, or county of a borough, town or city, were liable to contribute, before the passing of the said act for regulating corporations, shall be applicable to such place or precinct as if the same had not been included within the metes and bounds of such borough, town or city, under the provisions of the said act for regulating corporations; provided also, that no election of any mayor, alderman, councillor, auditor, or assessor, heretofore made, or any other proceeding whatsoever in any such borough, town or city, since the 25th day of December last,⁽ⁱ⁾ shall be liable to be questioned after the passing of this act, by reason that any such part of any county, or the liberties of any borough, town or city, may or may not have been taken to be part of any such borough, town or city, under the provisions of the said act."

The result is this therefore: As regards the boroughs, cities, counties [346] *of boroughs, and counties of cities, mentioned in the first sections of Schedules (A.) and (B.) respectively, no part of any county, or of the liberties of any of these places, which was not, before the passing of the Municipal Corporations Act, *either* part of such place, *or* within the parliamentary boundary of it, shall be taken to be within the metes and bounds of any such place.

As regards the boroughs named in the second sections of the said Schedules (A.) and (B.) respectively, no part of any county, or of the liberties of any of these places which was not part of such place before the passing of the Parliamentary Boundaries Act,^(k) shall be taken to be within the metes and bounds of such place, or within the county of such place. Hence the limits of the counties of such places mentioned in these sections as are counties of towns, or counties of cities of themselves, are identified for municipal purposes with the limits of such

(i) i. e. A. D. 1835.

(k) Passed July, A. D. 1832. Where a corporation had prescribed to have common for all their freemen inhabiting within the borough and paying *scot and lot*, &c., and by the Municipal Corporations Act, s. 7, the ancient borough was enlarged by the addition of a contiguous parish, they can prescribe in such terms no longer, but the right must be alleged to be in them for all the freemen residing within the limits of the ancient borough, the Municipal Corporations Act not having made the new boroughs the same as the old ones for all purposes; *Beadsworth v. Torkington*, 1 Q. B. 791. And where a right of common was so alleged in an action on the case by a freeman, for disturbance of common, held, on a plea denying the right, that the variance was fatal, though it was proved that the plaintiff, in fact, inhabited within the ancient municipal limits; *S. C.* 1 Q. B. 791. As to the right of voting since the Boundaries Act, s. 37, in detached portions or districts belonging, *vid. Palmer v. Allen*, 6 C. B. 51. *Scot* means share of public burdens; *lot*, the turn to perform public functions and offices; *Merew. & St. Hist. Bor.* 901. 1090, 1091; *vid. Mad. Firm. Burg.* 251, 271, pl. 10; 272, pl. 13.

towns or cities. Various points in the law of counties of cities and counties of towns will require to be stated at some length, in order fully to comprehend the bearing of the above enactment; but we shall postpone the discussion of that subject until we have stated a subsequent enactment relating to detached places, which completes, with the addition of some decisions which appear to be in point to illustrate it, the subject of boundaries of municipal corporations.

The Municipal Corporations Act, in section 8, proceeds thus:—"And be it enacted, that every place and precinct which shall be included within the metes and bounds of any borough as hereinbefore provided, and none others, shall be part of such borough, and in those boroughs which are counties of themselves shall be part of such county, and of none other; (l) and in every case in which the metes and bounds *of any borough or county under the provisions of this act shall [*347] not include any place or precinct which before the passing of this act was part of such borough or county, such place or precinct shall thenceforward be taken to be part of the county wherein such place or precinct is situated, or with which it has the longest common boundary; provided nevertheless, that if any such place or precinct shall have been liable, (m) before the passing of this act, to contribute to any rate made for the purpose of satisfying any lawful debt to which the rate-payers of such borough or county were liable to contribute before the passing of this act, and in case any difference shall arise concerning the proportion of such debt as ought therefore to be paid and contributed in respect of such place or precinct, it shall be lawful for the senior justice of assize for the county of which such place or precinct shall thenceforward be taken to be part, on his circuit, on the application of the council of such borough, or of the chairman of a public meeting of the ratepayers of such place or precinct, to appoint, by writing under his hand, a barrister, not having any interest in the question, to arbitrate between the parties, and by his award, under his hand and seal, to assess the propor-

(l) By the Parliamentary Boundaries Act the parish of Clifton was included in the county of the city of Bristol, which is named in the first section of Schedule (A) of the Municipal Corporations Act; held, in 1836, that the Gloucestershire justices (within which county the parish of Clifton was situate before the passing of the first-mentioned act) had no longer power to make an order for diverting a footway in the parish, for that it was become part of the county of the city of Bristol, and therefore within the jurisdiction of the justices of Bristol and not of those of Gloucestershire; *R. v. Justices of Gloucestershire*, 4 A. & E. 689. Before the act a parish was wholly within the jurisdiction of the justices of a borough which had separate quarter sessions and four justices, but no non-intromittant clause in the charter, though part only of the parish was within the borough, and part only was included within the new boundary of the borough as settled by the act. The overseers of the parish made a poor's rate for the whole, which was duly allowed both by the county and borough justices. An occupier of land in the part without the parish appealed, and, held, that the county sessions had jurisdiction to try the appeal and to amend the rate; for the county justices had jurisdiction, by virtue of 1 Geo. 4, c. 36, before the passing of the Municipal Corporations Act, and that act, in sect. 111, excludes only where the borough was before exempt from their jurisdiction; *Reg. v. Inhabitants of Bridgwater*, 10 A. & E. 711, although the borough had seven justices (vid. 1 Geo. 4, c. 36), at the time of the appeal.

(m) As to liability of borough increased by addition of a district containing a bridge, to the maintenance of the bridge, vid. sup. p. 283.

tion, if any, of such debt as ought therefore to be paid and contributed in respect of such place or precinct; and such arbitrator shall also assess the costs of the arbitration, and shall direct by whom and in what proportion, and out of what fund, the same shall be paid; and such rate as aforesaid shall continue to be levied by warrant of the council of such borough, and paid by such place or precinct, as if this act had not passed, until such proportion shall have been fully paid and satisfied to the treasurer of the borough, and no longer: provided, nevertheless, that every county gaol, house of correction, or lunatic asylum, court of justice, or judge's lodging, which at the time of the passing of this act is taken to be for any purpose within any county, shall still, for all such purposes, be taken to be within such county, any thing herein contained to the contrary notwithstanding."

With reference to the latter proviso, it may be desirable to notice that a felony, committed in a district added to a county of a city, or county of a town, by the operation of the above sections, must be tried by a jury from the county of the city or town.⁽ⁿ⁾ But in case for dis-
[*348] turbing *the plaintiff in taking the profits of the office of judge in the sheriffs' court in London, which is a county of itself, on a suggestion that the office was grantable by the mayor and aldermen, it was prayed that the venire might issue into the next county; but Hale, C. J., refused to award it, because it did not appear by necessary collation from the record that the title of the mayor and aldermen to fill the office would come in question.^(o)

We now proceed to state some points in the law respecting counties of cities and counties of towns, which it will be necessary to be acquainted with in order fully to apprehend the law respecting sheriffs of such counties, and for other purposes connected with the general subject of corporations.

It was early held to be unquestionable that any town or city might be constituted a county of itself by royal charter, and thereby exempted from the jurisdiction of the sheriff of the county within which such city or town was locally situate, provided a sheriff or sheriffs of such county

⁽ⁿ⁾ *R. v. Piller*, 7 C. & Pa. 337; further s. 109, inf. p. 352. It had been held, previously to the statute, that the guildhall of a county of a city may, for the purpose of trying cases at assizes, be considered to be within the body of the county at large; and therefore, the venue in an indictment for perjury committed in the hall was well laid in the county at large; *R. v. Gough*, Dougl. 760; vid. 3 B. & A. 87. In that case the charter creating the city a county of itself expressly reserved power to the king's justices to enter the vill and hold assizes, as they had been accustomed to do previously, and the perjury took place at the trial of a county cause. But any offence committed in the hall during the assizes for the county, unconnected with the execution of the commission for the county, must have been tried in the city, and by a jury from thence; Dougl. 764; 20 Vin. Abr. 316, 317.

^(o) Hardr. 311; vid. *infra*, JURY, SHERIFFS; Stra. 418; Carth. 448. So there is no objection to inhabitants of the county of a city being jurymen on the trial of a quo warranto information against one who claimed to be alderman; *R. v. Higgins*, 3 Salk. 81; S. C. 1 Ventr. 366; vid. 38 Geo. 3, c. 52, s. 1; 5 & 6 Will. 4, c. 76, s. 109. As to committing for trial at county quarter sessions of persons accused of felonies triable at quarter sessions, and committed within the borough, 4 & 5 Will. 4, c. 27, s. 1, which seems to be undisturbed by the Municipal Corporations Act, though the rest of the statute may perhaps be repealed by ss. 1, 107, of the Municipal Corporations Act; Dickens. Q. Sess. 168, 6th ed.

of a city, or county of a town, were constituted at the same time, so that the execution and administration of justice might be provided for as effectually as before the erection into a separate county of the city or town;(*p*) and an act of parliament was not thought to be necessary, nor was it doubted that the crown by letters-patent could enlarge the boundaries of a county of a city or town,(*q*) though, on the other hand, the practice seems to have been to proceed by way of act of parliament, where it was desired to disunite a portion of it from a county of a city or town, and restore it as part of the county at large.(*r*)

It was also laid down that the bounds of the city, and the county of a city, are generally the same;(*s*) and subsequent authorities are to the same effect,(*t*) though the city of A. will not be intended, it is said, to be the same thing as A. in an assignment of perjury in an indictment.(*u*)

With respect to voting for members of parliament for counties of cities and towns, it may be worth while observing that 3 Geo. 3, c. 24, is now *repealed,(*v*) and persons personating voters of any description [*349] for boroughs are made liable as for a misdemeanor.(*x*) The reader will find most of the law on the subject of voting in such corporations more fully indicated hereafter.(*y*)

As to the question whether the courts ought to take judicial notice of a county of a city, or a county of a town :

It has been laid down generally, and without qualification, that the courts will take such notice;(*z*) but there are authorities to the contrary effect;(*a*) the former opinion seems, however, to be much the weightier; and it is settled that the city of London is judicially noticed as a county of itself.(*b*) If, therefore, in a case where the venue is local, it is laid in any other county, and by the body of the declaration the thing declared on appears to have been done, or to have taken place, in the city of London, that discrepancy will be ground of demurrer.

The courts also notice the alterations made in the boundaries of counties of this kind by statute,(*c*) but do not notice particular parts within

(*p*) Mitton's case, 4 Rep. 33; case of the city of Gloucester, Poph. 17; Chester, 4 Inst. 215; Bristol, R. v. Haythorne, 5 B. & A. 410; Com. Dig. County, A.; vid. charter of Edw. 3, making Bristol a county of itself, Yearb. 47 Edw. 3, fol. 26, pl. 74; sup. p. 343, n. (•).

(*q*) R. v. Inhabitants of Norwich, Stra. 177; vid. an instance of this being done by Hen. 6, Mad. Firm. Burg. p. 293.

(*r*) Vid. 1 Timberland's Debates of the House of Lords, p. 52, a bill for disuniting certain hundreds from the county of the city of Gloucester, and restoring them to be part of the city of Gloucester. N. B. There must be an error in the last line of *city* for *county*; vid. R. v. Gough. Dougl. 760.

(*s*) 1 Rol. Abr. 803, pl. 6; vid. Mayor, &c., of Coventry v. Lythall, 10 M. & W. 773. (*t*) Green v. Cubit, 2 Keb. 637; per Twisden, J., 2 Keb. 705.

(*u*) R. v. Stone, 1 Show. 335; Trem. P. C. 148; vid. 1 T. R. 69.

(*v*) 6 & 7 Vict. c. 18, s. 72.

(*x*) S. 83.

(*y*) Vid. infra.

(*z*) Per. cur., Yearb. 34 Hen. 6, fol. 50, B.; Rippon v. Dawson, 7 Dowl. 247; Gibbons v. Roberts, Salk. 266; vid. 7 M. & Gra. 13; 21 Vin. Abr. 117, pl. 26; 20 Vin. Abr. 316; 2 Show. 286; Mayor, &c., of Berwick v. Shanks, 3 Bing. 461; 3 & 4 Will. 4, c. 99, s. 7.

(*a*) R. v. Holland, 2 Kelynge, 221.

(*b*) 1 Vin. Abr. 35, pl. 2.

(*c*) Rippon v. Dawson, 5 Bing. N. C. 206.

such counties^(d) any more than they notice particular towns within counties at large.^(e) But it seems they will notice that there is no such person as "the mayor of the city of Lincoln, in the county of Lincoln," and will quash a mandamus for being so directed, the proper style being "the mayor of the city of Lincoln, in the county of the city of Lincoln."^(f)

With respect to trials in counties of towns, the law stands thus :

By a statute of Geo. 3, it was enacted as follows :^(g) "Whereas there at present exists in the counties of cities and towns corporate, within this kingdom, an exclusive right that all causes and offences which arise within their particular limits should be tried by a jury of persons residing within the limits of the county of such city or town corporate, which ancient privilege, intended for other and good purposes, has in many instances been found by experience not to conduce to the end of justice ; and whereas it will tend to the more effectual administration of justice in certain cases if actions, indictments, and other proceedings, the causes of which arise within the counties of cities and towns corporate, [*350] were tried in the next adjoining counties : In order, *therefore, to remedy this mischief for the future, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, in every action, whether the same be transitory or local, which shall be prosecuted or depending in any of his majesty's courts of record at Westminster, and in every indictment removed into his majesty's Court of King's Bench by writ of certiorari, and in every information filed by his majesty's attorney or solicitor-general, or by the leave of the Court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venue in such action, indictment, or information, be laid in any county of any city or town corporate, within that part of Great Britain called England, or if such writ of mandamus be directed to any person or persons, body politic and corporate, that it shall and may be lawful for the court in which such action, indictment, information, or other proceeding, shall be depending, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, indictment, information, or proceeding, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and to award proper writs of venire^(h) and

(d) Sheriffs of Gloucester's case, Cro. Eliz. 264.

(e) R. v. Greep, Comb. 460 ; Thornedike v. Turpington, March, 125 ; Gadsby v. Warburton, 7 M. & Gra. 13 ; Brune v. Thompson, 2 Q. B. 789.

(f) R. v. Mayor, &c., of Lincoln, 12 Mod. 190 ; S. C. Ld. Raym. 1238.

(g) 38 Geo. 3, c. 52, s. 1. The converse had also been held in one case, viz., that indictments for felonies, done in the county at large, might be taken in the county of the city ; vid. Anders. R. 292, pl. 3. The exclusive jurisdiction in boroughs was mainly founded on the old franchise or liberty of *retorna brevium*, Merew. & S. Hist. Bor. 1724, which it has been expressly decided did not become extinct by coming into the king's hands ; Keil. R. 72, pl. 16, cited 1 Vent. 407.

(h) N. B. 7 Geo. 4, c. 64, s. 20, cures a wrong venue, but not a venire into a

distringas accordingly, if the said court shall think it fit and proper so to do. And(*i*) be it further enacted, by the authority aforesaid, that it shall and may be lawful for any prosecutor or prosecutors to prefer his, her, or their bill or bills of indictment,^(k) for any offence or offences committed or charged to be committed within the county of any city or town corporate, to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king for the body of such adjoining county at any sessions of oyer and terminer or general gaol delivery, and that every such bill of indictment found to be a true bill by such jury shall be valid and effectual in law as if the same had been found to be a true bill by any jury sworn *and charged to inquire for the king for the body of the county of such city or town corporate.” [*351]

Then follow other provisions, by which(*l*) indictments found by a grand jury of the county of a city or town, or inquisitions taken before the coroner, may be ordered before the court of oyer, &c., for the said county, to be filed with the proper officer of the next adjoining county, and the defendants removed to the gaol thereof, &c.; the judges(*m*) of the Court of King's Bench, &c., may, on application of the prosecutor, cause persons in custody for offences committed within the county of any city or town corporate to be removed into the custody of the sheriff of the next adjoining county for trial, and coroners direct to the court of oyer, &c., for such adjoining county, inquisitions, &c.; recognisances(*n*) entered into for prosecution of persons for offences committed within the county of any city or town corporate, &c., are to be forfeited, if the parties, on notice of intention to prefer indictments in the next adjoining county do not appear, &c., but(*o*) not to be estreated until the next following sessions for the adjoining county. Persons, (*p*) before whom such recognisances shall be entered into, are to return them to the next court of oyer and terminer for the next adjoining county, upon notice of intention to prosecute at such sessions for any offence committed within the county of any city or town, and after such notice bills shall not be preferred, &c., at any sessions for the county of the city or town; justices(*q*) of

wrong county, *Reg. v. Mitchell*, 2 Q. B. 636; and in such case the judgment must be arrested, as the trial will be without jurisdiction, *id.*, *ibid.*

(*i*) 38 Geo. 3, c. 52, s. 2; *vid.* *Anders.* 292, pl. 3.

(*k*) Where an indictment, found at the borough quarter sessions, commenced thus: Borough of Stamford to wit. The jurors, &c., present, that F. M., late of the parish of St. Martin, Stamford Baron, in the county of Northampton, and within the borough of Stamford, and J. B., late of the same parish, &c., on, &c., with force and arms, in the parish aforesaid, in and upon one W. C., &c., did make an assault, &c. The said parish, being entirely in the county of Northampton, but part of it being part of the borough of Stamford, and the rest of the borough being in the county of Lincoln, and the indictment being removed by certiorari, a venire was awarded into the county of Lincoln. The offence was committed in that part of the parish which is within the borough and within 500 yards of the county of Lincoln: Held, that for the trial to be good in either county, the offence must be laid and tried in the same county; that the venue as laid was in Northamptonshire; that the trial was without jurisdiction, and that the judgment must be arrested; for that, though 7 Geo. 4, c. 64, s. 20, cures a wrong venue, it does not cure a wrong venire; *Reg. v. Mitchell*, 2 Q. B. 636.

(*l*) S. 3.

(*m*) S. 4.

(*n*) S. 5.

(*o*) S. 6.

(*p*) S. 7.

(*q*) S. 8.

oyer and terminer for the adjoining county may order the expenses of prosecution, &c., to be paid as if the indictment had been tried in the court of the county of the city or town, and(*r*) for the purposes of the act Yorkshire is next adjoining county to Kingston-upon-Hull, and Northumberland is next to Newcastle-upon-Tyne; and then by the Municipal Corporations Act(*s*) it is added, that Northumberland shall be considered next adjoining county to Berwick-upon-Tweed, Gloucestershire to Bristol, Cheshire to Chester, and Devonshire to Exeter.

Then the first-mentioned act(*t*) went on to provide thus: "Provided always, that nothing in this act shall extend, or be construed to extend, to the cities of London and Westminster, or the borough of Southwark, or the city or county of the city of Bristol, or the city or county of the city of Chester, or to the criminal jurisdiction of the city of Exeter and county of the same city, unless in cases of indictment removed into his majesty's Court of King's Bench by writ of certiorari from any court of criminal jurisdiction within the said city or county of the said city of Exeter." But this clause, so far as relates to Bristol, *Chester [**352*] and Exeter, is repealed.^(u) And it is further enacted,^(x) "That the town of Berwick-upon-Tweed shall be taken to be a county of a town corporate, and to be within all the provisions of the act of 38 Geo. 3, and that after the 1st day of May, A. D. 1836, and until his majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within any county of a city or town corporate, all bills of indictment for offences committed within such county of a city or town corporate shall be preferred, and all proceedings upon such indictments shall be had, as in the last-mentioned act is authorized to be done." That is, prosecutors, upon entering into a recognizance in 40*l.* for paying the extra costs attending the prosecution out of the county of the city, may prefer indictments for offences committed therein to the jury of the county next adjoining, &c.

The result therefore is, that the enactments of the 38 Geo. 3 are applicable to every county of city, except London, Westminster and Southwark, and also to the newly constituted county of a town of Berwick-upon-Tweed. Consequently, in actions depending in any of the courts of Westminster, where the venue is laid in the county of a city or town corporate in England, the court, on application of either party, may award the venire, &c., to the sheriff of the county next adjoining, except in the cases of London, Westminster, and Southwark,^(y) and it seems to be immaterial for this purpose, whether the next adjoining county be a county palatine or not.^(z) Again, if the venue in any indictment removed into the Queen's Bench by certiorari be laid in a county of a town, that court may order the trial to be by a jury of the county next adjoining,

(*r*) S. 9.

(*s*) 5 & 6 Will. 4, c. 76, s. 109, Sched. C. (*t*) 38 Geo. 3, c. 52, s. 10.

(*u*) 5 & 6 Will. 4, c. 76, s. 109. The exception is complete, and extends as well to civil as to criminal proceedings; *Cole v. Gane*, 3 D. & L. 369; *vid.* 1 Wils. 77.

(*x*) 5 & 6 Will. 4, c. 76, s. 109. *Vid.* as to cost, 38 Geo. 3, c. 52, s. 12; *R. v. Nottingham*, 4 East, 208.

(*y*) *Cole v. Gane*, 3 D. & L. 369; *Doe d. Mayor, &c., of Bristol v. —*, 1 Wils. 77. As to changing the venue to a county of a city or town, *Bird v. Morse*, 7 Taunt. 385. As to directing writ of summons to a defendant inhabiting a county of a city, &c. *Ripon v. Dowson*, 7 Dowl. 247. As to changing venue in action against sheriffs of London, *Salk.* 670. (*z*) *R. v. St. Mary*, 7 T. R. 735.

and may award writ of venire, &c., accordingly, without subjecting the prosecutor to the above recognizance.(a)

With respect to the place in which justices of assize, &c., may hold courts, it is now the law, that such courts may be holden for a county at large, and also for a county of a city or town, in any court house or other building, whether in or belonging to such county at large, or in or belonging to such county of a city or town, indiscriminately; and also they are empowered to adjourn the court from one to the other as they see fit, provided that they shall not be authorized to hold any such court in any place more than three miles distant from the county, city, or town, for which such court is holden.(b)

*SHERIFFS.

[*353]

It will be the most convenient course to proceed immediately to the subject of corporate sheriffs, owing to its immediate connexion with the subject of counties of cities and towns.

By the joint operation of the Municipal Corporations Act, and the Municipal Administration of Justice Act,(c) it is enacted, that in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester,(d) Coventry, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester and York; and in the counties of the towns of Caermarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council shall, on the 9th day of November, at the quarterly meeting in every year, appoint a fit person to execute the office of sheriff, with the like duties and powers(e) as the sheriff, or the person filling the office of sheriff, in the said towns and counties respectively would have had if this act (i. e. the Municipal Corporations Act) had not passed; and every sheriff so appointed shall hold his office until the appointment of his successor. A criminal information will be

(a) 38 Geo. 3, c. 52, s. 1; 4 East, 208; R. v. Goff, R. & Ry. C. C. R. 179; R. v. Mellon, id. 144, that the offence must be laid to have been committed in the county of the city. (b) 2 & 3 Vict. c. 72, s. 1.

(c) 6 & 7 Will. 4, c. 105, s. 5, amending the 61st section of the former act. The stat. 1 Rich. 2, c. 2, prohibiting any one, who has been sheriff of a county for a year, to be within three years next ensuing, made sheriff again, does not apply to sheriffs of counties of cities and towns; R. v. Haythorne, 5 B. & C. 429, note.

(d) As to the duty of sheriff of county of city of Chester, in executing criminals for offences committed in the county at large, 5 & 6 Will. 4, c. 1.

(e) Where there was no sheriff before the passing of the Municipal Corporations Act, which was the case in some of the above places, ex gra., Oxford, where the bailiffs had the execution of writs from the city courts, but the sheriff of Oxfordshire executed the process of the superior courts, the effect of the above enactments is merely to invest the city sheriff with the powers of the bailiffs in this respect; the sheriff of Oxfordshire retains the power to execute process of the superior courts within the city; Grainger v. Taunton, 3 Bing. N. C. 64; S. C. 3 Scott, 393. A corporation having *retorna brevium* may sue the sheriff of the county at large in an action on the case, if he enter and serve process; Vill. of Derby v. Foxley, 1 Rol. R. 118. Before the passing of the act the mayor and bailiffs had the execution of all process in Berwick-upon-Tweed; vid. 3 Bing. 461; 2 Burr. 847. These corporate sheriffs are no longer required to take the declaration in 9 Geo. 4, c. 17, since 5 & 6 Will. 4, c. 28; but they must take the oaths mentioned 3 Geo. 1, c. 15, s. 21; Wats. Sheriffs, 17, 2nd edit.

granted against the party elected, if he refuses to take upon him the office, unless he have paid a fine, which it has been agreed should stand in lieu of service.^(f) And it is no answer that he was, when elected, in a state of disability, legal or otherwise, to serve the office, if the disability were such as he might himself, and it was his duty to, have removed.^(g)

A subsequent statute enacted,^(h) that the office of sheriff shall not be deemed an office of profit, disqualifying from being chosen mayor or councillor, or creating any disqualification for any other office named in the Municipal Corporations Act; and with respect to this, as to all other municipal offices, a person duly elected will not in general be heard to disable himself;⁽ⁱ⁾ and besides, as regards the office of sheriff [*354] *in particular, it is laid down, that no man can be exempt except by act of parliament or letters-patent;^(j) for by ancient prerogative the crown has a natural interest in the person of every subject for him to serve in such functions as he may be appointed to.^(k)

The office being an annual one, and necessary in these counties of cities and towns, a mandamus to proceed to election will issue, if the corporation delay to elect at the proper time.^(l) An attorney is privileged from serving the office,^(m) because his privilege is that of the court to which he belongs, and not personal to himself.

In case the sheriff is interested in the cause, the venire and other writs must be directed to the coroner, and always must whenever the sheriff is an improper person to direct them to;⁽ⁿ⁾ if the coroner be also a party to the suit, then the direction must be to persons appointed by the Court, and nominated by the master, called elisors.^(o) Therefore, where the sheriff and coroner were both members of the corporation, in a suit by the corporation, the court directed the process to two persons as elisors.^(o) But where in trespass the defendant justified under the custom of foreign bought and foreign sold, within the city of York, and issue was taken on the custom; upon a suggestion that the sheriff and coroners of York were citizens, and that there were no freeholders within the county of the city except citizens, to try the

(f) *R. v. Wodrow*, 2 T. R. 731; *R. v. Grosvenor*, 1 Wils. 18.

(g) *Att.-Gen. v. Read*, 2 Mod 299; *S. C. Trem. P. C.* 559.

(h) 5 & 6 Vict. c. 104, s. 8.

(i) *R. v. Larwood*, Carth. 306; *S. C. Salk.* 467; *vid. tam. Harrison v. Evans*, 3 Bro. P. C. 465. As to exception in case of an attorney, *vid. sup.*

(j) *Moor. R.* 111; *Pelham's case*, Savil. 43; *Earl of Shewsbury's case*, 9 Rep. 46; *R. v. Larwood*, Salk. 168; *vid. Garland v. Carlisle*, 2 C. & M. 77; *S. C.* 4 Cl. & F. 701. (k) *Knowles v. Luce*, *Moor.* 109; *vid. 1 Ld. Raym.* 32.

(l) *Stra.* 1180. The same person may be re-elected; 5 B. & C. 429, note.

(m) *Mayor, &c., of Norwich v. Berry*, 4 Burr. 2109; *S. C.* 1 W. Bla. 636.

(n) *R. v. Warrington*, Salk. 152. As to challenging the array because sheriff is related to some one of the jurors, *Kynaston v. Mayor, &c., of Shrewsbury*, Andr. 85. 104; or a corporator, 10 M. & W. 274.

(o) *Mayor, &c. of Norwich v. Gill*, 1 Dowl. 246, where see the form of a writ in such case; *et. vid. 4 Dowl.* 6. As to poundage, the stat. 29 Eliz. c. 4, does not extend to judgments of the corporation courts, but it does to judgments of the superior courts executed by sheriffs of cities, &c., and therefore the latter are entitled in such cases to the same poundage as sheriffs of counties at large; *Lyster v. Bromley*, Cro. Car. 287; *Davis v. Griffiths*, 7 Dowl. 204.

issue; if that were admitted, or not denied, a venire facias was to be awarded to the next county.(p) So if the coroner is defendant, in a cause in which the sheriff has not returned a writ of ca. sa., and it is sought to attack the latter, the writ of attachment must issue to elisors.(q) But generally, when the sheriff is in contempt, the writ of attachment issues to the coroner (if he is a proper person,) and not to the mayor; if the offender have gone out of office, the writ is directed to the new sheriff.(r)

Where there are two sheriffs, but not where two persons, as in Middlesex, make one officer, if one be interested, the venire may be directed to the other;(s) but if one dies after the writ issues, the other *cannot execute it, his power being suspended till the appointment of the successor.(t) [**355*]

The courts took notice how many sheriffs there were in a county of a city or town,(u) and if one died, they could award no process to the other, for his power is suspended.(x) But they did not take notice that the sheriff is an officer of the corporation; and therefore, in an action by the corporation, on a motion to change the venue, there must have been an affidavit of the fact.(y)

The sheriff has an exclusive right in general to execute all process within the corporate limits; but if the sheriff of the county execute a writ within such limits, though it is wrong, for which the corporation might have an action, yet the execution is not illegal or void.(z)

THE COUNCIL.

In every borough to which it relates, the Municipal Corporations Act establishes a council, who are to transact the business of the corporation, by enacting,(a) "That in every borough shall be elected, at

(p) Com. Dig. Action, N. 11; Dyer, 279, B. pl. 10; Benl. 23, cited Waggoner v. Fish, 2 Brownl. 287; vid. Moor. 582; Hardr. 312.

(q) Reg. v. Sheriff of Glamorganshire, 1 Dowl. N. S. 308.

(r) Anon., 2 Ventr. 216. As to effect of one being interested where the two persons make one officer, Corrigall v. London and Blackwall Railway Company, 5 M. & Gra. 219.

(s) Rich v. Player, 2 Show. 286; Letsom v. Buckley, 5 M. & Selw. 144; vid. Thompson v. Farren, 1 Scott, N. R. 275.

(t) Auditor Curle's case, 11 Rep. 4 b.

(u) Per Saunders, C. J., 2 Show. 289; Lamb v. Wiseman, Hob. 70. Where there are two sheriffs, and an escape is made, and one of them dies, vid. Bennion v. Watson, Cro. Eliz. 625. As to the form of declaration, Jones v. Pope, 1 Saund. 34; venue, Griffith v. Walker, 1 Wils. 336. When the action does not lie, 5 & 6 Vict. c. 98, s. 31.

(x) R. v. Warrington, 4 Mod. 65.

(y) Mayor, &c., of Bristol v. Proctor, 1 Wils. 298; Lush's Pract. 352.

(z) Per Hale, C. B., in Atkins v. Clare, 1 Ventr. 406.

(a) 5 & 6 Will. 4, c. 76, s. 25. The corporation acts by the agency of the council; and therefore the acts of the council are the acts of the corporation. Hence a mandamus ought to be directed to the corporation by their corporate name, though the thing required in it to be done is by the statute to be done by the council; R. v. Mayor, &c., of Oxford, 6 A. & E. 349; R. v. Mayor, &c., of Gloucester, 3 Bulstr. 190; S. C. 1 Rol. R. 409; R. v. Mayor, &c., of Abingdon, Salk. 699; R. v. Mayor, &c., of Hertford, Salk. 701; R. v. Mayor, &c., of Norwich, Andr. 180; R. v. Mayor, &c., of Hull, 1 Barnard. K. B. 83; Reg. v. Ledgard, 1 Q. B. 620, 621; Mayor, &c., of Sandwich v. Reg., 10 Q. B. 574, 579; vid. 6 Q. B. 441. And it seems, that,

the time and manner hereinafter mentioned, one fit person, who shall be and be called 'the mayor' of such borough; and a certain number of fit persons, who shall be and be called 'aldermen' of such borough; and a certain number of other fit persons, who shall be and be called 'the councillors' of such borough; and such mayor, aldermen, and councillors, for the time being, shall be and be called 'the council' of such borough; and the number of persons so to be elected councillors of such borough shall be the number of persons in that behalf mentioned in injunction with the name of such borough in the Schedules (A.) and (B) to this act annexed; and the number of persons so to be elected aldermen shall be one-third of the number of persons so to be elected councillors; and on the 9th day of November in this present year, the councillors first to be elected under the provisions of this act, and on the 9th day of November, in the year 1838, and in every third succeeding year, the council for the time being of every borough shall elect from the councillors, or from the persons qualified to be councillors, [*356] *the aldermen of such borough, or so many as shall be needed to supply the places of those who shall then go out of office, according to the provisions hereinafter contained; and that upon the 9th day of November, in the year 1838, and in every third succeeding year, one-half of the number appointed as aforesaid to be the whole number of the aldermen of every borough shall go out of office; and the councillors, immediately after the first election of aldermen, shall appoint who shall be the aldermen who shall go out of office in the year 1838, and thereafter those who shall go out of office shall always be those who have been aldermen for the longest time without re-election: provided always, that any alderman so going out of office may be forthwith re-elected, if then qualified as herein provided: provided also, that the alderman so going out of office shall not be entitled to vote in the election of a new alderman." The meaning of *immediately* here seems to be merely that the councillors who elected the first aldermen should also appoint who were first to go out of office; (b) it does not seem to be considered that an omission to appoint for a week or a month would vitiate the appointment, provided the same councillors were in office who elected the first aldermen. "And(c) be it enacted, that the mayor and aldermen shall, during their respective offices, continue to be members of the council of the borough, notwithstanding anything hereinafter contained as to councillors going out of office at the end of three years." "And(d) be it enacted, that upon the 1st day of November, 1836, and in every succeeding year, one-third part of the number appointed as aforesaid to be the whole number of

on disobedience to a peremptory mandamus, the attachment ought to be against such of the council as refuse obedience; per Lord Denman, C. J., 1 Q. B. 619; Bull. N. P. 201, 202.

(b) Reg. v. Alderson, 1 Q. B. 883. Vid. as to meaning of "*immediately*," 8 M. & W. 281, 287; Cas. Temp. Hardw. 114; 7 M. & Gra. 493, 494; 12 A. & E. 683; 11 A. & E. 119; 9 Q. B. 688; 2 Leon. 77.

(c) Sect. 26.

(d) Sect. 31. The expenses of showing cause against rule for a mandamus, moved for by a disappointed candidate at an election of councillors, are not payable out of the borough fund; Reg. v. Leeds, 4 Q. B. 790.

the councillors of every borough shall go out of office, and in the said year 1836, those who shall go out of office shall be the councillors who were elected under the provisions of this act by the smallest number of votes in this present year, and in the next year, 1837, who shall go out of office shall be the councillors who were elected under the provisions of this act by the next smallest numbers of votes in this present year; the majority of the whole council always determining, when the votes for any such persons shall have been equal, who shall be the person so to go out of office; and thereafter those who shall so go out of office shall always be the councillors who have been for the longest time in office without re-election: provided always, that any councillor so going out of office shall be capable of being forthwith re-elected, if then qualified, as herein provided." And(*e*) be it enacted, that upon the 1st day of November in every year, the burgesses so enrolled in every borough shall assemble and elect, from the persons qualified to be councillors, the councillors of such borough, or such part of them as shall be needed to supply the places of those who shall then *go out of office; provided nevertheless, that whenever any day [*357] by this act appointed for any purpose shall in any year happen on a Sunday, in every such case the business so appointed to be done shall take place on the Monday following."

Such being the constitution of the council, we shall postpone entering upon questions connected with the election and qualification of councillors until we come to the attributes and liabilities of councillors, when the whole subject may be discussed with greater advantage. At present, we proceed to state the functions of the council.

By an enactment already stated, (*f*) it is provided that the corporation, by the council, shall do and suffer all acts which such body corporate, and its successors, lawfully might have done and suffered, &c. The effect of this is to make the council the ministers or agents of the corporation; but it is to be remarked that the council are neither *the* corporation, nor are they in themselves *a* corporation. (*g*) With respect to the acts of the body, it is enacted, (*h*) "that all acts whatsoever, authorised or required by virtue of this act to be done by the council of such borough, and all questions of adjournment, or others, that may come before such council, may be done and decided by the majority of the members of the council, *who shall be present* (*i*) at any meeting held in pursuance of this act, the whole number present at such meeting not being less than one-third part of the number of the whole council; and at all such meetings the mayor, if present, shall preside; and the mayor, or, in the absence of the mayor, such alderman, or in the absence of all the aldermen, such councillor, as

(*e*) Sect. 30.

(*f*) Vid. sup., p. 342, sect. 6.

(*g*) Per Patteson, J., in Reg. v. Paramore, 10 A. & E. 286; Reg. v. York, 2 Q. B. 850; per Coleridge, J., in Mayor, &c., of Lichfield v. Simpson, 8 Q. B. 73; per Patteson, J., 5 Q. B. 963. But in some senses it is the governing body in the corporation, vid. dict. per Ld. Denman, C. J., 1 Q. B. 619.

(*h*) Sect. 69.

(*i*) By 5 & 6 Vict. c. 104, s. 2, it is made unlawful for any member of the council of any borough to vote or to take part in the discussion of any matter before the council, in which such member shall, directly or indirectly, by himself or his partner or partners, have any pecuniary interest.

the members of the council then assembled shall choose to be the chairman of that meeting, shall have a second or casting vote in all cases of equality of votes; and minutes of the proceedings of all such meetings shall be drawn up and fairly entered into a book to be kept for that purpose, and *shall be signed by the mayor, alderman, or councillor presiding at such meeting, (k)* and the said minutes shall be open to the inspection of any burgess, ^(l) at all reasonable times, on payment of a fee of one shilling: provided always, that, previous to any meeting of the council held by virtue of this act, a notice of the time and place of such intended meeting shall be given three clear days at least before such meeting, by fixing the said notice on or near the door of the town hall of the [358] *borough; and such notice shall be signed by the mayor, who shall have power to call a meeting of the council as often as he shall think proper; and in case the mayor shall refuse to call any such meeting, after a requisition for that purpose, signed by five members of the council at the least, shall have been presented to him, it shall be lawful for the said five members to call a meeting of the council, by giving such notice as is hereinbefore required in that behalf, such notice to be signed by the said members instead of the mayor, and stating therein the business proposed to be transacted at such meeting; and in every case a summons to attend the council, specifying the business proposed to be transacted at such meeting, signed by the town clerk, shall be left at the usual place of abode of every member of the council, or at the premises in respect of which he is enrolled a burgess, three clear days at least before such meeting; and no business shall be transacted at such meeting other than is specified in the notice; provided always, that there shall be in every borough four quarterly meetings in every year, at which the council shall meet for the transaction of general business, and no notice shall need to be given of the business to be transacted on such quarterly days; and the said quarterly meetings shall be holden at noon on the 9th day of November, or if the 9th day of November shall fall on a Sunday, on the day following, and at such hour on such other three days before the 1st day of November then next following, as the council, at the quarterly meeting in November, shall decide; and the first business transacted at the quarterly meeting in November shall be the election of mayor."

As will be observed, the power of adjournment is supposed to belong to the council, as is obvious from the mode in which it is spoken of in the above section; and in fact, as has been before observed, the power of adjournment appears to be at common law incident to every meeting of a corporate body; and though the council is not the corporation, yet

(k) The minutes ought to be entered at the meeting, and signed by the person presiding at the meeting, and not after it separates; *R. v. Mayor, &c., of Evesham*. 8 A. & E. 266. An entry in the minute-book is not evidence of an appointment, or any other act or thing that ought to be done under the common seal; *Reg. v. Mayor, &c., of Stamford*, 6 Q. B. 433.

(l) By 7 Will. 4 & 1 Vict. c. 78, s. 22, any burgess is at liberty, at all seasonable times, to make any copy of, or take any extract from the book above-mentioned, and also to make any copy or take any extract from any order in council of such borough for the payment of any money.

it represents the corporation, and, as appears, is the only representative of it, and the only mode or channel through which it can act, there being no provision made in the Municipal Corporations Act for aggregate meetings of the whole corporation, and the continuing any such aggregate meeting as might in any borough have been customarily held under the old system, would be invalid as a usage or custom inconsistent with the act; and the same of a meeting of such kind held under a charter, for that part of the charter which enjoined or provided for such aggregate meeting would be inconsistent with the act, and therefore abolished. Hence it seems a just conclusion, that the meetings of the council are the corporate meetings, and therefore that the power of adjournment is incident.*(m)*

With respect to the question of notice of the meetings of the council, it is to be observed that no notice is necessary for a quarterly meeting; *nor for an adjourned quarterly meeting, if the adjourned meeting [*359] is to do no other business than was before the quarterly meeting in the first instance.*(n)* But if there be an intention to transact other than the ordinary business of a quarterly meeting at such meeting, there ought to be notice of such intention.*(o)*

The council may delegate their functions. “And *(p)* be it enacted, that it shall be lawful for the council of any borough to appoint out of their own body, from time to time, such and so many committees, either of a general or special nature, and consisting of such number of persons as they may think fit, for any purposes which in the discretion of such council would be better regulated and managed by means of such committees; provided always, that the acts of every such committee shall be submitted to the council for their approval.” “And *(q)* everything provided under any local act of parliament to be done exclusively by any particular or limited number, class, or description of the members of any body corporate, named in the said schedules A. and B., the continuance of which is not inconsistent with the provisions of the said act, and also everything provided in any such local acts to be done by the justices, or by some particular class or description of members of such body corporate, being justices, at some court of general or quarter sessions assembled, and which does not relate to the business of the court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council, or by some committee of the council, or any three or more of such committee, to be appointed at a quarterly meeting of the council: provided also, that everything herein authorised to be done at a quarterly meeting of the council may be done at a meeting of the council to be specially summoned for that purpose as soon as may be after the passing of this act.”

As to the question of what is meant by the words “the business of a

(m) Vid. Reg. v. Grimshaw, 10 Q. B. 755.

(n) Reg. v. Thomas, 8 A. & E. 183; Reg. v. Grimshaw, 10 Q. B. 755; R. v. Harris, 1 B. & Ad. 936.

(o) Per Coleridge, J., in Reg. v. Grimshaw, 10 Q. B. 755. What no longer part of the business of a quarterly meeting, 5 & 6 Vict. c. 98, s. 17.

(p) Sect. 70.

(q) 6 & 7 Will. 4, c. 105, s. 8.

court of criminal or civil judicature," we find it has been held that the regulation of the fees of a court of requests comes within their meaning, and that the council had no authority to interfere in it.^(r) This power of appointing committees, however, does not enable the council to throw upon those committees any part of its responsibility to the general body of the corporation, because, as it will have been observed, the acts of these committees must be sanctioned by the council itself before they can be valid. But neither is the council responsible to third parties for acts done under the authority of the Municipal Corporations Act, and [*360] within the competence of the council to *perform, as representing the corporation; for it is the corporation that is acting by and through the medium of the council; and therefore for every act which the council do, provided they are authorized to do it, either by the Municipal Corporations Act, or by the provisions of the charters of the corporations (not being inconsistent or contrary to that act,) or by the general rules of law as applicable to corporations; it is the corporation and not the council, who are responsible, and who must be sued, if a remedy is sought by the party injured by such act. And the same is the case of a nonfeasance; and wherever the council have neglected to do anything that it was their duty as representatives of the corporation to have done, the corporation is responsible.^(s)

The council, it will be seen, from the mode of its construction, is in fact a very fluctuating body, and it has no attribute of the corporate character belonging to itself as a body (unless the statutory one of being bound by its majority,) and therefore it has no perpetual identity; and therefore orders for payment of money made by one council may be brought up to the Court of Queen's Bench by certiorari, and quashed at the instance of a council subsequently elected;^(t) or (as it seems to follow) at the instance of the same council who passed the order. However, this only applies to orders for the payment of money; which are expressly excepted^(u) out of the general enactment of the Municipal Corporations Act, prohibiting orders made in pursuance of it to be removed by certiorari;^(x) and where such an order for payment of money is brought up by certiorari and quashed, the rule absolute must be drawn up naming such party as the court shall decide ought to be charged with costs as prosecutor, otherwise an attachment against such party cannot be obtained.^(y) By the practice of the crown office, when orders are brought up by certiorari, the parties seeking to enforce the orders are considered as prosecutors, and the parties against whom they will be enforced, if the motion fails, and at whose instance the certiorari issued, as defendants.^(z) The costs ought to be made the subject of a separate

(r) *Palmer v. Powell*, 6 M. & W. 627. Appointment of a borough gaoler does not belong to the council as being matter relating to the business of a court of criminal jurisdiction; *Reg. v. Lancaster*, 16 Law J. (N. S.) Mag. Cas. 139.

(s) 1 Q. B. 623.

(t) *Reg. v. Mayor, &c., of Bridgewater*, 10 A. & E. 283. 285; *vid. per Lord Denman, C. J.*, 1 Q. B. 882.

(u) 7 Will. 4 & 1 Vict. c. 78, s. 44. The *resolutions* of the council for the payment of money considered as included, and may also be brought up and quashed; *Reg. v. Mayor, &c., of Warwick*, 8 Q. B. 926. (x) 5 & 6 Will. 4, c. 76, s. 132.

(y) *Reg. v. Dunn*, 5 Q. B. 959.

(z) 5 Q. B. 959, note (b).

motion.(a) Where, however, the council do any act which, either generally or in the particular circumstances of the case, they have no authority as representing the corporation to do, then, such of them as concur in the act (and those who stay away from the meeting at which the act is resolved upon are in strictness to be considered as voting with the majority who decide for such act) are personally responsible to the party injured.(b)

The council are further to appoint trustees to represent the corporation according to the following enactment; the cases to which it

*applies being all those not already provided for by the foregoing [*361] enactments, or by the enactments to be hereafter mentioned relative to charitable trusts.(c)

“(d) be it enacted, that in every borough in which the body corporate, or a particular or limited number, class, or description of members of the body corporate, or of persons appointed by the body corporate, was or were, before the passing of this act, trustees jointly with other trustees for the execution of any act of parliament, or of any trust, or in which the body corporate, or any particular or limited number, class, or description of members or nominees of the body corporate, by any statute, charter, bye-law, or custom, was or were, before the passing of this act, lawfully appointed to or exercised any powers, duties, or functions whatsoever, not otherwise herein provided for, and the continuance of which is not inconsistent with the provisions of this act, the council of such borough, on the day named in such act as last aforesaid, or in the deed or will by which such trust is created, for a new election, nomination, or appointment of trustees, or on which such new election, nomination, or appointment has usually been made (and if there shall be no such day named or usually observed, then on the first day of January in every year,) shall appoint the like number of members of the council, or as near as may be to the like number of members of the council, as there were theretofore members or nominees of such corporate body, who in right of their office were such trustees, or charged with the execution of such powers, duties, and functions, in room of the members or nominees of such corporate body ceasing to be trustees, or ceasing to exercise such powers, duties, and functions by virtue of this act, and in every case of extraordinary vacancy among the trustees or persons so appointed by the council, shall forthwith appoint one other member of the council in the room of the person by whom such vacancy has been made, and to hold his trust or office for such time as the person by whom such vacancy has been made would regularly have held it.”

(a) Reg. v. Greene, 4 Q. B. 646; vid. per Lord Denman, C. J., 5 Q. B. 963.

(b) Anon., Cro. Eliz. 33, pl. 14; Day v. Savage, Hob. 87. Vid. MAJORITY.

(c) Staniland v. Hopkins, 9 M. & W. 178.

(d) S. 73. The corporation are made trustees by s. 72 for executing by the council the powers and provisions of all acts of parliament made before 9th September, A.D. 1835, (other than acts made for securing charitable uses and trusts), and of all trusts other than charitable, of which the said body corporate, or any of the members thereof in their corporate capacity, was or were sole trustees before the term of the first election of councillors under this act; vid. s. 142, inf., and also 9 M. & W. 178. It is also to be observed that the relative *which* in the s. 72, refers not to the next antecedent *acts of parliament*, but to *powers and provisions*; 9 M. & W. 192.

The council, therefore, has just the same power, and no more, than the local act vests in the corporation or the members in their corporate capacity.^(e)

With respect to the powers of lighting, cleansing, paving, &c., the council *may* be invested with all powers for lighting, paving, cleansing, watching, regulating, supplying with water, and improving, which may have been conferred by act of parliament on trustees, by deed of transfer executed by such trustees, the corporate body in such case [*362] *becoming trustee for executing by the council the several powers of such acts; ^(f) and the council is further empowered to order parts of a borough, not within a local act for lighting thereof, to be included within the provisions of such act, so far as relates to lighting, or to any rates authorised to be levied for the purpose of lighting.^(g) The council may also assume the powers of inspectors under 3 & 4 Will. 4, c. 90, for lighting any part of the borough not within a local act for lighting it.^(h)

With respect to the effect of the new legislation, for regulating corporations in towns and cities, upon the local acts subsisting for the regulation of particular matters therein, we may observe that nothing in the Municipal Corporations Act is to effect any local act for the relief of the poor;⁽ⁱ⁾ that offences against local acts are made cognizable by the borough justices with the same powers, &c., as the county justices had before by virtue of such local act;^(k) and that generally, all local acts remain in force, except so far as they are inconsistent with, or contrary to, the provisions of the Municipal Corporations Act.^(l)

Perhaps the most permanently important function of the council is that of making bye-laws, which, as has already been explained, is a power incident to all corporations with whose constitution such a power is consistent. The Municipal Corporations Act charges the council with this power under the following limitations; "And^(m) be it enacted, that it shall be lawful for the council to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force throughout such borough, and to appoint by such bye-laws such *fincs*⁽ⁿ⁾ as

^(e) Reg v. Mayor, &c., of Poole, 7 A. & E. 730.

^(f) S. 75.

^(g) S. 87.

^(h) S. 88. Where a council had assumed such powers relating to a township in the borough, and made an order on overseers to collect and pay a sum named, *vid.* what held to be an insufficient publication of the rate, Reg. v. Whipp, 4 Q. B. 141.

⁽ⁱ⁾ 6 & 7 Will. 4, c. 103, s. 4.

^(k) 7 Will. 4 & 1 Vict. c. 78, s. 31. Where the local act empowers justices to issue a distress warrant for payment of rates due under it, there must be a summons to the party before they can grant it; R. v. Mayor, &c., of Stafford, 3 A. & E. 425; Painter v. Liverpool Oil Gas Company, 3 A. & E. 433. As to form of warrant, *vid. id.* 434, note ^(a). If the local act in any way dispenses with a previous summons and hearing it is different, 3 A. & E. 433; R. v. Benn, 6 T. R. 198; *vid.* 7 T. R. 275.

^(l) Municipal Corporations Act, s. 1.

^(m) S. 90.

⁽ⁿ⁾ Strictly speaking, this term is incorrect; for all fines for offences belong to the crown, 3 Salk. 265. Also to every fine, imprisonment is incident, 8 Rep. 59 b; March, R. 186. The technical term is *pain* to denote the pecuniary mulct assessed by the bye-law.

they shall deem necessary for the prevention and suppression of such offences, provided that no fine so to be appointed shall exceed the sum of 5*l*." From this proviso, therefore, it would at first sight appear that the council could not impose by bye-law a fine or pain over the value of 5*l*. But in a previous action^(o) we find it enacted that aldermen, auditors, and assessors, on refusal to serve, shall pay such a fine not exceeding 50*l*., and the mayor, on refusal, such a fine not exceeding 100*l*., as the council by a bye-law shall declare in that behalf. *Here, therefore, arises one of those occasions of perplexity in the construction of this statute, which are not infrequent, and [*363] which have been observed upon judicially as follows:—"The court is^(p) well aware of the difficulty of putting a construction on this act of parliament, which is free from doubt and perplexity, arising from an endeavour to frame by one act of parliament one universal charter for all municipal corporations, and to combine with that object all the principles of corporation law that are to be found in a long series of judicial decisions." However, the apparent contradiction may be got rid of by construing the act to mean, that the council shall have the whole power of the corporation to make bye-laws affixing pains or penalties of *any amount*, to be agreed upon amongst themselves, in all cases except bye-laws for the suppression, &c., of nuisances, where the amount must not exceed 5*l*., and except bye-laws assessing the sums to be paid for refusing the above-mentioned offices, where the amount is not to exceed 50*l*. and 100*l*. respectively. No judicial decision has as yet occurred to throw any light on the subject. The actual amount of the fine need not be specified in the bye-law; it will be sufficiently certain if it states the limits between which the sum is to range, subject to the discretion of the mayor or of the council.^(q)

There are other very important provisions to the following effect:—

I. "That no such bye-law shall be made unless at least two-thirds of the whole number of the council shall be present."^(r)

II. "That no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof, shall have been sent, sealed with the seal of the said borough, to one of his majesty's principal secretaries of state, and shall have been affixed on the outer door of the town hall, or in some other public place within such borough;^(s) and if at any time within the said period of forty days, his majesty, with the advice of his privy council, shall disallow the same bye-law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation."

III. "That it shall and may be lawful for his majesty, if he shall think fit, at any time within the said period of forty days, to enlarge the time within which such bye-law, if disallowed, shall not come into force; and no

^(o) S. 51.

^(p) 9 M. & W. 195.

^(q) Piper v. Chappel, 14 M. & W. 624; overruling Wood v. Searl, J. Bridgm. 141.

^(r) S. 90.

^(s) The fixing on the town hall, and allowance by the secretary of state, will not make good a bye-law originally defective; Stationers' Company v. Salisbury, Comb. 221; vid. 11 Rep. 54b; Quo Warranto Cas. Att.-Gen., arg. p. 44; 6 Q. B. 383.

such bye-law shall in that case come into force until after the expiration of such enlarged time."

The first observation arises on the provision regulating the proportion of the council who must be present at a meeting for making a bye-law; for it is remarkable that two-thirds are only required to be present; the bye-law may be passed by a majority of these two-thirds; but it would [*364] *seem that every one of these must take part in the proceedings, and vote one way or other, in order to make a valid bye-law, for it would seem impossible to consider that the legislature meant, by requiring the presence of two-thirds, that that proportion should be merely present, and that it did not signify whether they all voted or not.^(t) The object of the act seems to have been to secure for every bye-law the sanction of so large a proportion of the council as would give it unquestionable weight and authority with the community at large, and that object would only be colourably and delusively carried out, if councillors might be present in order to make up the number, but need not take part in the proceedings.

A question arises as to the proper mode of enforcing these bye-laws; for, though it is enacted,^(u) "that all the provisions hereinafter contained relative to offences against this act, punishable upon summary conviction, shall be taken to apply to all offences committed in breach of any bye-law or regulation made by virtue of this act;" yet it is necessary to ascertain, if possible, whether these summary remedies are alternative to the old common law remedy of debt or assumpsit for the amount of the fine or penalty imposed by the bye-law; and it is submitted, that they are not so, but that the corporation, for the execution of all bye-laws made under this act, can only resort to the remedies given by the act; for where an act of parliament incorporated a body of persons, and gave them power to make bye-laws, and to punish the breach of them by fine or amercement, it was held that the corporation were precluded by that enactment from inflicting any other punishment;^(x) and so it would seem, that, for breaches of bye-laws made by virtue of this act, the proper and peculiar remedies are those which are pointed out by the act as applicable for enforcing them.

It appears to be probable that the legislature, in giving these summary remedies, meant to discourage litigation with respect to the statutory bye-laws, the penalty in which must needs (by the statute) be in most cases a sum not exceeding 5*l.*, and a mode of trying the validity of such bye-laws is equally open upon an action of trespass for the distress or otherwise, as it would be upon the action of debt or assumpsit for the amount of the penalty.^(y)

The above section is remarkable, as implying, apparently, that there may be bye-laws made, not by virtue of this act, i. e., not having reference to any of the objects pointed out in the section giving the council

(t) Vid. *In re Rate Payers of Eynsham Parish*, 18 Law J. (N. S.) Q. B. 210.

(u) S. 91.

(x) *Kirk v. Nowell*, 1 T. R. 124, 125.

(y) *Moir v. Munday*; *Sayer*, 181, 185; vid. *Elwood v. Bullock*, 6 Q. B. 383, where vid. instances of unreasonable bye-law, as being in restraint of trade, and for other reasons; et vid. S. C. as to pleading a bye-law made by the council.

power to make bye-laws; but as the act does not appear to contemplate meetings of the aggregate body of the corporation as such for any purpose, and as the power of making bye-laws, is at common law, incident *prima facie to *them only* could make any other bye-laws than [365] those which the council are empowered to make, except where the charter vests the power otherwise, and in that case it would probably appear that such provision of the charter was inconsistent with this act. On the whole, therefore, no practicable mode appears by which any bye-laws other than those which the council are empowered to make, could be legally framed, as the council are empowered to do all that the old corporations were legally competent to.(z) The old bye-laws, it must be remembered, are to be enforced as they were before the act.

The council of any borough is empowered to execute new securities for the repayment and satisfaction of any debt or obligation contracted by or on behalf of the body corporate before the passing of the Municipal Corporations Act, and any money borrowed and applied by the council in or towards the satisfaction and discharge of any such pre-existing debt or obligation, shall be deemed to be a debt contracted before the passing of the said act,(a) and the corporate property is made liable to all bonâ fide debts and contracts entered into or incurred before the passing of the Municipal Corporations Act.(b) Also the council is restrained from selling, mortgaging, or alienating the lands, tenements, or hereditaments, of the body corporate, or any part thereof, except in pursuance of some contract bonâ fide entered into by the old corporation on or before the 5th day of June, 1835, or of some resolution duly entered in the corporation books on or before that day.(c) But, with the approbation of the Lords of the Treasury, the council may make any disposition whatsoever of the real property of the corporation;(d) and since this last enactment, it seems that the approbation of the Lords of the Treasury would be necessary to enable municipal corporations to sell their real property, even in cases where all corporations are empowered absolutely so to do by former statutes, *e. g.*, to the commissioners of Greenwich Hospital (7 Geo. 4, c. 35); to justices for building lunatic asylums (9 Geo. 4, c. 40, s. 15); to the Government under fortification acts (43 Geo. 3, c. 55, and 44 Geo. 3, c. 95); for redemption of land-tax (42 Geo. 3, c. 116, s. 69); to trustees of turnpike roads (7 Geo. 4, c. 76, s. 8); to commissioners of sewers (3 & 4 Will. 4, c. 22, s. 24); to the Commissioners of Woods and Forests (7 Geo. 4, c. 77, s. 9). And this is the more probable, as we find that in future it will not be competent for municipal corporations to sell lands for the purposes of *public undertakings*, without the consent of the Lords of the Treasury.(e)

The terms of the enactment of section 94, are as follow :

(z) S. 6.

(a) 6 & 7 Will. 4, c. 104, s. 1, and 7 Will. 4 & 1 Vict. c. 78, s. 28. This latter act does not sanction borrowing for any other purpose but to pay the debts of the old corporation; 4 Q. B. 893; *vid. Pallister v. Mayor, &c., of Gravesend*, C. B. T. 1850.

(b) *Vid. Houldsworth v. Mayor, &c., of Dartmouth*, 11 A. & E. 490.

(c) S. 94.

(d) 6 & 7 Will. 4. c. 104, s. 2; *inf. p.* 367.

(e) 8 Vict. c. 18, s. 15.

[*366] *“(f) be it enacted, that it shall not be lawful for the council of any body corporate to be elected under this act to sell, mortgage, or alienate, the lands, tenements, or hereditaments, of the said body corporate, or any part thereof, except in pursuance of some covenant, contract, or agreement, bonâ fide made or entered into on or before the 5th day of June, A. D. 1835, by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate on or before the said 5th day of June, or to demise or lease (except in pursuance of some covenant, contract, or agreement, bonâ fide made or entered into on or before the said 5th day of June, by or on behalf of such body corporate, on or before the said 5th day of June; or except in the cases hereinafter mentioned) any lands, tenements, or hereditaments, of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements, or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and in every lease, which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned)(g) be reserved and made payable during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same: provided nevertheless, that in every case in which such council shall deem it expedient to sell and alienate, or to demise and lease for a longer term than thirty-one years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements, or hereditaments, it shall be lawful for such council to represent the circumstances to the Lords Commissioners of his Majesty’s Treasury; and it shall be lawful for such council, with the approbation of the said Lords Commissioners, or any three of them, to sell, alienate, and demise, any of the lands, tenements, and hereditaments, of the said body corporate, in such manner, and on such terms and conditions as shall have been approved by the said Lords Commissioners; provided always, that notice of the intention of the council to make such application as aforesaid shall be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough, one calendar month at least before such application, and a copy of the memorial intended to be sent to the said Lords Commissioners shall be kept in the Town Clerk’s Office during such calendar month, and shall be freely open to the inspection of every burgess at all reasonable hours during the same.”

It has been contended, that the corporation would not be indictable for contravening this branch of the statute; for to do so, would not be [*367] *a misdemeanor, or an offence of so public a nature as to be the subject of an indictment;(h) but this seems questionable, since

(f) S. 94. As to s. 97, vid. *Mayor, &c. of Arundel v. Holmes*, 8 Dowl. 118.

(g) Ss. 94, 95. S. 96 empowers to demise for seventy-five years, &c.

(h) 4 Q. B. 773.

the decisions that the lands, &c., are held in trust for the benefit of the public of the borough.

The power of disposition given above has been since extended thus: “And⁽ⁱ⁾ be it enacted, that the power of disposition, given to the council of any body corporate, in the instances of demises for seventy-five years, authorised by the said act, shall extend to the demise or lease thereof, either at a reserved rent or fine, or both, as the council shall think fit; and the power of disposition by the said act over the lands, tenements, and hereditaments, of such body corporate, to be exercised with the approbation of the Lords Commissioners of his Majesty’s Treasury, or any three of them, shall extend to the disposition of such lands, tenements, and hereditaments, with such approbation as aforesaid, whether by way of absolute sale, or by way of exchange, mortgage, or charge, demise, or lease, and to every other disposition of the same whatsoever, which shall be so approved of as aforesaid.” It seems that the allowance of the Lords of the Treasury ought to be obtained before any expenditure is incurred by the corporation towards any disposition of the lands, &c.^(k)

The council may have a salaried police magistrate, or magistrates, appointed for the borough, if they think fit, by passing a bye-law, fixing the amount of salary, and transmitting it to the secretary of state, who shall, if he think fit, appoint a barrister of not less than five years’ standing, the salary to be paid quarterly out of the borough fund.^(l)

The council must make a fresh application to the secretary of state on each vacancy, unless they are of opinion that the vacancy should not be filled up.^(m)

The council of every borough, having a separate commission of the peace, must provide and furnish a suitable police office or offices for the purpose of transacting the business of the justices of the borough.⁽ⁿ⁾

The council in every borough must appoint and keep on foot a sufficient number of their own body, who, together with the mayor, are to be the watch committee of the borough,^(o) who are to order payment of salaries, compensations, rewards, &c., for services, ordinary and extraordinary, to the police constables of the borough, and other charges relating to the constabulary force, subject to the approbation of the council.^(p)

The enactment is as follows: “And be it enacted, that the council *to be elected for any borough shall immediately after their first election, and so from time to time hereafter as they shall deem [*368] expedient, appoint, for such time as they may think proper, a sufficient number of their own body, who, together with the mayor of the borough for the time being, shall be and be called the watch committee for such

(i) 6 & 7 Will. 4, c. 104, s. 2; vid. n. (g).

(k) Vid. Att.-Gen. v. Earl of Mansfield, 2 Russ. 501.

(l) S. 99. He may do alone whatever is authorized by 11 & 12 Vict. c. 42, to be done by one or more justices of the peace, vid. s. 29 of that act, and as to forms of warrants, &c.; et vid. 11 & 12 Vict. c. 43, s. 33; and every sitting or acting of his shall be deemed a petty session of the peace, 12 & 13 Vict. c. 18, s. 1.

(m) S. 99.

(n) S. 100, et vid. 12 & 13 Vict. c. 18.

(o) S. 76.

(p) S. 82.

borough, and all the powers hereinafter given to such committee may be executed by the majority of those who shall be present at any meeting of such committee, the whole number present at such committee being not less than three, and such watch committee shall, within three weeks after their first formation, and so from time to time thereafter as occasion shall require, appoint a sufficient number of fit men, *(q)* who shall be sworn in before some justice within the borough to act as constables, *(r)* for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending the offenders against the peace; and the men so sworn shall not only within such borough, but also within the county in which such borough, or part thereof, shall be situated, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has or hereafter may have within his constablewick by virtue of the common law of this realm, or of any statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within such borough, or within any county in which they shall be called on to act as constables, for conducting themselves in the execution of their office.” *(s)*

The proper mode of trying the right to this office of constable is by *quo warranto* information, and all the information will be *granted* though the office is not within the statute 9 Ann. c. 20. *(t)*

It was necessary to give the general power of appointing constables to the newly organized corporations, because corporations cannot, at common law, appoint constables; though they might have the power to do so by [369] prescription or custom. *(u)* A constable, when appointed *under this section, has all the privileges belonging to the office at common law, and, therefore, when sued for an act done in the exercise of his

(q) 31 Geo. 2, c. 17, exempts from serving as constables persons aged sixty-three and upwards. Attorneys are exempt, *Prowse's case*, Cro. Car. 389; Brethren of the Trinity House, *R. v. Clarke*, 1 T. R. 679; matriculated servants of the colleges at Oxford, *R. v. Routledge*, Dougl. 573; as to dissenting ministers, 52 Geo. 3, c. 155, s. 9; other exemptions, Com. Dig. Leet, M. 7; Harrison's Digest, 3986, 3987; 5 Vin. Abr. 431, 432. As to who is a fit man generally, *vid. note to Gresley's case*, 8 Rep. 41 b; Com. Dig. Leet, M. 7. The persons appointed must have notice; Com. Dig. Leet, M. 6.

(r) They are not corporate officers; *R. v. Wallis*, 5 T. R. 375. But a mandamus will lie to the justices to swear them in if duly appointed, *Hawk. P. C. c. 10, s. 47*; also to restore or discharge, *Bac. Abr. Mandamus, c. 1*; *Middlecott's case*, *Latch*, R. 123, 229.

(s) S. 76. By 3 & 4 Vict. c. 88, s. 14, a mode is pointed out by which a corporation may consolidate its police with the county police; and by s. 15 the government of the consolidated body is provided for. Councils are empowered to provide a police superannuation fund by 11 Vict. c. 14.

(t) *R. v. Goudge*, Stra. 1213; per Lord Mansfield, C. J., 3 Burr. 1821; *vid. R. v. Wallis*, 5 T. R. 375. Serving the office gained a settlement at common law in the parish where the constable inhabited, Stra. 1014; because the tenure of the office was then for a year *prima facie*; but under the Municipal Corporations Act, as the duration of the office is discretionary in the watch committee, and not in its nature annual, the serving it does not gain a settlement, *R. v. Middlewich*, 3 A. & E. 156.

(u) *R. v. Barnard*, Salk. 502; Com. Dig. Leet, M. 6; *R. v. Lone*, Stra. 920.

general duty, on the plaintiff discontinuing, he would have been entitled to double costs,(x) previously to a late act;(y) but now he is, in such circumstances, entitled to such full and reasonable indemnity, as to all costs, charges and expenses incurred in and about the action, as shall be taxed by the proper officer in that behalf,(z) and not merely to costs as between attorney and client under the 133rd section of the Municipal Corporations Act, which would, it seems, be all he would be entitled to if he were sued for any thing done in pursuance of the act.

By the common law a constable, when appointed, must take an oath (if required) to do his duty; and he may be indicted for refusing; but the indictment must show how he was appointed, and how the corporation has the power to appoint;(a) and there appears to be no room to doubt that a constable appointed under this act might be indicted upon refusal to take the oath, as for neglecting and refusing to take upon him the office.(b)

It is material to remark, that a constable is not entitled to notice of action for anything done in pursuance of this act,(c) nor to have the venue laid in the proper county, nor to plead the general issue and give the special matter in evidence; for the statute 21 Jac. 1, c. 12, only applies to a constable acting at common law.(d)

The further provisions respecting constables are as follow: "And(e) be it enacted, that the watch committee for any such borough as aforesaid may from time to time frame such regulations as they shall deem expedient for preventing neglect or abuse, and for rendering such constables efficient in the discharge of their duties, and the said committee, or any two justices of the peace having jurisdiction within the borough, may at any time suspend or dismiss any constable whom they shall think negligent in the discharge of his duty, or otherwise unfit for the same, and when any man shall be so dismissed, or cease to belong to the said constabulary force, all powers vested in him as a constable by virtue of this act shall immediately cease, and no man so dismissed as aforesaid shall be re-appointed without the consent of two of the justices of the peace having jurisdiction within the borough."

The powers which may be exercised by the constable appointed under this act are compounded of the powers of a constable at common law and of the municipal powers given by the act, but the former are wholly dependent on his appointment to the latter,(f) and a discharge from *the office of borough constable necessarily, therefore, is a discharge from the powers of constable at common law; so that the [*370]

(x) 21 Jac. 1, c. 12, s. 5.

(y) *Maberly v. Titterton*, 7 M. & W. 540. As to notice of action, 5 & 6 Vict. c. 97, s. 4.

(z) 5 & 6 Vict. c. 97, s. 2. As to entitling to costs, *Chit. Archb. Pract.* 1117, 8th edit.; 1 Dowl. N. S. 212; 3 Dowl. 800.

(a) *Com. Dig. Leet*, M. 6, 8; *vid. R. v. Bower*, 1 B. & C. 587. Or a criminal information may be brought; *Keene's case*, *Freem.* 348; *R. v. Woodrow*, 2 T. R. 731.

(b) *R. v. Brain*, 3 B. & Ad. 614; *Crawley's case*, *Cro. Car.* 567; *Reg. v. Vincent*, 9 Car. & P. 91.

(c) *Shatwell v. Hall*, 10 M. & W. 526.

(d) 7 M. & W. 542.

(e) S. 77. A mandamus will lie to restore or discharge; *Bac. Abr. Mandamus*, C. 1.

(f) *Vid. 7 M. & W. 542, 543.*

man, after such discharge, has no more power or authority as regards the preservation of the peace than any other individual.

The punishment of constables for neglect of duty is thus provided for: "And(*g*) be it enacted, that if any constable of any borough shall be guilty of any neglect of duty, or of any disobedience of any lawful order, every such offender, being convicted thereof before any two justices of the peace, shall for every such offence be liable to be imprisoned for any time not exceeding ten days, or to be fined in any sum not exceeding forty shillings, or to be dismissed from his office, as such justices shall in their discretion think meet."

At common law a constable is subject to an indictment for neglect of duty; for every officer neglecting a duty incumbent upon him, either by statute or common law, is, for his default, indictable, (*h*) and it seems that the constables appointed under this act are indictable for default of duty, notwithstanding the summary method of punishment pointed out above; for the act does not constitute that to be an offence which was not an offence before, and, therefore, does not confine the remedy to the mode it points out, but merely gives the party the option of having recourse to the statutory remedy, instead of proceeding by way of indictment.

At common law the office of constable may be served by deputy; (*i*) but it does not appear that the Municipal Corporations Act contemplates any substitution in serving this office; and, if so, it would seem that the provision of 1 W. & M. c. 18, s. 1, enabling dissenters to execute the common law office by deputy, does not apply to municipal constables under this act.

The power of imprisonment here given must be strictly pursued; for, but for the statute, municipal corporations have no power to imprison in any case, although, as has been observed, a great number of charters give the power of imprisonment; (*k*) and that the corporation had passed a bye-law inflicting imprisonment, to which bye-law the party had expressly assented, would make no difference, for such power of imprisonment is contrary to Magna Charta, (*l*) and a man cannot assent to his own imprisonment when it is not legally authorized. (*m*) In London, however, a custom to imprison in certain cases has been *held good; the [*371] customs there having frequently been confirmed by parliament, (*n*) though elsewhere such custom is clearly bad. (*o*)

(*g*) S. 80. It would seem that a constable could not be imprisoned for refusing to be sworn in, notwithstanding this section, but that the only remedy is by indictment; *Crawley's case*, Cro. Car. 567; *R. v. Hewson*, 12 Mod. 180.

(*h*) *Reg. v. Wyat*, Salk. 381; *Croather's case*, Cro. Eliz. 654; *Coleman's case*, 2 Rol. R. 78; *Burrough's case*, Ventr. 305; *R. v. Clarke*, 5 B. & A. 665. As to form of indictment, *R. v. Harper*, 5 Mod. 96.

(*i*) *R. v. Clarke*, 1 T. R. 689; *Medhurst v. Waite*, 3 Burr. 1262; or even by a woman, 2 Hawk. P. C. e. 10, s. 36.

(*k*) Vid. sup. pp. 84—86; 2 Burr. 847.

(*l*) *Clarke's case*, 5 Rep. 64; *Langham's case*, March, 179, 189.

(*m*) Per Patteson, J., in *Webb v. Taylor*, 1 Dowl. & L. 684; so *Foster v. Jackson*, Hob. 61; Bull. N. P. 17; 2 East, 244; 8 Rep. 116, 117; 2 Exch. 656.

(*n*) *R. v. Clerk*, Com. R. 24.

(*o*) *Langham's case*, March, 179, 189.

The duties of constables are thus pointed out:—"And(*p*) be it enacted, that it shall be lawful for any constable, during the time of his being on duty, to apprehend all idle and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of intention to commit a felony, and to deliver any person so apprehended into the custody of the constable appointed under this act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall think fit to take bail, in the manner hereinafter mentioned" (as follows):—"And(*q*) be it enacted, that where any person charged with any petty misdemeanor shall be brought, without the warrant of a justice of the peace, into the custody of any constable appointed under this act, during his attendance in the night time at any watch-house within any such borough as aforesaid, it shall be lawful for such constable, if he shall think fit, to take bail by recognizance, without any fee or reward from such person, conditioned that such person shall appear for examination within two days before a justice of the peace within the borough, at some time and place to be specified in the recognizance; and every recognizance so taken shall be of equal obligation on the parties entering into the same, and liable to the same proceedings for the estreating thereof, as if the same had been taken before a justice of the peace; and the constable shall enter in a book to be kept for that purpose in every watch house the names, residence, and occupation of the party, and his surety or sureties, if any, entering into such recognizance, together with the condition thereof, and the sums respectively acknowledged, and shall lay the same before such justice as shall be present at the time and place when and where the party is required to appear, and if the party does not appear at the time and place required, or within one hour after, the justice shall cause a record of the recognizance to be drawn up, to be signed by the constable, and shall return the same to the next general or quarter sessions of the peace for the borough, or for the county in which such borough is situate, in those boroughs for which there shall be no separate general or quarter sessions of the peace, with a certificate at the back thereof, signed by such justice, that the party has not complied with the obligation therein contained, and the clerk of the peace shall make the like estreats and schedules of every such recognizance as of recognizances forfeited in the sessions of the peace; and if the party not appearing shall apply *by any person on his behalf to postpone the hearing of the charge against him, and the justice shall think fit to consent [*372] thereto, the justice shall be at liberty to enlarge the recognizance to such further time as he shall appoint, and when the matter shall be heard and determined, either by the dismissal of the complaint, or by binding the party over to answer the matter thereof at the sessions or otherwise, the recognizance for the appearance of the party before a justice shall be discharged without fee or reward."

(*p*) Sect. 78. As to defraying expenses arising out of these acts, *vid. per* Lord Denman, C. J., 5 Q. B. 870; *et vid. inf.* pp. 372-374.

(*q*) Sect. 79.

By the Towns Improvement Clauses Act, every constable authorized by a warrant of distress under it, must give his aid in executing the warrant, under penalty not exceeding 5*l.*(*r*) The same is the case under the act for the Improvement of the Public Health.(*s*) But there is no such clause in the Nuisances and Contagious Diseases Acts.(*t*)

Constables are thus protected in the performance of their duty:—“And(*u*) be it enacted, that if any person shall assault or resist any constable of any borough appointed under this act, in the execution of his duty, or shall aid or incite any person so to assault or resist, every such offender, being convicted thereof before any two justices of the peace, shall, for every such offence, forfeit and pay such sum not exceeding 5*l.*, as the said justices shall think meet: provided always that nothing herein contained shall prevent any prosecution by way of indictment against any person so offending, but so as that such person shall not be prosecuted by indictment, and also proceeded against under this act for the same offence.”

Several important questions have arisen with respect to prosecutions supported or set on foot by corporations, for the protection of their constables acting under this act, it is “enacted,(*x*) that the treasurer of every borough appointed under this act shall pay to the constables of such borough appointed under this act such salaries, wages, and allowances, and at such periods as the watch committee for such borough shall, subject to the approbation of the council, direct, and the council shall order to be paid also any extraordinary expenses(*y*) which such persons shall appear to have necessarily incurred in apprehending offenders, and executing the orders of any justice of the peace having jurisdiction within such borough, such expenses having been first examined and [*373] approved by such justice; and the said treasurer *shall also pay such further sums as the watch committee shall, subject to the approbation of the council, award to any of the persons belonging to the said constabulary force, as a reward for extraordinary diligence or exertion, or as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received, or shall be worn out by length of service, and all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this act.”

The award and direction by the watch committee must be a specific

(*r*) 10 & 11 Vict. c. 34, s. 192.

(*s*) 11 & 12 Vict. c. 63, s. 104.

(*t*) 9 & 10 Vict. c. 96, revived by 11 & 12 Vict. c. 123, amended by 12 & 13 Vict. c. 111. Formerly the removal of nuisances was enforced by writ of mandamus or prohibition to the corporation, enjoining them to take the necessary steps; Fitz. N. B. 185, D.; but such proceeding has long been obsolete, 15 East, 600, 601.

(*u*) Sect. 81.

(*x*) Sect. 82. All legal expenses of this kind are payable out of the borough fund, both in corporations with separate quarter sessions and without; per Patten-son, J., in Reg. v. Mayor, &c., of Gloucester, 13 Law J. (N. S.) Q. B. 236. Vid. sup. p. 371, n. (*p*).

(*y*) Semb. a mandamus would lie to compel the reimbursement of these expenses to the constables; R. v. Hunt, Stra. 42, 93; R. v. Erle, 2 Burr. 1197. What are not “extraordinary expenses,” per Patten-son, J., 5 Q. B. 867.

substantive award or direction; a resolution of the watch committee, recommending to the favourable consideration of the council a memorial of a constable, praying to be allowed certain expenses connected with the execution of his statutory duties, is not an award or direction sufficient to justify the council in ordering the payment of such expenses out of the borough fund.(z)

The expenses here mentioned were incurred by two of the constables in prosecuting a person for an assault upon them in the execution of their duty as constables; but the prosecution not having been instituted at the instance of the corporation, in pursuance of a previous resolution of the council for that purpose, it seems that such expenses could not be charged upon or paid out of the borough fund.(a) But there is little doubt that if the council had passed a previous resolution under the corporate seal ordering such prosecution, a subsequent order by the council for the payment of the expenses of such prosecution out of the borough fund would be valid, on the same grounds as an order for payment of expenses of prosecuting for an assault on the mayor in the execution of his office, such prosecution having been previously duly ordered by the council, is valid.(b) At least it would be good if the prosecution had been instituted by the corporation under a proper resolution of the council, founded upon an award or direction of the watch committee; although, it seems, that this mode would be somewhat circuitous, and not called for by the expressions used in the last cited clause.(c) But however this be, the general principle seems unquestionably settled, that where a duty is imposed on a body of persons, and where costs incidentally and necessarily arise out of proceedings instituted to call in question the propriety of acts done to enforce that duty, the body have necessarily a right to defray such expenses out of the public fund of which they have the superintendence and *management.(d) And this principle is applicable [*374] to all public bodies having public duties to perform; and most of all to those which are entrusted with the duty of preserving order and peace, and of taking measures for the prevention of crime.

With respect to the expenses incurred by constables in *defending* an indictment brought against them for acts done in the execution of their duties under the act, it has been held that the council have no power to make an order for the payment of such expenses in the first instance; the award or direction must be made by the watch committee, and, if approved by the council, becomes a valid order for the payment out of the borough fund(e) of such expenses.

(z) Reg. v. Stamford, 4 Q. B. 900, note.

(a) R. v. Lichfield, 4 Q. B. 893. All acts named in conjunction with the borough in schedule (E) to the act annexed, and all acts made before the passing of this act, so far as relates to the appointment, regulation, powers and duties, or to the assessment or collection of any rate to provide for the expenses of any watchman, constables, patrol or police, for any place situated within such borough, are repealed by s. 84. As to the new watch rate, vid. *infra*, BOROUGH FUND and s. 92.

(b) Reg. v. Lichfield, 4 Q. B. 893. (c) Vid. per Coleridge, 5 Q. B. 482.

(d) R. v. Inhabitants of Essex, 4 T. R. 594; R. v. Commissioners of Sewers for Tower Hamlets, 1 B. & Ad. 239; vid. Att.-Gen. v. Mayor of Norwich, 2 My. & C. 406; Houldsworth v. Mayor, &c., of Dartmouth, 11 A. & E. 502.

(e) Reg. v. Thompson, 5 Q. B. 477.

It is to be observed that all prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, *(f)* and shall be commenced within six calendar months after the fact committed, and not otherwise, and the same of actions. *(g)* Therefore all actions and prosecutions against constables acting in pursuance of this act are subject to this rule; but it is different, as appears, when the act was done by the constable acting as at common law, and not acting merely as he is expressly empowered by this act to do.

The fees of clerk to the justices of the borough, for business done in respect of persons apprehended by the police, and brought before the justices, or in respect of informations and other proceedings taken by and at the instance of the police, must be paid out of the borough fund (if they cannot be obtained from the defendants and culprits, who ought to pay them,) as expenses "necessarily incurred in carrying into effect the provisions" of the Municipal Corporations Act; and the court will grant a mandamus to enforce payment, and will make the rule absolute, although it be suggested that a retrospective rate might be necessary, leaving the corporation to state that fact, if it existed, and discuss its effect on a return. *(h)*

Besides the borough constables, or policemen, mentioned above, another description of peace officer is provided by the act, under the name of special constables. "And *(i)* be it enacted, that any two or more justices of the peace having jurisdiction within any borough, are hereby authorized and required, in the month of October in every year, to nominate [*375] and appoint, by precept in writing under their *hands, so many as they shall think fit of the inhabitants of such borough (not legally exempt from serving the office of constable, *(k)*) to act as special constables within the said borough whensoever they shall be required by the warrant of any of the justices of the peace having jurisdiction within such borough so to act, and not otherwise. And every such warrant shall recite, that in the opinion of the justice granting the same, the ordinary police force of the borough is insufficient at that time to maintain the peace of the borough; and every person so appointed a special constable shall take the oath set forth in the act, *(l)* &c., and shall have the powers and immunities, and be liable to the duties and penalties enacted by the said last-mentioned act, and every person so appointed a special constable shall receive out of the borough fund for every day during which he shall be called out to act as such, the sum of three shillings and sixpence and no more."

But where a borough is contributory to the county rate, under sect. 13 of that statute, an order of the borough justices of the borough upon the

(f) Sect. 133. Where the offence is laid in one county in a part of a borough, the rest of which is in another county, and the indictment is found at the borough quarter sessions, and then removed by certiorari, and the venire awarded into the second county, the trial had there is without jurisdiction, and the judgment must be arrested, for though 7 Geo. 4, c. 64, s. 20, cures a wrong venue, it does not cure a wrong venire, where the venue is right; Reg. v. Mitchell, 2 Q. B. 636.

(g) Sect. 133.

(h) Reg. v. Mayor, &c., of Gloucester, 5 Q. B. 862.

(i) Sect. 83.

(k) Vid. sup. p. 368, n. *(q)*.

(l) 1 & 2 Will. 4, c. 41.

treasurer of the county in which it is situate, for the payment of such expenses of special constables, may be made and is binding on the treasurer, when the special constables are appointed on an extraordinary occasion, under stat. 1 & 2 Will. 4, c. 41.(*m*) It is only special constables, appointed under the 76th section of the Municipal Corporations Act annually, to whom the borough fund is liable for their payment.(*n*)

Finally, the watch committee are required to transmit a report on the 1st day of January, 1st of April, 1st July, and 1st of October, in every year, to one of the Secretaries of State, of the number of men appointed to act as constables or policemen in such borough; and of the description of arms, accoutrements, and clothing, and other necessities furnished to each man; and of the salaries, wages, and allowances payable to such constables or policemen; and of the number and situation of all station houses in such borough; and also a copy of all rules, orders, and regulations which shall from time to time be made by such watch committee, or by the council of such borough, for the regulation and guidance of such constables or policemen.(*n*)

As to the watch rate, it is enacted (after providing,(*o*) that immediately upon the appointment of constables, on the coming into operation of the Municipal Corporations Act, the then provisions of local acts respecting watching, and the assessment and collection of watch rates, were to cease, &c.,) that in every case in which, before the 9th September, 1851, a rate might be levied in any borough for the purpose of watching, conjointly with any other purpose, nothing in the Municipal Corporations Act shall be construed to prevent the levying and collecting such rate for such other purpose solely, or to repeal the *powers [**376*] given in any act, so far as the same relate to such other purpose, &c.;(*p*) and then there is the farther provision,(*q*) "that in every case in which, before the 9th September, 1835, any rate might be levied in any borough, or in any parish or place made part of any borough, under the provisions of the Municipal Corporations Act, for the purpose of watching solely by day or by night, or for the purpose of watching by day or by night conjointly with any other purpose, it shall be lawful for the council to levy a watch rate, sufficient to raise any sum not greater than the average yearly sum which during the last seven years, or where any such rate shall not have been levied during seven years, then during such less number of years as such rate shall have been levied, shall have been expended in the maintenance and establishment of watchmen, constables, patrol, or policemen within the district in which such rate was levied; and for that purpose the council shall have all the powers hereinbefore given to the council in the matter of the borough rate. And where any part of any borough shall not, on the 9th September, 1835, be within the provisions of the act authorizing the levy of such rate for watching as aforesaid, it shall be lawful for the council from time to time to order that such part, or so much thereof as to the council shall seem fit, shall be rated to the watch rate in like manner as other parts of the borough, to be specified in such order, and such watch rate thereupon

(*m*) Reg. v. Hulton, 19 Law J. (N. S.) Mag. Cas. 32.

(*n*) Sect. 86.

(*o*) Sect. 84.

(*p*) Vid. s. 84.

(*q*) Sect. 92.

shall be levied within the part mentioned in such order in like manner as in the other parts of the borough so specified,^(r) and all such sums levied in pursuance of such watch rate shall be paid over to the account of the borough fund: provided always, that no such order as last aforesaid shall be made for rating to such watch rate any part of any borough in which, on 9th September, 1835, such rate as aforesaid shall not be levied, and which is more than two hundred yards distant from any street or contiguous line of houses which shall be regularly watched within the borough under the provisions of this act.” It is farther provided,^(s) “that in all cases where a watch rate may be made and levied in any borough, the council may order the churchwardens and overseers of every parish or place within which such rate may be levied, or such other persons as by law may make a poor rate for any such parish or place within the limits of such borough, to pay the amount of such part and portion of such rate for which such parish or place respectively shall be liable, out of the poor rate made and collected, or to be made or collected for such parish or place. Or the council, instead of ordering such churchwardens and overseers, or other persons, to pay the same out of the poor rate, may order them to make and collect a certain pound rate upon and from the occupiers or possessors of all rateable property within such parish or [377] place, for the amount of the rate for which such *parish or place may be liable as aforesaid. And if such churchwardens, overseers, and other persons, upon being so ordered to pay such rate out of the poor rate, or to make and collect a pound rate as aforesaid, shall refuse or neglect to do so, the amount thereof may be made and levied off the goods of them, or any of them, by distress, by virtue of a warrant in that behalf, under the hand and seal of the mayor, or of any two borough justices, or if any person liable to pay such pound rate shall neglect or refuse to pay the same, the amount thereof may be levied upon his goods by distress in like manner.”^(t)

But it having been found that the amount of watch rate leviable under these powers was in many cases insufficient, the legislature subsequently ^(u) empowered “the council of every borough named in the schedules of the Municipal Corporations Act to levy a watch rate on the occupiers” of all messuages, lands, tenements, and hereditaments within those parts of the borough which shall be watched by day and by night, and which from time to time, by any order of the council, shall be declared liable to such watch rate; and every such rate shall be made upon an estimate of the net annual value of the several hereditaments rated thereto, that is to say, of the rent at which, one year with another, the same might, in their actual state, be reasonably expected to let from year to year; the probable annual average cost of the repairs, insurances, and other expenses, if any, necessary to maintain the hereditaments in their actual

(r) Vid. *Cobb v. Allan*, 10 Q. B. 683; inf. *BOROUGH RATES*.

(s) 7 Will. 4 Vict. c. 81, s. 1.

(t) Vid. *Fernley v. Worthington*, 1 M. & Gra. 491, as to the effect of this enactment; *Cobb v. Allan*, 10 Q. B. 683, as the form of the council's order, &c. As to collecting watch rates in places partly within and partly without the borough, 7 Will. 4 & 1 Vict. c. 81, s. 3; 9 & 10 Vict. c. 110.

(u) 2 & 3 Vict. c. 28, s. 1.

state, and all rates, taxes, and public charges, except tithes, or tithe commutation rent-charges, if any, being paid by the tenant, and either by one rate made yearly, or by two or more rates made half-yearly, or otherwise."

The amount of such watch rate is to be (x) at the discretion of each council, but not exceeding in any one year the sum of sixpence in the pound.

The former statute, viz. 2 & 3 Vict. c. 28, does not apply to any borough in which the borough fund is sufficient, with the aid of the amount only of watch rate which could be raised under the Municipal Corporations Act, and without the aid of any borough rate, to defray the expense of the constabulary force of the borough, together with all the other expenses legally payable out of the borough fund, by virtue of the said Municipal Corporations Act, or any other act or acts of parliament.(y)

Subsequent provisions have been made for the better collecting of watch and borough rates in parishes partly within and partly without boroughs, and for the due publication of such rates,(z) which will be stated under the head of BOROUGH RATES.

*We now proceed to the subject of the appointment by the council of officers in municipal corporations. "And (a) be it [*378] enacted, that the council of every borough, on the 9th day of November in this present year, shall appoint a fit person, not being a member of the council, to be the town clerk of such borough, who shall hold his office during pleasure, and in any borough may be an attorney of one of his Majesty's superior courts at Westminster, any law, statute, charter, or usage to the contrary notwithstanding; and the council of every borough shall *in every year* (b) appoint another fit person, not being a member of the council, to be the treasurer of the borough, and also such other officers as have been usually appointed in such borough, or as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of this act, and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be reappointed; and shall take such security for the due execution of his office by any such town clerk, treasurer, or other officer, as the said council shall think proper; and shall order to be paid to the mayor, and to the town clerk and treasurer, and to every such other officer to be employed as aforesaid, such salary or allowance as the said council shall think reasonable: and in case of a vacancy in any such office as aforesaid by death, resignation, removal, or

(x) 3 & 4 Vict. c. 28, s. 2.

(y) Ibid. s. 1.

(z) 9 & 10 Vict. c. 110; vid. inf. BOROUGH RATES.

(a) Sect. 58. They have also power, by s. 118, to appoint an officer in certain cases, not being the recorder, for the trial of civil actions in the borough court of record, and where there is the power to hold such court, there is the obligation, which the Court of Queen's Bench will enforce, and it will be no excuse that the court has been disused for two hundred years, &c.; R. v. Mayor, &c., of Wells, 4 Dowl. 562.

(b) This election is no longer annual, but to be during the pleasure of the council; 6 & 7 Vict. c. 89, s. 6.

otherwise, the council of such borough may appoint another fit person in the place of the person so asking such vacancy: provided that the town clerk and treasurer shall not be the same person."

The officers named here are not the only officers that the council have power to appoint; they may still appoint all such officers as before the act the corporation had lawful authority to appoint, provided there is nothing in the nature of the duties or character of such offices inconsistent with, or incapable of being modified by the provisions of the Municipal Corporations Act.^(c) The practical check upon the council in this respect consists in the right to have the order for payment of any such officer quashed upon certiorari by the Queen's Bench,^(d) upon its appearing to be made for such a purpose as was not duly chargeable on the borough fund; and it is no answer to a motion for the certiorari, that the alleged order was only in the shape of a resolution in the minute book;^(e) for [*379] both may be brought up and quashed. Elections of such officers, formerly by charter or custom held on Sundays, are now to be held on the Saturday next preceding, or Monday next following.^(f)

The subject of compensation of officers whose offices may be abolished, or who may have been removed by the council, is thus treated in the Municipal Corporations Act:—"And (g) be it enacted, that every officer of any borough or county who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office under the provisions of this act, or who shall not be reappointed as aforesaid, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and every person entitled to such compensation as aforesaid shall deliver to the town clerk, or in case such person shall himself be town clerk, then to the treasurer of the borough, a statement under the

(c) Reg. v. Bishop of Bath and Wells, 5 Q. B. 147. 161; 9 Rep. 52. Where the common seal is necessary to be attached to an appointment, a mandamus will go to the keepers of it, if they refuse to affix it to the appointment; 3 Burr. 1647; 4 T. R. 699; 1 Q. B. 378. But though the writ goes to affix, there is no ground to think it will issue to detach a common seal when once formally affixed; Ex parte Nash, 14 Jur. 574.

(d) Reg. v. Mayor, &c., of Bridgewater, 10 A. & E. 281; Reg. v. Paramore, 10 A. & E. 286; vid. 8 Q. B. 926.

(e) Reg. v. Lichfield, 4 Q. B. 893; vid. 8 Q. B. 926.

(f) 3 & 4 Will. 4, c. 31, s. 1.

(g) Sect. 66. An officer appointed durante bene placito may be removed at libitum, Com. Dig. Franchise, F. 32, and would not, therefore, in general be entitled to compensation. Whether collector of quay and harbour duties for the corporation, under a local act, be a corporate officer within this section, vid. Reg. v. Corporation of Poole, 7 A. & E. 730. Where an appointment of an officer by a corporation is by deed, it must be stamped with an ad valorem stamp, under 55 Geo. 3, c. 184, Sched., Part I.; Reg. v. Welch, 2 C. & Kirw. 296. In an action by an officer to enforce a claim, debt, or duty accruing to him in his official capacity, upon a traverse of the allegation that he is such officer, evidence of his acting as such is sufficient prima facie evidence of his appointment, such appointment not being necessarily by deed, McGahey v. Alston, 2 M. & W. 206; so in any action against him, S. C.

hand of such person setting forth the amount received by him or his predecessors in every year during the period of five years next before the passing of this act on account of the salary, fees, emoluments, profits, and perquisites in respect whereof he shall claim such compensation, distinguishing the office, place, situation, employment or appointment in respect whereof the same shall have been received, and containing a declaration that the same is a true statement, according to the best of the knowledge, information and belief of such person, and also setting forth the sum claimed by him as such compensation; and the town clerk or treasurer, as the case shall be, shall lay such statement before the council, who shall take the same into consideration and determine thereon; and immediately upon such determination being made, the person preferring such claim, if he shall not himself be the town clerk, shall be informed thereof by notice in writing under the hand of the town clerk; and in case such claim shall be admitted in part and disallowed in part, such notice shall specify the particulars in which the same shall have been admitted and disallowed respectively; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon, or in case one-third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive, it shall [*380] be lawful for the person preferring such claim, or any member of the council who shall subscribe such protest, to appeal to the Lords Commissioners of his Majesty's Treasury, who shall thereupon make such order as to them shall seem just; and such order, signed by three or more of such Lords Commissioners, shall be binding on all parties: provided always, that if the council shall not determine on such claim within six calendar months after the aforesaid statement shall be delivered to the town clerk or treasurer, as the case shall be, such claim shall be considered as admitted; provided also, that the person preferring such claim, if any member of the council shall so require, upon receiving notice in writing signed by the town clerk, unless such person shall himself be town clerk, in which case no such notice shall be requisite, shall from time to time attend at any meeting or adjourned meeting of the council for the investigation of such claim, and then and there, upon his oath or solemn affirmation, to be taken or made before the mayor (who is hereby authorised to administer the same), shall answer all such questions as shall be asked by any member of the council touching the matters set forth in the statement subscribed by such person as aforesaid, and produce all books, papers, and writings in his possession, custody or power relating thereto; provided also, that every such officer who shall be continued in or reappointed to such office under the provisions of this act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act, and had not been continued in or reappointed to such office."

It has been thought desirable to state this section, though it, as well as the decisions upon it, relate chiefly to what is past, and could not

recur again but for a late act, which incorporates these provisions, and makes them applicable to the cases where grants of charters have been made to towns since the Municipal Corporations Act, in this way:—
 “And (*h*) be it enacted, that every officer of any such borough, or of any county, or any division of a county in which such borough is situated, who was in any office of profit at the time of granting of any such charter of incorporation, or of any grant afterwards made by his late majesty or by her majesty before the passing of this act, whose office shall have been abolished, or who shall have been removed from his office, or who shall [*381] have been deprived of any part of the fees and *emoluments of his office in consequence of any such grant, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees and emoluments of the office which he shall so cease to hold, or for such part thereof as he shall have been so deprived of, regard being had to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and all the provisions of the Municipal Corporations Act relating to the claim of any corporate officer for compensation, and to the manner of determining and securing the amount of such compensation, shall apply severally to the officers hereby indemnified; provided always, that the statements to be delivered to the town clerks of the said several boroughs by the said officers, shall set forth the fees and emoluments, in respect whereof they shall claim compensation, during five years next before the several times when the profits of their several offices were first affected by any of the said grants respectively.”

The first observation which appears deserving of notice with respect to these provisions is, that compensation cannot be granted for the emoluments of an office which the holder voluntarily resigned; he must have been removed either wholly or in part, or his office must have been abolished. (*i*) With respect to the meaning of the term officer of a division of a county, it has been decided, that a person who, before the grants of a charter of incorporation to Manchester, and separate commission of the peace, and separate court of quarter sessions to that borough, was clerk to such of the justices of the county of Lancashire, acting for the division of Manchester, as met at Salford, and clerk to the justices for the time being appointed under an act for the more effectual administration of the office of a justice of the peace within the townships of Manchester and Salford, (*k*) was not such an officer, and therefore not entitled to compensation under the stat. 5 & 6 Vict. c. 111, s 2. (*l*) There must be, under the Municipal Corporations Act, either a substantial abolition

(*h*) 5 & 6 Vict. c. 111, s. 2. “Office” is used to mean “place, situation, employment or appointment;” vid. *Reg. v. Mayor, &c., of Bridgewater*, 6 A. & E. 347; per Coleridge, J., 8 Dowl. 503. By compensation is meant adequate compensation, either as originally assessed by the council, or as the assessment is amended by the Lords of the Treasury; *Mayor, &c., of Sandwich v. Reg.*, 10 Q. 580. Fees, in general, can only be due to an officer by ancient usage or act of parliament; *Fleetwood v. Finch*, 2 H. Bla. 221.

(*i*) *Vid. Att.-Gen. v. Parr*, 8 Cla. & F. 409.

(*k*) 53 Geo. 3, c. 72.

(*l*) *Reg. v. Manchester*, 9 Q. B. 458; *vid. Reg. v. Mayor, &c., of Bridgewater*, 6 A. & E. 339; et *vid. 5 Q. B. 402*.

of the office, or removal of the holder from it;(*m*) for if the office remains, though its value be much diminished, no compensation is provided by that act.(*m*) It is not material that the office for which the claim is made is not mentioned in the charter,(*n*) but the office must be such as makes the holder an officer of the corporation, and must not be merely an office under a local act.(*o*) The council must determine on the claim within six months, or they will be taken to have admitted it.(*p*)

With respect to who are officers within the limits appointed by the *statutes, it seems that an officer *de facto* merely may be entitled [382] to compensation.(*q*)

The steward of a borough, if the stewardship is an office of profit, is entitled.(*r*)

An attorney of the sheriff's court, where the right of practising was limited before the passing of the Municipal Corporations Act(*s*) to a certain number of persons who paid a consideration for the office, was held to be entitled to a mandamus to the council to give a bond for the amount of compensation due;(t) the Lords of the Treasury having made their award in favour of the claimant, the court expressly guarded themselves against being supposed to give any opinion on the merits. The appeal to the Treasury is confined wholly to the question of the amount of compensation,(*u*) and their decision seems to be final as to that;(u) but they have no power to decide whether the officer had or had not been properly removed;(x) and a mandamus will go to the council to assess compensation, notwithstanding the decision of the Lords of the Treasury that it is not a case for compensation.(y) Also the Court of Chancery will interfere to prevent the council from misusing the power of granting compensation notwithstanding the appeal to the Treasury.(z)

By the 67th section of the Municipal Corporations Act, it is provided that the sum payable to any person as such compensation as aforesaid shall be secured by bond under the common seal, to be prepared at the expense of the borough fund.

The responsibility of officers appointed under this Act is thus provided for: "And(*a*) be it enacted, that every town clerk, treasurer, or other

(*m*) Reg. v. Mayor, &c., of York, 3 Q. B. 560.

(*n*) Reg. v. Mayor, &c., of Carmarthen, 11 A. & E. 9.

(*o*) Reg. v. Poole, 7 A. & E. 730; Ex parte Harvey, id. 739; 4 M. & W. 613.

(*p*) Sup. p. 380; et vid. Reg. v. Mayor, &c., of Swansea, 11 A. & E. 66.

(*q*) R. v. Parry, 14 East, 549; Reg. v. Mayor, &c., of Cambridge, 4 P. & D. 294; vid. inf. TOWN CLERK. (*r*) Reg. v. Norwich, 8 A. & E. 633. (*s*) Vid. s. 119.

(*t*) Reg. v. Mayor, &c., of York, 8 Dowl. 502. As to this bond, vid. Reg. v. Warwick, 15 L. J. (N. S.) Q. B. 306; 5 M. & Gra. 219; 6 Q. B. 70; 8 M. & W. 152; 10 Q. B. 580; Municipal Corporations Act, s. 51. The bond may be sued upon, and the plaintiff may have judgment of elegit; Mayor, &c., of Poole v. Whitt, 15 M. & W. 571.

(*u*) Reg. v. Mayor, &c., of Norwich, 8 A. & E. 633; et vid. Reg. v. Lords of the Treasury, 10 A. & E. 374; Reg. v. Sandwich, 10 Q. B. 563; Reg. v. Harwich, 8 A. & E. 633.

(*x*) Reg. v. Lords of the Treasury, 10 A. & E. 384; vid. 1 Q. B. 386, 751.

(*y*) Reg. v. Warwick, 10 A. & E. 386; vid. 11 A. & E. 9.

(*z*) Att.-Gen. v. Poole, 4 My. & C. 30; Att.-Gen. v. Aspinall, 2 My. & C. 613.

(*a*) S. 60. Except where it would be inconsistent or contrary to the act or the charters, the corporation may appoint persons not members of the corporation to

officer appointed by the council as aforesaid, shall, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the said council shall direct, deliver to the council, or to such person as they shall authorize for that purpose, [*388] a true account in writing of all matters committed to *his charge by virtue of this act, and also of all moneys which shall have been by him received by virtue or for the purposes of this act, and how much thereof shall have been paid and disbursed, and for what purposes, together with proper vouchers for such payments, and also a list of the names of all such persons as shall not have paid the moneys due from them for the purposes of this act, and of the amount due from each of them; and every such officer shall pay all such moneys as shall remain due from him to the treasurer for the time being, or to such person as the said council shall authorize to receive the same; and if any such officer shall refuse or wilfully neglect to deliver such account, or the vouchers relating to the same, or such list as aforesaid, or to make payment as aforesaid, or shall refuse or wilfully neglect to deliver to the said council, or to such person as they shall authorize, within three days after being thereunto required by notice in writing under the hands of any three or more of the said council, to be given to or left at the last place of abode of such officer, all books, papers, and writings in his custody or power relating to the execution of this act, or to give satisfaction to the said council, or to such other person as aforesaid, respecting the same, then and in every such case, upon complaint made on behalf of the said council, by such person as they shall authorize for that purpose, of any such refusal or wilful neglect as aforesaid, to any justice of the peace^(b) for the county or other jurisdiction wherein such officer so refusing or neglecting shall be or reside, such justice is hereby authorized and required to issue a warrant under his hand and seal for bringing such officer before any two justices of the peace for such county or jurisdiction; and upon the said officer appearing, or not being found, it shall be lawful for such justices to hear and determine the matter in a summary way; and if it shall appear to such justices that any moneys remain due from such officer, such justices may, and they are hereby authorized and required, upon non-payment thereof, by warrant under their hands and seals, to cause such moneys to be levied by distress and sale of the goods of such officer; and if sufficient goods shall not be found to satisfy the said moneys and the charges of the distress, or if it shall appear to such justices that such officer has refused or wilfully neglected to deliver such account, or the vouchers relating thereto, or such list as aforesaid, or that any books,

all ministerial offices, and in most cases without deed or warrant, *Cary v. Matthews*, Salk. 191; and such officer, if chosen *durante bene placito*, may be removed *ad libitum*, *Com. Dig. Franchise*, F. 32. Such an office may be granted for a term of years, *Com. Dig. Officer*, B. 2; or in reversion, 11 Rep. 4; Salk. 465; *Com. Dig. Officer*, B. 13. But an attorney to sue and appear for the corporation must be appointed under the common seal; *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 574; *Com. Dig. Franchise*, F. 19, Reg. v. *Chester*, 2 Show. 366.

(b) The magistrates for the county at large may determine these complaints, though such officers reside within the borough, and there are justices of the borough; *Re justices of Gateshead*, 6 A. & E. 550. But it does not appear whether the same would be held if the borough had a separate quarter sessions.

papers, or writings relating to the execution of this act remain in the hands or in the custody or power of such officer, and that he has refused or wilfully neglected to deliver the same, or to give satisfaction respecting the same as aforesaid, then, and in every such case such justices shall and they are hereby required to commit such offender to the common goal or house of correction for the county or jurisdiction *where such offender shall be or reside, there to remain(c) without bail until he shall have paid such moneys as aforesaid, or [*384] shall have compounded with the said council for such moneys, and shall have paid such composition in such manner as they shall appoint (which composition the said council are hereby empowered to make and receive), or until he shall have delivered a true account as aforesaid, together with such vouchers and lists as aforesaid, or until he shall have delivered up such books, papers and writings or have given satisfaction in respect thereof to the said council, or to such other person as aforesaid, as the case may be: provided always, that no person so committed shall be detained in prison, for want of such distress only, for a larger space of time than three calendar months: provided also, that nothing in this act contained shall prevent or abridge any remedy by action against any such officer so offending as aforesaid, or against any surety for any such officer; but such officer shall not be sued by action and also proceeded against in a summary manner by virtue of this act for the same cause."

Without this proviso, it would seem that an action must have lain in many cases where the summary remedy before justices would be inadequate; as if a debt were due to the corporation, and in consequence of their officer's neglect to give in the list of debtors, the time of recovering the debt within the Statute of Limitations had expired before the corporation were in a situation to be able to sue for it, it is manifest that the summary proceedings would be inadequate, and indeed nugatory; an action also would have been maintainable on the general principle, that where a statute imposes a duty on a public officer, he is responsible for neglect of that duty to any person who sustains damages by the neglect;(d) and a fortiori to his immediate employers, who appoint and

(c) As to imprisoning, vid. sup. p. 370. A mandamus to admit to any ministerial office under the corporation, except such as are held at will, may be had; and it is no objection that the office is of a trivial nature, *R. v. Barker*, 3 Burr. 1267. So a mandamus has been granted to restore to the office of scavenger, 1 Stra. 59; of sword bearer, *R. v. Mayor of Bristol*, 1 Show. 288; of clerk of the works, *R. v. Mayor of London*, 2 T. R. 182, n.; of yeoman of the wood wharf, Stra. 832; of an under-schoolmaster, *R. v. Morpeth*, Stra. 58; vid. Stra. 1023; to swear in an ale taster, Stra. 608; Com. Dig. Mandamus, A. Where the office is a freehold office, it has been thought a mandamus to restore will lie, even for a suspension from the office; per Lord Eldon, C., 17 Ves. 323; vid. 2 T. R. 179. Where under pretence of an election to a corporate office, the corporation excludes a person from a ministerial office against his will, a mandamus will go to restore him; *Baston's case*, Poph. 176; *S. C. Dyer* 332, B, in marg.

(d) *Barry v. Arnaud*, 10 A. & E. 646; *Lacon v. Hooper*, 6 T. R. 224. If the injury have arisen from the neglect of the deputy, the action ought to be brought against the principal; 5 Q. B. 159. That ministerial officers, not being annual ones, may, if authorized by statute or charter, appoint deputies, vid. *R. v. Mayor, &c., of Gravesend* 2 B. & C. 604; and it seems that such ministerial officers may in general, at any rate with the allowance of the corporation, appoint deputies to perform particular ministerial acts on special occasions; vid. 2 B. & C. 605; Com. Dig. officer, D. 1; *Salk*. 96; 19 Vin. Abr. 599; if involves trust and confidence in

pay him, if they are injured by his conduct. Moreover the corporation might sustain irreparable damage before they could avail themselves of the mode of recovering the documents pointed out in the *above [385] section,^(e) and a possibility of damage and injury has frequently been held a sufficient ground for an action on the case. Therefore, the statute in stating the duty, and appointing the remedy for recovery of the books, &c., does not preclude the adoption of an action on the case for the breach of duty, even although there be no circumstances in the case to obstruct the application to the justices for the exercise of their summary powers.^(f) Perhaps, however, an indictment would not have been maintainable in such case,^(g) in analogy to the principle, that where a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy must be pursued, and no other;^(h) but this is far from being clear; and the question must turn on whether the non-performance of the acts of surrender of the books, &c., specified in the section, would be misdemeanors at common law; for if so, they would be indictable as such, though not as being absolutely prohibited in a separate clause by the Municipal Corporations Act;⁽ⁱ⁾ for they do not appear to be. It will be observed, moreover, that this section only gives the summary remedy with respect to "all books, papers and writings in the custody or power of the officer *relating to the execution of this act*;" and it appears to be highly questionable whether these words would include charters, title deeds, leases, and other documents relative to the rights and powers possessed by corporations previous to, and wholly independent of this act. In such cases the corporation are left, it would seem, to the ordinary modes of proceeding afforded by the general law.^(k)

It would seem that the last proviso that *both* action and summary proceedings are not to be resorted to, is superfluous, as it is only in cases of penal actions that the defendant may also be liable under circum-

the holder, he cannot make a deputy, 9 Rep. 48; Com. Dig. Officer, D, 2; Mandamus to restore a deputy, Stra. 196; Com. Dig. Mandamus, A.; Bac. Abr. Mandamus, C. 1; R. v. Clapham, 1 Vent. 111.

^(e) Therefore there may occur cases in which generally a mandamus would be granted, and such remedy, it seems, remains to the corporation, notwithstanding the above enactment. That ministerial officers are bound to obey and execute writ, vid. R. v. Simpson, Stra. 809; R. v. White, cited Stra. 894; R. v. Rees, Carth. 393; Taylor v. Raymond, cited Stra. 895; R. v. Harris, 3 Burr. 1420. Unless where the facts suggested in the writ can be directly impugned, vid. R. v. White, 2 Ld. Raym. 1210; or the writ has been delivered so late that it could not be executed, vid. Stra. 763. Mandamus to officer in charge of the books of the corporation to attend with them at the next corporate meeting, Re Calne, Stra. 948; to outgoing officer to deliver records concerning the administration of justice to the new officer, Com. Dig. Mandamus, A.; 1 Siderf. 31; Cas. Temp. Hardw. 99; 2 Stra. 879.

^(f) Mayor, &c., of Lichfield v. Simpson, 8 Q. B. 65, where see form of declaration. Quo warranto does not lie against a merely ministerial officer; R. v. Corporation, &c., of Bedford Level, 6 East, 356; vid. 4 T. R. 381.

^(g) Per Williams, J., 8 Q. B. 74.

^(h) Castle's case, Cro. Jac. 644; 1 Wms. Saund. 135, note (4); 5 B. & Ad. 560.

⁽ⁱ⁾ R. v. Carlile, 3 B. & A. 161; Reg. v. Buchanan, 8 Q. B. 887.

^(k) An action will lie against a ministerial office for misbehaviour in his office by which the plaintiff is injured; Bull. N. P. 64; Drewe v. Coulton, 1 East, 563, n.; Pryce v. Belcher, 15 L. J. (N. S.) C. B. 305; S. C. 4 D. & L. 238.

stances to another proceeding; ex. gra. to a criminal information; (*l*) if indeed in those actions. (*m*)

The council in any borough, regulated under the Municipal Corporations Act, may adopt the provisions of the Baths and Washhouses Act, (*n*) and may levy the expenses with, and as part of, the borough rate, or by a separate rate, and apply the same as if the [*386] expense of carrying the act into execution were an expense necessarily incurred in carrying into effect the provisions of the Municipal Corporations Act. (*o*)

The council of every borough containing 10,000 inhabitants may purchase, or take by gift, grant, or devise, lands, &c., for the purpose of establishing a museum of science and art, and raise a rate in the same manner as a borough rate, for its support and maintenance, provided the rate do not exceed one halfpenny in the pound. (*p*)

The council, except where the Public Health Act 1848, is in force, on the receipt, or as soon afterwards as can be, of a notice, signed by two or more inhabitant householders of the borough, stating the filthy condition of any building in the borough, or within the jurisdiction of the corporation, so as to be a nuisance to, or injurious to the health of, any person, or that upon any premises within such jurisdiction there is any foul or offensive ditch, gutter, drain, privy, cesspool or ashpit, or any ditch, gutter, drain, privy, cesspool or ashpit kept or constructed so as to be a nuisance to or injurious as aforesaid, or that upon any such premises swine, or any accumulation of dung, manure, offal, filth, refuse, or other matter or things are or is kept, so as to be a nuisance to or injurious as aforesaid, or that upon any such premises, being a building used wholly or in part as a dwelling-house, or being premises underneath any such building, any cattle or animal are or is kept so as to be a nuisance to or injurious as aforesaid, by themselves, or by some committee thereof, shall, after twenty-four hours notice in writing given to some person on the premises, or if there be no person, by fixing the same on some part of the premises, or in case of emergency, without notice, &c., enter the premises, &c., and may complain to a justice, who may summon the owner or occupier before two justices, who shall order to whitewash, &c., or remove the nuisance. (*q*)

With respect to pleading acts done by the council, or right vested in them, it may be material to notice, that the council established by the Municipal Corporations Act is not a continuation of any former body, but an entirely new one; for the common law knew nothing of such a body as a council, or a common council, or a town council, in municipi-

(*l*) Vid. *Combe v. Pitt*, 1 W. Bla. 524.

(*m*) *R. v. Sparrow*, 2 T. R. 198; *Wakley v. Cooke*, 16 M. & W. 822; S. C. 4 Dowl. & L. 702; *R. v. Fielding*, 2 Burr. 719.

(*n*) 9 & 10 Vict. c. 74.

(*o*) Ibid. s. 2.

(*p*) 8 & 9 Vict. c. 43.

(*q*) 11 & 12 Vict. c. 123. If the order is not obeyed, the owner, &c., is liable to a penalty of 10s. for every day of the continuance of the nuisance, and the council may, by their servants, &c., enter and whitewash, &c., or remove the nuisance, s. 1, and recover the costs from the owner, &c., as money paid to his use, or before two justices, who shall issue a summons, &c., and order for payment; and if the costs, with those of the application, &c., be not paid in seven days, then the whole to be recovered by warrant of distress and sale, &c., s. 2.

pal corporations;(r) though in several corporations there were such bodies established by usage, or charter, or *local act*; but all such bodies are now abolished, as being inconsistent with the Municipal Corporations Act; and therefore, where it is necessary to trace the possession of any [*387] *right, &c., which was formerly vested in a common council, &c., or in the old corporation, care must be taken as to deriving it in proper terms to the present council, in whom such right vests by the Municipal Corporations Act, and subsequent acts.(s)

Having thus gone through the various functions of the council, and explained its province as representing and acting for the corporation, we shall proceed to state the rules as to the election and liabilities of councillors.

We have seen that the number of councillors in every borough to which the act applies are the numbers mentioned opposite the name of such borough in the Schedules (A.) and (B.,) that one-third of the number go out of office each year, and that the election is made by the general body of the burgesses of the borough inrolled on the burgess roll.(t)

BURGESSES.

In the first place, therefore, it is necessary to understand who are burgesses and what is the burgess list and roll, which will necessarily leads us into a long inquiry.

Who are to be burgesses is thus declared: "And(u) be it enacted, that every *male person*(x) of full age, who on the last day of August in any year shall have occupied any *house*(y) warehouse, counting-house or shop within any borough during that year, and the whole of each of the two preceding years, and also during the time of such occupation shall have been an inhabitant householder(z) within the said borough,

(r) Per Buller, J., in *R. v. Knight*, 4 T. R. 431.

(s) 6 & 7 Will. 4, c. 105, s. 8. In a return by the corporation, or by any corporate officer, acts done by the council ought to be pleaded as done by the corporation; 5 B. & C. 427, 428; *vid. sup.* p. 342.

(t) *Vid. ss.* 25, 26, 30, 31; *sup. pp.* 356, 357; *et vid. s.* 29.

(u) Sect. 9.

(x) The only corporation, having a municipal character, of which females have ever formed part, appears to have been that of the Pontenarii of Maidenhead; *Palm.* 77; *vid. sup.* p. 6.

(y) A person residing in a house, for the *whole* of which he is rated, has a right to be on the burgess roll, though he lets a room in the house, at a yearly rent, to a person who does not sleep there; *R. v. Mayor, &c., of Eye*, 9 A. & E. 670. But if the tenant and occupier of a house underlets the cellar, having an internal communication, the said occupier, not being rated for the cellar (the under-tenant using it as a warehouse, and being separately rated for it), could not claim to be registered for the house alone; for there being an internal communication, the occupier in law occupied the whole, but was only rated for part; *id.* 677. Where the premises occupied (described as houses) are under the same roof, and open on a common passage and staircase, the occupier of each set of premises being duly rated is qualified under this section; *id.* 679. And, generally, where a house is let out in separate portions to different tenants, and the owner or landlord does not reside on the premises, though there is but one outer door common to all the tenants, each distinct portion is a house; per *Littledale, J.*, *id.* 689.

(z) The owner, however small a part of the house he reserves for his own occupation, is in law the occupier of the whole, though he have ever so many lodgers; per *Buller, J.*, in *R. v. Eyles, Caldec. Sett. Cas.* 414; *Reg. v. Mayor of Eye*, 9

or within seven miles of the said borough,^(a) shall, if duly inrolled in that year according to the provisions hereinafter contained,^(b) be a *burgess of such borough and member of the body corporate of [*388] the mayor, aldermen and burgesses of such borough; provided always, that no such person shall be so inrolled in any year, unless he shall have been rated, in respect of such premises so occupied by him within the borough, to all rates made for the relief of the poor of the parish wherein such premises are situated, during the time of his occupation as aforesaid, and unless he^(c) shall have paid, on or before the last day of August as aforesaid, all *such rates*,^(d) including therein all borough rates, if any, directed to be paid under the provisions of this act, as shall have become payable by him in respect of the said premises, except such as shall become payable within six calendar months next before the said last day of August: provided also, that the premises, in respect of the occupation of which any person shall have been so rated, need not be the same premises or in the same parish, but may be different premises in the same parish or in different parishes: provided also, that no person being an alien shall be so inrolled in any year, and that no

A. & E. 670. An inhabitant must reside, to be within the meaning of the act, 4 B. & C. 961; and the residence must be *bonâ fide*, 6 T. R. 560; 5 T. R. 466; vid. 7 M. & Gra. 1.

(a) The miles are to be reckoned according to the distance along the way of nearest access. As to the measurement of the distance under the Reform Act, as regards the right of voting for member of parliament for boroughs, 6 & 7 Vict. c. 18, s. 76, *inf. n.* (f).

(b) The disqualification, disentitling a party to be inrolled, ought to be distinctly proved; and, if there be a doubt, the claim of right ought to prevail rather than the refusal, per Lord Denman, C. J., 2 Q. B. 699; and if he is refused on particular grounds of alleged disqualification, which are not clearly made out, and he establishes his title to be inrolled in other respects, a mandamus will go to the mayor to insert his name on the roll, Reg. v. Mayor of Lichfield, 2 Q. B. 693. N. B., the later practice seems to be to direct the mandamus in such case to the mayor and his assessors; vid. Reg. v. Mayor, &c., of New Windsor, 7 Q. B. 908.

(c) i. e. he himself, and not another for him, acting as a volunteer; Reg. v. Mayor, &c., of Bridgnorth, 10 A. & E. 66. *Semb.* he must be assessed as occupier; a *bonâ fide* payment of rates by him without being called upon is not sufficient; 7 M. & Gra. 72. But payment by landlord in consequence of an arrangement between him and the tenant is a good payment by the latter; 3 T. R. 550; 8 East. 383.

(d) This does not include paving and lighting rates extending only over part of the borough, Reg. v. Mayor, &c. of Lichfield, 2 Q. B. 693, the words only relating to poor rate and borough rate; *id. ibid.* The words only include the legal amounts of rates made or ordered by the council, &c., not any sums which may be demanded by the overseers under colour of such rates. Therefore, where the council made a rate of 6*d.* in the pound, and the overseers demanded of a party 7*d.* in the pound, in the name of that rate, which he refused to pay, and was in consequence excluded from the burgess list and refused insertion on the roll, as for not having paid "all such rates," &c., under the above section, the court granted a mandamus to the mayor and assessors to enrol his name; Reg. v. Mayor, &c., of New Windsor, 7 Q. B. 908; vid. 2 Q. B. 693. It is a good return to a mandamus "to enrol the name of A. B., being duly qualified to be inrolled in the burgess roll," to say that "A. B. is not duly qualified," &c.; Reg. v. Mayor, &c., of New Windsor, 7 Q. B. 908. 917; R. v. Williams, 8 B. & C. 681; vid. Reg. v. Mayor of Dover, Exch. Ch. 1847. But if a mandamus to enrol sets out certain facts from which it deduces, as a conclusion of law, that the prosecutor is qualified and entitled to be restored or placed on the list, the return cannot traverse that conclusion, but must put in issue some of the facts from which it is derived; R. v. Williams, 5 T. R. 66.

person shall be so inrolled in any year who, within twelve calendar months next before the said last day of August, shall have received parochial relief or *other alms*,^(e) or any pension or charitable allowance from any fund entrusted to the charitable trustees of such borough hereinafter mentioned: provided that in every case provided in this act the distance of seven miles shall be computed by the nearest public [*389] *road or way by land or water.”^(f) “And^(g) be it enacted, that no medical or surgical assistance given by the charitable trustees of any borough shall be taken to be such charitable allowance as shall disqualify any person from being inrolled a burgess as aforesaid; nor shall any person be so disqualified by reason that any child of such person shall have been admitted and taught within any public or endowed school.”^(h) “And⁽ⁱ⁾ be it enacted, that in every borough it shall be lawful for any person occupying any house, warehouse, counting-house, or shop, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming, and actually paying or tendering the full amount of the last made rate then payable in respect of such premises, the overseers of the parish, in which such premises are situate, are hereby required to put the name to such occupier upon the rate for the time being; and in case such overseer shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this act, be deemed to have been rated to the relief of the poor in respect of such premises from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid; provided always, that where by virtue of any act of parliament the landlord shall be liable to the payment of the rate for the relief of the poor in respect of any premises occupied by his tenant, nothing herein contained shall be deemed to vary or discharge the liability of such landlord; but in case the tenant, who shall have been rated for such premises in consequence of any such claim as aforesaid, shall make default in the payment of the poor’s rate payable in respect thereof, such landlord shall be and remain liable for the payment thereof in the same manner as if he alone had been rated in respect of the premises so occupied by his tenant.” “And^(k) be it enacted, that where any house, warehouse, counting-

(e) This means parochial alms; Reg. v. Mayor, &c., of Lichfield, 2 Q. B. 693. Moneys distributed annually from the income of a charitable institution established by an individual for the use and benefit of the poor housekeepers of the borough, not receiving parochial relief from any parish therein, are not such alms; id. *ibid.*; vid. R. v. Halesworth, 3 B. & Ad. 717; Mashiter, app., and Town Clerk of Lancaster, resp., 2 Lutw. Registr. Cas. 112, that being relieved from the payment of poor rates on account of poverty is not receiving parochial alms within 36th section of Reform Act.

(f) Minge v. Earle, Cro. Eliz. 212. 267; Leigh v. Hind, 9 B. & C. 774; vid. 1 Ventr. 328. As to the measurement of the same distance as regards voters for members of parliament for cities and boroughs, vid. 5 & 6 Vict. c. 18, s. 76; Johnson’s case, Fitz. & F. Rep. 395. As to alleging in pleading residence at such distance, R. v. Mead, 1 Ventr. 328. As to measurement of distances under various acts of parliament, vid. Cro. Eliz. 212; 1 Ventr. 328; 2 W. Bla. 968; 1 & 2 Vict. c. 106, s. 129; 9 Q. B. 76.

(g) Sect. 10.

(h) Vid. per Patteson, J., 2 Q. B. 702.

(i) Sect. 11.

(k) Sect. 12.

house, or shop, in any borough, shall come to any person by descent, marriage, marriage settlement, devise, or promotion to any benefice or office, such person shall be entitled to reckon the occupancy, and rating in respect of the occupancy, thereof by the person from or by whom such house, warehouse, counting-house, or shop, shall have so come to him, as his own occupancy and rating, conjointly with the time during which he shall have since occupied and been rated for the same, and shall be entitled to be enrolled a burgess in respect of such successive occupancy and rating, provided he shall be otherwise qualified as herein provided."

*" And(*l*) be it enacted, that after the passing of this act no person shall be enrolled a burgess of any borough, for the purpose [*390] of enjoying the rights conferred for the first time by this act, in respect of any title other than by occupancy and payment of rates within such borough, according to the meaning and provisions of this act." " And(*m*) be it enacted, that on the fifth day of September, in every year, the overseers(*n*) of the poor of every parish, wholly or in part, within any borough, shall make out an alphabetical list, to be called the "The Burgess List," according to the form number 1, in the Schedule (D.) to this act annexed, of all persons who shall be entitled to be enrolled in the burgess roll of that year according to the provisions of this act, in respect of property within such parish; and the overseers shall sign such burgess lists, (*o*) and shall deliver the same to the town clerk of the borough on the said fifth day of September in every year, and shall keep a true copy of such lists, to be purused by any person, without payment of any fee, at all reasonable hours, between the fifth and fifteenth days of September in every year; and the town clerk shall forthwith cause copies to be printed of all overseers' lists delivered to him, and shall deliver a copy of all such lists to any person requiring the same, on payment of a reasonable price for each copy; and shall cause a copy of all such lists to be fixed on or near the outer door of the town hall, or in some public and conspicuous situation within the borough, on every day during the week next preceding the fifteenth day of September in every year." " Provided(*p*) always, and be it enacted, that in any borough in which there shall be no town clerk, or in which the town clerk shall be dead or incapable of acting, all matters by this act required to be done by and with regard to the town clerk, shall be done by and with regard to the person executing duties in such borough similar to those of town clerk; and if there be no such person, or if such person shall be dead or incapable of acting, then by and with regard to such fit person as the mayor of such borough shall appoint in that behalf; provided always, that

(*l*) Sect. 13.

(*m*) Sect. 15.

(*n*) i. e., all persons who shall execute the duties of overseers of the poor; s. 142.

(*o*) Overseers neglecting to make out and sign are liable to the penalty in s. 48. *vid. infra*, that is, to the penalty of 50*l*.; *King v. Burrell*, 12 A. & E. 460. All the overseers ought to sign, per *Patteson, J.*, *id. ibid.*; *King v. Share*, 3 Q. B. 31, where see commencement of declaration in debt for the penalty. No notice of action necessary, 12 A. & E. 460, the offence being an omission to do something required by the act, s. 133. A printed burgess list, containing the overseer's name in it as a burgess, although corrected in his handwriting, is not sufficiently signed by him; *King v. Burrell*, 12 A. E. 460.

(*p*) Sect. 16.

every precinct or place, whether extra-parochial or otherwise, which shall have no overseers, shall, for the purpose of making out such list as aforesaid, be deemed within the parish adjoining thereto, such parish being wholly or in part situate within the same borough as such precinct or place; as if such precinct or place shall adjoin two or more parishes [“(1)"] as situate as aforesaid, it shall be deemed to be within the least populous of such parishes according to the last census for the time being; and the overseers of the poor of every such parish shall insert in the list for their parish the names of all persons who would have been entitled to be inserted in the list for such precinct or place, if such precinct or place had had overseers, or been rated to the maintenance of the poor."

"And it is enacted, that every person, whose name shall have been omitted in any such burgess list, and who shall claim to have his name inserted therein, shall, on or before the fifteenth day of September in every year, give notice thereof to the town clerk in writing, according to the form number 2 in the said Schedule (D), or to the High Officer:

"And every person, whose name shall have been inserted in any burgess list for any borough, may object to any other person as not being entitled to have his name retained in the burgess list for the same borough:

"And every person so objecting shall, on or before the fifteenth day of September in every year, give to the town clerk of such borough, and also give to the person objected to, or leave at the premises for which he shall appear to be rated in the burgess list, notice thereof in writing, according to the form number 3 in the said Schedule (D), or to the like effect:

"And every town clerk shall include the names of all persons claiming to be inserted on the burgess list, in a list according to the form number 4 in the said Schedule (D), and shall include the names of all persons so objected to as not entitled to be retained on the burgess list, in a list according to the form number 5 in the said Schedule (D), and shall cause copies of such several lists to be fixed on or near the outer door of the town hall, or in some public or conspicuous situation within such borough, during the eight days next preceding the first day of October in every year; and the town clerk shall likewise keep a copy of the names of all persons claiming as aforesaid, and also a copy of the names of all persons so objected to as aforesaid, to be perused by any person without payment of any fee, on all reasonable hours during the eight days, Sundays excepted, next preceding the first day of October in every year, and shall deliver a copy of each of such lists to any person requiring the same, on payment of a sum not exceeding one shilling for each copy."

[“(1)” See Sched. (D), *id.* infra.

[“(2)” Vols. 2 Q. B. 141, 143.

[“(3)” Form 1, Sched. (D), requires “the place of abode, and also the property in which the objector is said to be rated in the burgess list,” as he stands. *Id.*, Form 2, *supra*, No. of *Charwell*, 2 A. & E. 406. A notice signed “A. B., King’s Head Street, Norwich,” is not sufficient. *Housing of “paupers of abode” in the Police and Registration Acts* (7 W. & W. 17—18).

*It will be most convenient to place here the rules relating to revision of burgess lists, and making up the roll, which will [*392] complete the subject.

REVISED BURGESS LISTS.

The Burgess Lists are revised thus:—"And(*a*) be it enacted, that the mayor, and the two assessors hereinafter mentioned,^(b) to be chosen in every year by the *burgesses* of every borough, shall hold an open court within such borough, for the purpose of revising the said burgess lists, at some time between the 1st October inclusive and the 15th October inclusive, in the year 1836, and every succeeding year, having first given three days clear notice of the holding of such court, to be fixed on or near the outer door of the town hall, or in some public and conspicuous situation within the borough; and the town clerk of every such borough, shall, at the opening of the court, produce the said lists, and a copy of the lists of the persons claiming, and of the persons objected to, so made out as aforesaid; and the overseers, vestry clerks, and collectors of poor's rates of every parish, wholly or in part within every such borough, shall attend the court, and shall answer upon oath all such questions as the court may put to them, or any of them, touching any matter necessary for revising the burgess lists; and the mayor(*c*) shall insert in such lists the name of every person who shall be proved to the satisfaction of the court to be entitled to be inserted therein according to the provisions of this act, and shall retain on the list the names of all persons to whom no objection shall have been duly made, and shall also retain on the said lists the name of every person who shall have been objected to by any person, unless the party so objecting shall appear by himself, or by some one in his behalf, in support of such objection; and where the name of any person inserted in any one of the said lists shall have been duly objected to, and the person objecting shall appear by himself, or by some one in his behalf, in support of such objection, the court shall require proof of the qualification of the person so objected to, and in case the qualification of such person shall not be proved to the satisfaction of the court, the mayor shall expunge the name of every such person from the said lists; and he shall also expunge from the said lists the name of every person who shall be proved to the court to be dead; and shall correct any mistake, or supply any omission, which shall be proved to the court to have been made in any of the said lists in respect of the name or place of abode of any person who shall be included in any such list, or in respect of the local description of his property; provided always, that no person's *name shall be inserted by the mayor in any such list, or shall be expunged therefrom, except in the case of death, unless [*393] notice shall have been given as is hereinbefore required in each of the

(*a*) Sect. 18.

(*b*) Sect. 37. Vid. ASSESSORS.

(*c*) Under this section the mayor's decision was final; but 7 Will. 4 & 1 Vict. c. 78, s. 24, gives a mandamus to insert on the burgess roll (per Lord Denman, 1 Q. B. 461,) the name of any one who has been expunged or omitted.

said cases.”(d)—“And(e) be it enacted, that every mayor, holding any court under this act for the revision of the said lists, shall have power to adjourn the same from time to time, so that no such adjourned court shall be held after the fifteenth day of October in any year, and shall have power to require an overseer or person having the custody of any book containing any rate made for the relief of the poor during that or any preceding year, in any parish wholly or in part within the borough, to produce the same, and allow the same to be inspected at any court to be held for the revision of the burgess(f) lists, and shall have power to administer an oath to the town clerk and to the overseers, and to all persons claiming to be inserted in,(g) or making objection to the omission or insertion of any name in, any of the said lists, and to all persons objected to in any of the said lists, and to all persons claiming to have any mistake in any of such lists corrected, and to all witnesses who may be tendered or examined on either side; and the mayor and assessors shall, upon the hearing in open court, determine upon the validity of such claims and objections; and the mayor shall in open court, write his initial against the names respectively struck out or inserted, and against any part of the said lists, in which any mistakes shall have been corrected, and shall sign his name to every page of the several lists so settled.”

Having thus seen what are the burgess lists, we now come to the burgess roll:—“And(h) be it enacted, that the burgess lists, so revised and signed as last aforesaid, shall be delivered by the mayor to the town clerk of such borough, who shall keep the same, and shall cause the said burgess lists to be fairly and truly copied into one general alphabetical list in a book to be by him provided for that purpose, with every name therein [*394] numbered, beginning the numbers from the first *name, and continuing them in a regular series to the last name, and shall cause such books to be completed on or before the *twenty-second day of October* in every year,(i) and shall deliver such books, together with the lists, at

(d) Persons whose names may have been expunged, or claims rejected, may have a mandamus to restore their names, &c., on the roll; 7 Will. 4 & 1 Vict. c. 78, s. 24. They must come to the court prepared to prove their title; Reg. v. Mayor, &c., of Harwich, 8 A. & E. 919. (e) Sect. 19.

(f) It will be found that the term burgess as used in this statute differs materially from the old usages of the word; for the statute renders uniform and identical in such borough, that which previously had different significations in different boroughs. The consequence is, that the character of burgess-ship is wholly new; that the burgesses in any given corporation are not now the representatives of the old burgesses; and that whereas in many boroughs formerly burgess-ship was an office, 3 Burr. 1487. 1641; R. v. Mayor, &c., of Lyme (Raymond's case), Dougl. 168; R. v. Carter, Cowp. 220; R. v. White, Cas. Temp. Hardw. 8; vid. 1 Ld. Raym. 337; Merew. & S. Hist. Bor. 2225, 2226, it is not so now, In re Milner, 5 Q. B. 589. However, it seems the new burgess-ship is a franchise of a freehold nature, from which a man cannot be removed but by some legal act done, (R. v. Ponsonby, 1 Ves. 1,) unless by his own consent.

(g) It seems the mayor has power to insert on the lists, or to make a list of, persons claiming and proving to his satisfaction their title, though the overseers had sent in no list, or had omitted those persons' names from the list they sent in, per Patteson, J., in Reg. v. Mayor, &c., of Lichfield, 1 Q. B. 462, 463.

(h) Sect. 22; vid. inf. p. 397, s. 28; et vid. 3 Q. B. 481.

(i) Although the books are to be completed by 22d October, yet a person whose

the expiration of his office, to the person succeeding him in such office; and every such book in which the said burgess lists shall have been copied shall be the burgess roll(*k*) of the burgesses of such borough entitled to vote, after the passing of this act, in the choice of the councillors, assessors, and auditors of such borough, as hereinafter mentioned, at any election which may take place in such borough, between the first day of November inclusive, in the year wherein such burgess roll shall have been made, and the first day of November in the succeeding year: provided that no stamp duty shall be payable in respect of the admission, registry, or inrolment of any burgess, according to the provisions of this act."

A quo warranto information is the proper mode of raising the question of a person's right to remain upon the burgess roll after the objection has been taken and overruled at the Court of Revision; and the Court of Queen's Bench, though they will exercise great caution, and look narrowly into all the circumstances of the case, as disclosed in the affidavits, will probably, where they see clearly that the information ought to be granted, give facilities for expediting the decision, so that it may be obtained before the revision for another year takes place, provided the relator comes promptly.(*l*) But the party complained against cannot be called upon to show cause in the *first instance*; for a burgess is not a corporate officer, so as to be within a late enactment for rendering more expeditious proceedings by way of mandamus and quo warranto, so far as they effect corporate offices in boroughs;(m) and therefore the rule is to show cause simply. A burgess is liable to a quo warranto on the general ground that he claims and uses a franchise; and where a rule nisi for such information is discharged, and it appears that the party making affidavit as relator is indigent, and unable to pay costs, and was procured to make the application by another person, who is the real relator, the court, on a separate motion, will *order that person to pay the costs.(n)—"And(o) be it enacted, that every burgess of [³⁹⁵] any borough who shall be inrolled on the burgess roll for the time being of such borough, shall be entitled to vote in the election of councillors, and of the auditors and assessors hereinafter mentioned, for such borough;

name is in the revised list of that day is not on the burgess roll until the 1st November, and is not qualified to be a councillor between the 22nd October and that day; Reg. v. Harvey, 3 Q. B. 480, 481, inf. p. 397, n.(g).

(*k*) A mandamus will go to the mayor to insert on the roll any name unduly omitted; Reg. v. Mayor, &c. of Lichfield, 2 Q. B. 693. What is a sufficient compliance with the rule, Mich. T. 3 Vict. (11 A. & E. 2.) that the intended relator shall make affidavit that the motion for the rule for a quo warranto information is made at his instance, in moving for one against a burgess; Reg. v. Anderson, 2 Q. B. 740. Such information will be refused, where no question as to the validity of the election of any corporate officer depends on the right of the party complained against, and it appears that the complaint applies with a view of obtaining an indirect decision upon his own claim, Reg. v. Anderson, 2 Q. B. 740; he having previously obtained a rule absolute for a mandamus to the mayor to insert his name on the burgess roll, but taken no further steps thereon, and the question not being likely to be decided before the revision for another year had taken place.

(*l*) Vid. Reg. v. Anderson, 2 Q. B. 740. 744; Reg. Hodson, 7 Q. B. 648.

(*m*) 6 & 7 Vict. c. 89, s. 5; vid. In re Milner, 5 Q. B. 589.

(*n*) Reg. v. Greene, 4 Q. B. 646; et vid. per Lord Denman, C. J., 5 Q. B. 963. How to draw up the rule for costs in such case, vid. Rule of Court, 4 Q. B. 653.

(*o*) Sect. 29.

and no person who shall not be enrolled in such burgess roll for the time being, shall have any voice or be intitled to vote in any such election.”— In boroughs not divided into wards, the burgess roll consists of a general alphabetical list of the names of persons entitled to be burgesses; in boroughs having wards, the roll consists of lists for each ward arranged in each alphabetically, and copied by the town clerk into the roll. (*p*)

[*396]

COUNCILLORS.

It was necessary, for the full apprehension of the remaining part of the regulations respecting councillors, to give a view of the nature of burgess-ship as laid down by the statute. We now return to the former subject, observing that the awkwardness of the admixture of the two subjects arises out of the necessity of the case; for it would not have been possible to have presented otherwise the matter of these enactments, without sacrificing a good deal of the clearness of view, which, it is hoped, the reader will feel is gained by the arrangement that has been adopted.

We have already (*a*) seen that the election of councillors is to be made openly by such burgesses as are on the roll on the 1st of November in each year, out of such persons as are then qualified to be councillors.

Now, with respect to qualification for the office of councillors, every one who is entitled to be on the burgess list of the borough, during such time as he shall not hold any office or place of profit, other than that of mayor, in the gift or disposal of the council of such borough, or have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council, is eligible to be and be elected a councillor; this does not extend to disqualify a proprietor or shareholder in any company contracting with the council for the supply of light or water, or for insuring against fire any part of the borough; but where the only objection to a councillor is, that there is no good burgess list in existence, which applies equally to all the councillors elected at the same time, and also to all the existing burgesses, the court will refuse an information in the nature of *quo warranto* against him, if the result would be the dissolution of the corporation. (*b*)

A lease, sale, or purchase, of lands, tenements, or hereditaments, is not such a contract as disqualifies; (*c*) and a lease between the corporation as lessors, of the one part, and A. as lessee, of the other part, sealed with the common seal, though made *before* the passing of the Municipal Corporations Act, falls within the meaning of a contract with the council, and is therefore within the exemption of the statute of Victoria. (*d*) The word contract in the above section (s. 28) must be taken to have its ordi-

(*p*) Sect. 22, 45; 1 Q. B. 461.

(*a*) Vid. s. 30; sup. p. 356.

(*c*) 5 & 6 Vict. c. 104, s. 1.

(*b*) 6 A. & E. 810, vid. inf. p. 397.

(*d*) Reg. v. York, 2 Q. B. 847.

nary legal meaning, subject to the explanation *given by the latter statute.(e) Further, the lease, whether granted before or [*397] since the passing of the Municipal Corporations Act, must appear to be a lease between the corporation and the lessee, and must be so pleaded in either case; and so of all other contracts;(f) for all contracts made with the old corporation must necessarily be so, and all contracts made with the council are virtually, and in the eye of the law, made on behalf and in the name of the corporation, and must be stated according to their legal operation.

The clause is as follows, thus :—“ And(g) be it enacted, that no person being in holy orders, or being the regular minister of any dissenting congregation, shall be qualified to be elected or to be a councillor of any such borough, or an alderman of any such borough, nor shall any person be qualified to be elected or to be a councillor or alderman of any such borough who shall not be *entitled to be on the burgess list* of such borough,(h) nor unless he shall be seised or possessed of real or personal estate, or both, to the following amount; that is to say, in all boroughs directed by this act to be divided into four or more wards, to the amount of 1000*l.*; or be rated to the relief of the poor of such borough upon the annual value of not less than 30*l.*; and in all boroughs directed to be divided into less than four wards, or which shall not be divided into wards, to the amount of 500*l.*, or be rated to the relief of the poor in such borough upon the annual value of not less than 15*l.*; or during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council of such borough, or during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by or on behalf of such council: provided, that no person shall be disqualified from being a councillor or alderman of any borough as aforesaid by reason of his being a proprietor or shareholder of any company, which shall contract with the council of such borough for lighting or supplying with water or insuring against fire any part of such borough.”

A contract between A. of the one part, and the mayor, aldermen, and burgesses of the borough of — of the other part, and sealed with the common seal, is a contract with the council under this section.(h)

There is still another disqualification, viz. that no burgess shall be

(e) Vid. 2 Q. B. 849.

(f) Vid. 2 Q. B. 850.

(g) Sect. 28. The proceedings which take place with respect to the burgess lists between 5th September and 1st November in each year, are only for the preparation of that which is to be the roll or list for the year *beginning* with 1st November, and until that day the placing a name on the list gives no qualification under the statute, the list or roll of the former year being the list or roll until 1st November. Therefore where a person's name was placed on the revised burgess list finally made up on the 22nd October, held, that on the 29th October he was not “entitled to be on the burgess list,” and therefore was not qualified to be a councillor, Reg. v. Harvey, 3 Q. B. 475, his name not being on the burgess roll for the municipal year ending with the 1st November, but merely on a list or roll which was not to be in force *until* that day, 3 Q. B. 482.

(h) Reg. v. York, 2 Q. B. 847. The being treasurer of trustees of a paving act, and banker to them, is a share and interest in an employment by or on behalf of the council; Reg. v. Greene, 2 Q. B. 460.

[*398] eligible *to be elected a member of the council while holding the office of assessor or elective auditor.(i)

An uncertificated bankrupt is not disqualified from being elected a councillor, though a person, on being declared bankrupt while holding the office of councillor, is disqualified to retain, and immediately ceases to hold, the office.(k)

The office of sheriff is not an "office or place of profit" within this section; (l) but the offices of town clerk, treasurer, registrar of the court of record, are so.(m)

The word *contract* in this section does not extend to any lease, sale or purchase of any lands, tenements, or hereditaments, or to any agreement for any such lease, &c., or for the loan of money, or to any security for the payment of money only.(n)

With respect to the disfranchisement of a burgess, the same principles appear to apply that have been laid down above with reference to the disfranchisement of corporators generally, notwithstanding the Municipal Corporation Act and the later acts; for there appears to be nothing in them to prevent the corporation from exercising its common law power of disfranchising a person who, from crime or breach of duty to the corporation, becomes unfit to continue a member of it.

As to the mode of conducting the election of councillors, it is enacted(o)—"that every election of councillors within any borough according to the provisions of this act, shall be held before the mayor(p) and assessors for the time being of such borough, except as herein is excepted; and the voting at every such election shall commence at nine o'clock in the forenoon, and shall finally close at four o'clock(q) in the afternoon of the same day, and shall be conducted in manner following; that is to say, every burgess entitled to vote in the election of councillors, may vote for any number of persons not exceeding the number of coun-

(i) 7 Will. 4 & 1 Vict. c. 78, s. 15. As to giving notice of such disqualification, Reg. v. Hiorns, 7 A. & E. 960; et vid. inf. n. (p).

(k) R. v. Chitty, 5 A. & E. 609.

(l) 5 & 6 Vict. c. 104, s. 8.

(m) Vid ss. 58 and 119 Municipal Corporations Act.

(n) 5 & 6 Vict. c. 104, s. 1.

(o) Sect. 32.

(p) The duty of the returning officer in such election is purely ministerial; he is to assume that the persons voted for are duly qualified; Reg. v. Ledgard, 8 A. & E. 545; vid. 6 Q. B. 668. Since 7 Will. 4 & 1 Vict. c. 78, s. 1, no election shall be invalidated for want of title in the presiding officer; vid. 9 A. & E. 680. The presiding officer must stay until the election closes, or it is void; R. v. Buller, 8 East, 37; vid. tam. 11 East, 77; R. v. Williams, 2 M. & Selw. 141. On the other hand, however, notice of disqualification of any burgess to be elected councillor, ought to be given at the time of election, R. v. Hiorns, 7 A. & E. 960; and, as it appears, ought to be given, by posting in conspicuous places at the booths or polling places, the names of all burgesses who are disqualified, under the hand of the mayor and assessors. But, sem., this is not necessary where the disqualification is one of which the electors are bound to take notice, as arising out of their character, an act of parliament, or the judgment of a court of law. All votes given to persons whose disqualification has been duly notified will be thrown away, R. v. Munday, Cowp. 537; R. v. Parry, 14 East, 549; R. v. Hawkins, 10 East, 211; S. C. 2 Dow. 124; vid. 7 Q. B. 437, 438; and as to cases of notorious disqualification, vid. sup. p. 205—208.

(q) Or at any time before four o'clock, if one hour should have elapsed without a vote having been tendered, 7 Will. 4 & 1 Vict. c. 78, s. 18, i. e. tendered to the presiding officer.

cillors then to be chosen, by delivering *to the mayor and assessors, or other presiding officer, as hereinafter mentioned, a voting [*399] paper containing the christian names,^(r) and surnames, of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane or other place in which the property, for which he appears to be rated on the burgess roll, is situated."

We may properly repeat here (for the principle is very important in reference to all cases of corporate elections), that where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal in order to be made available, or it may be such as to place the elected candidate on the same footing as if he never had existed, and the voters for him were a nullity; but in no such case are the electors who vote for him deprived of their votes if the fact becomes known and is declared while the election is still incomplete; they may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterwards, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed ipso facto elected. But where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise, and to violate his duty of assisting at the election.^(s)

The statute proceeds:—

"And^(t) be it enacted, that at every election in any borough, the mayor, if it shall appear to him expedient for taking the poll at such election, may cause booths to be erected, or rooms to be hired and used as such booths, for different parts of such borough, which may be situated either in one place or in several places, and shall be so divided and allotted into compartments as to the mayor shall seem most convenient; and the mayor shall appoint a clerk to take the poll at each compartment, and shall cause to affix on the most conspicuous part of each of the said booths the names of the parts for which such booth is respectively allotted; and no person shall be admitted to vote at any such election except at the booth allotted for the part wherein the house, warehouse, counting-house or shop occupied by him, as *described in the burgess roll, may be; but in case no booth shall [*400]

^(r) Where only one vacancy had been duly declared, the votes given for two persons jointly were held to be thrown away; the candidate whose voting papers contained the name of one candidate only was held to be duly elected; Reg. v. Mayor, &c., of Leeds, 7 A. & E. 963; R. v. Withers, Cowp. 537. What is not sufficient identification of the voting papers to be evidence of the votes given, Reg. v. Ledgerd, 8 A. & E. 535. What is the proper custody of voting papers for councillors does not appear; those for aldermen are to be kept among the records of the borough, by 7 Will. 4 & 1 Vict. c. 78, s. 14.

^(s) Gosling v. Veley, 7 Q. B. 437, 438.

^(t) Sect. 33.

happen to be provided for any particular as aforesaid, the votes of the persons voting in respect of property situate in any part so omitted may be taken at any of the said booths; and public notice of the situation, division and allotments of the different booths shall be given two days before the commencement of the poll by the mayor; and in case the booths shall be situated in different places, the mayor may appoint a deputy to preside at each place: provided also, that no election shall be holden under this act in any borough in any church, chapel, or other place of public worship." "And(u) be it enacted, that no inquiry shall be permitted at any election as to the right of any person to vote as a burgess in any borough, except only as follows; that is to say, that the mayor or other presiding officer shall, if required by any two burgesses entitled to vote in the same borough, put to any voter, at the time of his delivering in his voting paper, and not afterwards, the following questions, or any of them, and no other:—

1. Are you the person whose name is signed as A. B. to the voting paper now delivered in by you?
2. Are you the person whose name appears as A. B. on the burgess roll now in force for this borough, being registered therein as rated for property described to be situated in ———? [*Here specify the street, &c., as described in the burgess roll.*]
3. Have you already voted at the present election?

And no person required to answer any of the said questions shall be permitted or qualified to vote until he shall have answered the same; and if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of a misdemeanor, and may be indicted and punished accordingly."(x)

In an indictment, a count for fraudulently, deceitfully, and in fraud of the provisions of the act, personating one H., whose name was on the burgess roll, and giving a vote in the name of H., was held to be bad, as not charging any offence either against the statute or at common law.(y) If the indictment be for making false answers, they must be alleged to have been made wilfully, or the indictment will be bad.(y) "And(z) be it enacted, that the mayor and assessors shall examine the voting papers so delivered as aforesaid, for the purpose of ascertaining which of the several persons voted for are elected; and so many of such persons, being equal to the number of persons then to be chosen, as shall have the greatest number of votes, shall be deemed to be elected; and in case of an equality in the number of votes for any two or more persons, the mayor and assessors, or any two of them, shall name from amongst those [*101] persons, for whom the number of votes shall be equal, so *many as shall be necessary to complete the requisite number of persons to be chosen; and the mayor shall cause the voting papers to be kept in the office of the town clerk during six calendar months at the least after every such election; and the town clerk shall permit any burgess to inspect the voting papers of any year, on payment of one shilling

(u) Sect. 34.

(x) Vid. Reg. v. Dodsworth, 2 M. & Rob. 72; Reg. v. Bent, 2 Car. & K. 179.

(y) Reg. v. Bent, 2 Car. & K. 179.

(z) Sect. 35.

for every search; and the mayor shall publish a list of the names of the persons so elected not later than two of the clock in the afternoon of the day next but one following the day of such election, unless such day be Sunday, and then on the Monday following."

In a case of a refusal of a person elected to take upon him the office, a mandamus will go to compel him;(a) at any rate, if there is no bye-law made fixing the fine for non-acceptance.(b)

In case of any mistake in the list of persons elected, which the mayor publishes under this section, being afterwards discovered, it cannot be corrected after two of the clock on the day but one following the day of election; and a party, whose name is in the first published list, and who has made and subscribed the declaration required by 9 Geo. 4, c. 17, s. 2, before two justices of the borough, is councillor de facto, and may have a mandamus to the corporation to receive him as such;(c) and, as it seems, though it does not appear whether he has made the declaration before two or more aldermen, or councillors, required by a latter section,(d) without which a councillor is not capable of acting.

Where the council have passed a bye-law, ascertaining the amount, or at least the limits, of the fine to be paid for non-acceptance of the office, a councillor elected, by omitting to take the declaration in this act mentioned,(e) within five days after notice of his election, becomes liable to pay the fine, and his office is deemed vacant, and shall be filled up by a fresh election;(f) but "no person, disabled by lunacy or imbecility of mind,(f) or by deafness, blindness, or other permanent infirmity of body, shall be liable to such fine; provided also, that every person so elected to any such office, who shall be above the age of sixty-five years, or who shall have already served such office respectively, or paid the fine for not accepting such office respectively, within five years from the day in which he shall be so re-elected, shall be exempted from accepting or serving the same office, if he shall claim such exemption within five days after notice of his election; provided always, that nothing in this act contained shall extend to compel the acceptance of any office or duty whatever in any borough, by any military, naval, or marine officer in his majesty's service on full pay, or by any officer or *other person employed and residing within any of her Majesty's dock-yards, victualling establishments, arsenals, or barricks.(g) [*402]

The mode of election, where boroughs are divided into wards, is this: "And(h) whereas it is expedient that certain boroughs of large population should be divided into wards before any election of councillors for such boroughs should take place: be it therefore enacted, that every borough in the said Schedule (A.) shall be divided into the number of wards mentioned in such schedule, in conjunction with the name

(a) Reg. v. Hungerford, 11 Mod. 142; vid. Stra. 1193.

(b) Vid. s. 90, sup. p. 362; and as to mode of levying, s. 51.

(c) Reg. v. Mayor, &c., of Leeds, 11 A. & E. 512.

(d) 5 & 6 Will. 4, c. 76, ss. 50, 51.

(e) Sect. 50. The fine seems to be in lieu of service; therefore a mandamus to take on him the office would not lie in any case where the fine was paid; 1 B. & C. 585.

(f) Sect. 51. To make these express exceptions is ridiculous, according to Holt, C. J.; Carth. 483.

(g) Sect. 51.

(h) Sect. 39.

of such borough; and that it shall be lawful for the barrister or barristers appointed in pursuance of the provisions hereinafter contained to revise the burgess and councillors' list of any borough in the present year, and he or they is and are hereby required, within the space of six weeks next after the passing of this act, to determine and set out the extent, limits, and boundary lines, of such wards, and what portions of such borough shall be included therein respectively; and the copy of the particulars of such division shall be forthwith transmitted to one of his majesty's principal secretaries of state, and, if his majesty by advice of his privy council, shall approve such determination, shall be published in the London Gazette, and another copy of such particulars shall be delivered to the town clerk of such borough, to be by him safely kept among the public documents of such borough; and every such borough shall, after such publication as aforesaid, be deemed to be divided into such wards as shall be so determined and set out as aforesaid, and such divisions shall continue and be in force until the same shall be altered by authority of parliament: provided always, that if his majesty, by advice of his privy council, shall not approve such determination, such publication as aforesaid shall nevertheless be made, and such division be in force for the purpose of any election under the provisions of this act, and until such times as his majesty shall, by advice of his privy council, upon further information and report from such barristers, definitely approve the division of such borough into wards in manner hereinbefore mentioned." And (i) be it enacted, that the said barrister or barristers shall, after the division of the borough into such number of wards as is directed by this act, apportion among the several wards of such borough the number of councillors mentioned in conjunction with the name of such borough in the said Schedule; (A.) and in assigning the number of councillors to each ward, the said barrister or barristers shall, as far as in his or their judgment he or they may deem it to be practicable, have regard as well to the number of persons rated to the relief of the poor in such wards as to the aggregate amount of the sums at which all the said persons shall be so rated: provided always, that the number of councillors assigned to each ward shall be a number divisible by three; and a copy of the particulars of the number of councillors so assigned to the several wards of the borough

[*403] *shall be forthwith transmitted to one of his majesty's principal secretaries of state, and, subject as aforesaid to the approval of his majesty, by the advice of his privy council, shall be published in the London Gazette, and another copy of such particulars shall be delivered to the town clerk of the borough, to be by him safely kept among the public documents of such borough; and the number of councillors so assigned to each ward of such borough shall, after such publication as aforesaid, be the number to be elected in such ward, and shall so continue until the same shall be altered by authority of parliament: provided always, that if his majesty, by the advice of his privy council, shall not approve the number of councillors so assigned to each ward, such publication shall nevertheless be made, and the number of councillors so assigned to each

ward of such borough by such barrister shall be the number to be elected in such ward at any election of councillors under this act, until such time as his majesty shall, by advice of his privy council, upon further information and report from such barrister, definitively approve such assignment in manner hereinbefore mentioned." "And(*k*) whereas it may be convenient in divers boroughs to adhere in the division of the same into wards, to the ancient division thereof into parishes or into districts under any local act, or to adapt such division to local circumstances, and such division so made might render difficult such apportionment of councillors as is hereinbefore directed: be it therefore enacted, that in every such case the said barrister or barristers shall be empowered, at his or their discretion, subject as aforesaid to the approval of his majesty, by the advice of his privy council, to divide any borough, in conjunction with the name of which, in the said Schedule (A.) shall be mentioned any number of wards greater than two, into any number of wards more or less by one than the number of wards mentioned in conjunction with the name of such borough in the said schedule." "And(*l*) be it enacted, that in every case in which there shall be a division into wards of any borough, the burgesses of every such ward, and none others, shall, on the day fixed for the first election of councillors, separately elect from the persons qualified to be councillors the whole number of councillors assigned to such ward respectively; and on the first day of November, in any subsequent year, shall separately elect from the persons qualified to be councillors one-third part of the whole number of councillors assigned to such ward; and on the first day of March next after the first election of councillors in such ward, and in every subsequent year, shall separately elect from the persons qualified to be councillors two assessors for such ward; and every such ward election first after such division into wards of any such borough shall be held before the mayor, or the person whom the mayor for the time being shall appoint in that behalf, and in every succeeding year shall be held before the alderman, whom the councillors chosen in such ward shall yearly appoint in that behalf, and before the two assessors of such ward; and the assessors whoshall hold the court for revising the burgess list with the mayor, shall be the assessors of the mayor's ward; and the votings, and other proceedings in all other respects at such ward elections, shall be conducted in the same manner as at elections of councillors or assessors respectively by the burgesses of the whole borough; and the aldermen and assessors of each ward shall have the same powers in regard to elections in their ward as the mayor and assessors for the whole borough, if not divided into wards; and every person so elected a councillor or assessor in such ward shall hold his office for the same time that he would have held it, if he had been elected by the burgesses of the whole borough, and if the number elected in such ward had been the whole number for the borough." "And(*m*) be it enacted, that every burgess of any borough shall be entitled to vote in the election of the councillors and assessors to be chosen within that ward, in which the property

(*k*) Sect. 41.(*l*) Sect. 43.(*m*) Sect. 44.

of such burgess, for which he appears to be rated on the burgess roll for the time being of such borough, shall appear to be situated, and not otherwise; and if any burgess shall be rated in respect of distinct premises in two or more wards, then he shall be entitled to be inrolled and to vote in such one of the said wards as he shall select, but not in more than one." "And(n) be it enacted, that, for the purpose of better ascertaining who are the burgesses of any such ward, the burgess roll of every borough so divided into wards shall thenceforward be made out, by or under the direction of the town clerk, in alphabetical lists of the burgesses in each ward, to be called "ward lists." "And be it enacted, that, if at any election of councillors or assessors for any borough, any person shall be elected a councillor or assessor in more than one of the wards of such borough, he shall, within three days after notice thereof, choose, or in his default the mayor shall declare, for which one of the said wards such councillor or assessors shall serve; and such person shall thereupon be held to be elected in that ward only which he shall so choose, or which the mayor shall so declare."

As to cases of extraordinary vacancies, it is provided as follows: "And(o) be it enacted, that if any extraordinary vacancy shall be occasioned in the office of councillor, auditor, or assessor for any borough, the burgesses entitled to vote shall, on a day to be fixed by the mayor of such borough, or in the case of a councillor or assessor, where the borough shall have been divided into wards, by the alderman of the ward in which the vacancy has happened (such day not to be later than ten days after such vacancy,) elect from the persons qualified to be councillors another burgess to supply such vacancy; and such election shall be held, and the voting and other proceedings, in case of a contest, shall be conducted in the same manner and subject to the same [*405] *provisions as are hereinbefore enacted with respect to the election of councillors as aforesaid; and every person so elected shall hold such office until the time at which the person in room of whom he was chosen would regularly have gone out of office, and he shall then go out of office, but shall be capable of immediate re-election if then qualified as herein provided: *provided always, that after the full number to be regularly elected of the councillors in any year shall have declared their acceptance of office, no new election of councillors shall be made by reason of such extraordinary vacancy, unless the number of councillors remaining after such vacancy shall not exceed two-thirds of the whole number of the council of such borough.*"

Where a councillor has been put off the burgess roll by the overseers for alleged non-payment of rates, but has nevertheless continued to exercise the office, this is not an extraordinary vacancy, on which the court will issue a mandamus to proceed to a new election; the vacancy must first be ascertained by a judgment on an information in the nature of quo warranto.(p) But the burgesses *may* elect another to supply

(n) Sects. 45, 46.

(o) Sect. 47. The proviso is repealed by 7 Will. 4 & 1 Vict. c. 78, s. 11.

(p) Reg. v. Phippen, 7 A. & E. 966; R. v. Mayor, &c., of Winchester, 7 A. & E. 215.

his place if they please, the proceedings of removing him from the burgess roll being bona fide,^(g) and the vacancy being established by certificate, under sect. 52 of the Municipal Corporations Act.^(r) In general, however, where an election of councillor is not made on the day, or within the proper time, a mandamus to proceed to election will issue.^(s) If a councillor be ousted and another person be elected, but only colourably in his stead, a mandamus to permit the former to exercise his office is proper, but not to restore, for the office is not filled by the other; but if the ouster and election be bona fide, there must be a quo warranto information to remove the latter before a mandamus can go to restore the former.^(t) Where there are two or more extraordinary vacancies to be filled at the same election, the person elected by the smallest number of votes shall be taken to be elected in the room of the person who would first have gone out of office, and so on with respect to the others.^(u)

An election taken for ordinary and extraordinary vacancies both together is wholly bad,^(x) and in that, and in all other cases of an actual vacancy and a void election to supply it, the court will grant a mandamus to proceed to an election.^(y) "And^(z) be it enacted, that if any *mayor, alderman, or assessor of any borough, who shall be in office at the time herein appointed for the revision by them of [*406] the burgess list under this act, or for any election of councillors, assessors, or auditors, which he is required to conduct or declare, shall neglect or refuse to revise such burgess list, or conduct or to declare such election as aforesaid, every such mayor, alderman or assessor shall for every such offence forfeit and pay the sum of 100*l.*; and if any overseer of any parish, wholly or in part within any borough, shall neglect^(a) or refuse to make out, sign, and deliver such list as aforesaid, or if the town

(g) *R. v. Mayor, &c., of Oxford*, 6 A. & E. 349.

(r) *Per Littledale, J.*, 7 A. & E. 971; et vid. 6 A. & E. 349.

(s) 7 Will. 4 & 1 Vict. c. 78, s. 26. Where an election not a nullity under this section, *Reg. v. Mayor, &c., of Leeds*, 7 A. & E. 964; vid. sup. p. 213.

(t) *R. v. Mayor, &c., of Oxford*, 6 A. & E. 349.

(u) 7 Will. 4 & 1 Vict. c. 78, s. 11.

(x) *Rowley v. Reg.* 6 Q. B. 668.

(y) *Per Patteson, J.*, *R. v. Stoke Damerell*, 5 A. & E. 589; vid. 1 A. & E. 80. 100.

(z) Sect. 48. A mandamus will issue to compel the mayor to insert a name on the burgess list, 7 Will. 4 & 1 Vict. c. 78, s. 24, subject to this, that the party applying to be inserted must make out a good title in all respects, and not only as regards the objections taken at the revision, *Reg. v. Mayor of Harwich*, 8 A. & E. 919; *Reg. v. Mayor of Lichfield*, 1 Q. B. 461, 462; and to this, that if he fail in his application he must pay the costs; *Reg. v. Mayor of Bridgenorth*, 10 A. & E. 66. N. B. in the above statute the term "burgess roll" (which is not made till after the revision) is improperly used for "burgess list," per Lord Denman, C. J., 1 Q. B. 461; vid. *Reg. v. Harvey*, 3 Q. B. 475. Where several persons are to be inserted on the roll, it is not regular to grant a single rule nisi for the issuing of several writs of mandamus; 10 A. & E. 70. The mandamus is not peremptory in the first instance: *Reg. v. Mayor of Eye*, 9 A. & E. 670.

(a) Where the overseers of a parish, within a borough, neglected to deliver a list, and the name of any party has in consequence been omitted from the burgess roll by the mayor, such party may have a mandamus under 7 Will. 4 & 1 Vict. c. 78, s. 24, to the mayor to insert his name on the roll, his qualification having been proved at the revision court; *Reg. v. Mayor of Lichfield*, 1 Q. B. 453. The overseers are, besides, liable to the penal action given by the latter part of the section; *King v. Burrell*, 12 A. & E. 460.

clerk of any borough shall neglect or refuse to receive, print, and publish such list as aforesaid, or if any such overseer or town clerk shall refuse to allow any such list to be perused by any person having right thereunto, every such *overseer* and town clerk respectively for every such offence shall forfeit and pay the sum of fifty pounds; and the said penalties hereby in such case imposed shall be recovered, with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, by action of debt or on the case in any of his majesty's superior courts of record; and the money so to be recovered shall, after payment of the costs and expenses attending the recovery thereof, be paid and apportioned as follows, (that is to say,) one moiety thereof to the person so suing, and the other moiety thereof to the treasurer to be appointed by virtue of this act, to be by him applied in aid of the borough fund hereinafter mentioned."

The overseer is liable to the penalty although his neglect be neither wilful nor corrupt,^(b) and the reasons on which that has been decided appear to apply equally to the town clerk: "Provided^(c) always, and be it enacted, that if any person holding the office of mayor, alderman or councillor for the borough shall be declared bankrupt, or shall apply to take the benefit of any act for the relief of insolvent debtors, or shall compound by deed with his creditors, or, being mayor, shall be absent for more than two calendar months, or, being an alderman or councillor, for more than six months, at one and the same time (unless in case of illness,) from the borough of which he shall be mayor, alderman or councillor, then and in every such case such person shall thereupon immediately become disqualified, and shall cease, to hold the office of such mayor, alderman, or councillor as aforesaid, and in the case of such absence shall be liable to the same fine, to be recovered in the same [*407] manner as if he had refused to accept the said office, and the council thereupon shall forthwith declare the said office to be void and shall signify the same by notice in writing under the hands of three or more of them countersigned by the town clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void; but every person so becoming disqualified and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office, and every person becoming disqualified to hold such office on account of absence as aforesaid shall, on his return to such borough, be capable of being re-elected to such office, provided he shall then be otherwise qualified."

The mode herein pointed out for giving the notice must be strictly pursued; a notice given by the mayor and all the aldermen and assessors of the wards of the borough, is not a correct notice of a vacancy under this section.^(d) The office is not void until the vacancy is duly declared.^(d)

(b) King v. Burrell, 12 A. & E. 460.

(c) Sect. 52.

(d) Reg. v. Mayor, &c., of Leeds, 7 A. & E. 963.

Every councillor is prohibited from being interested or concerned, or being employed directly or indirectly, as an architect, builder, artist, mechanic, workman, merchant, trader, or otherwise, howsoever, in any part of the work to be done or materials to be supplied in building a borough gaol or house of correction, or in any contract whatever relating thereto; and any one while in office, and becoming interested, concerned, or employed in such work or contract, shall thenceforward be disqualified from continuing to hold such office, and also from being thereafter elected or appointed to fill any corporate office within the borough, &c.(e)

Every councillor, on being elected, must make, &c., the following declarations: "And(f) be it enacted, that no person elected a mayor, alderman, or councillor, or auditor, or assessor, for any borough, shall be capable of acting as such, except in administering the declaration hereinafter contained, until he shall have made and subscribed before any two or more such aldermen or councillors (who are hereby respectively authorized and required to administer the same to each other) a declaration in the words or to the effect following (that is to say);

"I, A. B., having been elected mayor [or alderman, councillor, auditor or assessor,] for the borough of —, do hereby declare, that I take the said office upon myself, and will duly and faithfully fulfil the duties thereof according to the best of my judgment and ability; *and in the case of the party being qualified by estate say, And I do hereby declare that I am seised [or possessed] of real [or personal] estate or both, as *the case may be* to the amount of one thousand pounds [or five hundred pounds, *as the case may require,*] over and above what [*408] will satisfy my debts."

"And that every alderman who shall have made and subscribed the forgoing declaration in respect of estate shall once in every period of three years, if required in writing so to do by any two members of the council, make and subscribe a declaration that he is qualified to the same amount in real or personal estate, or both, as the case may then be, as the amount mentioned in the declaration originally made and subscribed by him: provided always, that nothing in this act contained shall be construed to dispense with the obligation of any person to make and subscribe the declaration provided and enjoined by an act made in the ninth year of his late majesty, George the Fourth, intituled 'An Act for repealing so much of several Acts as imposes the necessity of receiving the Sacrament of the Lord's Supper as a qualification for certain Offices and Employments.'"

This section preserves the necessity of making and subscribing the declaration required by 9 Geo. 4, c. 17, s. 2.(g) But some difficulty appears to arise here, at least with respect to the case of a councillor, for he is not admitted to his office.(h) Whereas the statute last mentioned appoints the declaration in it to be made, &c., "within one

(e) 7 Will. 4 & 1 Vict. c. 78, s. 39.

(f) Sect. 50.

(g) Per Patteson, J., 7 A. & E. 221.

(h) The declarations must be taken although they are not tendered; R. v. Slatford, Comb. 419.

calendar month next before *or upon* his admission, &c.," and it has been solemnly decided that the statute does not give the elected party a month for deciding whether he will make the declaration or not, but only excuses him from making it at the time of his admission if he has made it within a month before, and that *upon* means at the time of his admission and not within a reasonable time after.⁽ⁱ⁾ The declaration is as follows:—"I, A. B., do solemnly and sincerely, in the presence of God, profess, testify and declare upon the true faith of a Christian, that I will never exercise any power, authority or influence which I may possess by virtue of the office of —, to injure or weaken the Protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled."^(k)

The first mentioned declaration must be made and subscribed within five days after notice of the party's election.^(l)

Where a councillor, after being elected, is excluded from acting as a councillor, the proper way to raise the question of whether he is duly elected, is by mandamus to the corporation to permit him to act as councillor; and if the council resolve to, and do, show cause against the [*409] *rule nisi, they cannot charge the expense of doing so on the borough fund, nor the expense of counsel's opinion ordered by them to be taken in accordance with which the councillor was excluded.^(m)

With respect to the removal of councillors from their office, it is to be observed, that except in those cases in which the vacancy is appointed by the statute to be declared in a particular manner, the mode of information in the nature of *quo warranto* is the proper mode of trying the right to the office, and any one who is subject to the government of the council as an inhabitant of the district over which the corporate jurisdiction extends, has sufficient interest in the matter to be a good relator of such an information,⁽ⁿ⁾ and a motion for a rule nisi may be granted, though made on the affidavits of three persons, two of them not being qualified to be relators, and the affidavit of the third (who was so qualified) not showing sufficient ground for granting the information;^(o) and though leave to file such an information will not be refused merely because it may or will have the effect of dissolving the corporation, yet the court, in the exercise of its discretion, will refuse it where no fraud is imputed, no mischief has been done, *and* where the prosecution, if successful, would probably dissolve the corporation, and the prosecutors appeared

(i) *Reg. v. Humphery*, 10 A. & E. 335.

(k) 9 Geo. 4, c. 17, s. 2; *vid.* 1 & 2 Vic. c. 5, and c. 15 as to the declaration to be made by Quakers, Moravians and Separatists.

(l) 5 & 6 Will. 4, c. 76, s. 51. (m) *Reg. v. Mayor, &c., of Leeds*, 4 Q. B. 796.

(n) *R. v. Parry*, 6 A. & E. 810; *R. v. Hodge*, 2 B. & A. 344; *Reg. v. Quale*, 11 A. & E. 508; *R. v. Derby*, 7 A. & E. 419. But a councillor who assists in administering the declaration required by sect. 50, cannot be a relator on the ground of disqualification, if he knew of the disqualification at that time; *Reg. v. Greene*, 2 Q. B. 460. In general the mere acting in necessary business of the corporation with the party, is not a ground of objection to a relator, if he has not concurred in the election; *R. v. Clarke*, 1 East, 38; *R. v. Benney*, 1 B. & Ad. 684.

to have that intention.(o) The election, if not questioned within twelve months, is to be deemed good to all intents and purposes.(p) But as in all cases of corporate offices it must appear that the office is full, before the information will be granted,(q) and where it is full, a mandamus to swear in the opposing candidate cannot issue;(q) but where it is not full de jure of the party who has been allowed by the corporation to act in the office, a mandamus will issue, compelling them to receive the excluded party who has been duly declared to be elected.(r)

The general rule with regard to relators is, that a party who has knowingly voted for the party against whom the information is sought, cannot be *the* relator of it;(s) but where several parties join as relators on several affidavits, and all but one were either present and concurring in the election or assented to it afterwards, the information may be granted on the affidavit of the other, if he avow himself to be the relator.(t) The objection must be known to the person at the time of the election, either actually or impliedly, i. e. as being of a nature *that he was bound [*410] to take notice of, as arising from the provisions of the charter, or [an act of parliament, or a judgment of a court of law.(u) The information will be granted, though the affidavits only state that the party has taken upon himself the office of councillor, and has been seen present at meetings of the council acting as a councillor, without stating *further* the nature of the acceptance of office, or of the acting, and without stating that he has made the declaration required by the Municipal Corporations Act.(x) And where the election is impeached on objections to his voters on the ground of personation, and that some of them had no title to be on the burgess roll, it is no answer, in showing cause, that upon the defendant's affidavits enough of the opposite party's voters are bad to reduce his poll below that of the defendant, although the defendant's objections are founded on a comparison of the voting papers with the burgess roll, both verified by affidavit; for the court will not hold parties disqualified on affidavits which there is no opportunity to contradict.(x) Nor, as it seems, could the court disqualify or remove from the burgess roll any one whose name was there, on affidavits, under any circumstances, for that would be depriving a man of his freehold(y) without the intervention of a jury, which is contrary to a fundamental principle of the law of England.(z) But the court will not grant the information unless it be shown by the affidavits that the party is in office de facto; and it is not enough to state that the party has accepted office, without specifying the

(o) *R. v. Parry*, 6 A. & E. 810. (p) 6 & 7 Vict. c. 89, s. 1.

(q) *R. v. Derby*, 7 A. & E. 419; *Reg. v. Slatter*, 11 A. & E. 505.

(r) *Reg. v. Mayor, &c., of Leeds*, 11 A. & E. 517.

(s) *R. v. Dawes, &c., the Winchelsea cases*, 4 Burr. 2120; *R. v. Parkyn*, 1 B. & Ad. 690.

(t) *R. v. Symmons*, 4 T. R. 223; *vid. rule*, Mich. T. 3 Vict. (11 A. & E. 2).

(u) *R. v. Trevenen*, 2 B. & A. 339; *R. v. Slythe*, 6 B. & C. 240; *vid. sup.* p. 254.

(x) Sect. 50; *vid. Reg. v. Quayle*, 11 A. & E. 508. It seems, that showing that

the party elected made the declaration in s. 50 within five days of his election (s. 51), is showing an acceptance; per Lord Denman, C. J., 7 A. & 221. As to evidence on the issue, whether duly elected a councillor or not, *vid. Reg. v. Ledgard*, 8 A. & E. 535.

(y) *Bagg's case*, 11 Rep. 98 b; *Warren's case*, Cro. Jac. 540.

(z) *Vid. tam. per Parker, C. J., in Reg. v. Simson*, 10 Mod. 380.

mode of acceptance, although it appears that he has been declared duly elected; (a) acceptance being a legal inference from facts, which facts must be shown to the court for them to make the inference. (b) The difference between these two cases is, that in the first facts were stated which amounted to an user and acceptance of the office; in the last, a technical term was used instead of setting forth the facts which the term was meant to represent.

[*411] *PARLIAMENTARY FRANCHISE.

WITH respect to the right of voting for members of parliament for corporate towns and cities, it is to be observed, that, except so far as the right is reserved with certain qualifications to freemen, (c) it is at any rate not now, as it had been often considered to be, (d) a corporate franchise, but depends upon the Reform Act and upon parts of the act for the registration of voters, &c.; (e) the former of which must be looked to for the particulars of the right of voting as an inhabitant householder in corporate towns generally, which it confers, as well as for the rights of voting in boroughs, as freemen, potwallers, &c., &c., and of voting in cities and towns which are counties in themselves, as freeholders or burghage tenants, (f) and the other rights which it preserves; and the illustrations to be found in treatises on election law must be referred to for a full knowledge of the subject, but it may prove not wholly useless to state some leading points in that law.

Where a person claimed to vote in respect of property within a borough as occupier, under 2 Will. 4, c. 45, s. 27, it was held not to be sufficient that he *bonâ fide* paid the rate himself, but that as he occupied jointly with another person who was assessed solely to the poor rate, which he was not, he had no right to vote; (g) and that the omission of his name from the assessment was not cured by the stat. 6 & 7 Vict. c. 18, s. 75, (g) that section applying only to inaccurate or insufficient descriptions of the rate. (g)

A pauper, though sufficiently assessed to satisfy the Poor Law

(a) Reg. v. Slatter, 11 A. & E. 505.

(b) Vid. dict. per Littledale, J., 11 A. & E. 506.

(c) Vid. *infra*, FREEMAN, where several decisions respecting voters in boroughs will be found collected.

(d) Com. Dig. Parliament, D. 12; Glanv. 53; Merew. & St. Hist. Bor. 1191. 1205. 1224; R. v. Wells, 4 Burr. 2003.

(e) 2 Will. 4, c. 45, and 6 & 7 Vict. c. 18. What is a building within s. 27 of the former act, Wright v. Town Clerk of Stockport, 5 M. & Gra. 33; Jolliffe v. Rice, 6 C. B. 1; what is not, Pitts v. Smedley, 7 M. & Gra. 86; vid. id. 95. 151. 182. What is a house, 7 M. & Gra. 66, 122.

(f) As to the nature of burghage tenure, 2 Bla. Com. 82; Madox, Firm. B. 21; Co. Litt. 108 b; 4 C. B. 48. Potwallers' votes, 7 M. & Gra. 157.

(g) Moss v. Overseers of St. Michael's, Lichfield, 7 M. & Gra. 72. 75. As to duties of overseers in making out lists of voters and lists of objections, 6 & 7 Vict. c. 18, ss. 13. 18. As to form of notice of objection, 7 M. & Gra. 127; 5 id. 5; 7 id. 163; 2 C. B. 4. Service on *assistant* overseer good; Points v. Attwood, 6 C. B. 38. Posting; 2 C. B. 45, 60; 5 C. B. 45.

Amendment Act,^(h) would not be held to be assessed within the meaning of the above statutes.⁽ⁱ⁾ But the non-payment of a rate which has not been duly allowed and confirmed by *two* justices, does not disentitle to be placed on the register, for such a rate is void, and not merely irregular.^(k)

The proviso in the Reform Act, which preserves to persons entitled, at the time of its passing, to vote for cities or boroughs by virtue of any *other qualification than as a burgess or freeman,^(l) has been construed to mean only to enable parties to realize the right where [*412] the qualification has subsisted continuously since the passing of that act (i. e. 7th June, 1832).^(m)

As to disqualifications of officers and servants of the crown to vote for members, the reader is referred to the treatises on general election law, and to the statute and cases cited below.⁽ⁿ⁾

A very important question respecting the right of voting as a freeholder in a county of a city, &c., reserved by the Reform Act, viz. whether such votes may be created, has been so far decided as this, that where A. contracts to sell a house to B., and B. sells a share in it to C., the purchase being on C.'s part a *bonâ fide* investment of his money, with the expectation that the possession of the property would entitle him to vote, but A.'s object being to increase the number of voters, there, in the absence of all proof of an understanding between the parties that C. should vote in respect of such property in a particular way, or in support of a particular interest, C.'s vote was held to be good, and the conveyance, being made direct from A. to C. and others, not to be void under 7 & 8 Will. 3, c. 25, which makes void all conveyances in order to multiply voices, or to split or divide the interest in any houses or lands among several persons, to enable them to vote at elections of members of parliament; although C.'s purchase consisted of one equal share only in the house, and he bought it under a single conveyance from A. to him in conjunction with several other persons, as tenants in common with himself. The votes of the others were held equally good with that of C., there being the same absence of proof of the above-mentioned understanding in their cases also. The parties would not have purchased unless they had been satisfied of the value of the premises, and with the income they were to receive from the investment; the consideration paid being 292*l.* 5*s.*, and the house being worth at least 15*l.* a-year, which was the

(h) 4 & 5 Will. 4, c. 76. Non-payment of a void rate does not disqualify; Fox v. Davies, 6 C. B. 11.

(i) 7 M. & Gra. 74, 75.

(k) Fox v. Davies, 6 C. B. 11. If necessary, a mandamus will issue to the justices to sign the rate; R. v. Justices of Dorchester, Stra. 393; vid. R. v. Newcomb, 4 T. R. 368; et vid. 16 M. & W. 371.

(l) 2 Will. 4, c. 45, s. 33. The words seem to be used to designate the freemen of the Municipal Corporations Act only, the word burgess not having the sense put upon it in the last mentioned act; vid. 8 T. R. 246. As to claiming to be rated under s. 30, 7 M. & Gra. 145; to be registered, Hutchins v. Brown, 2 C. B. 25. Notice of claim may be received on Sunday, if 20th July falls on that day; 2 C. C. 72.

(m) Jeffrey v. Kitchener, 7 M. & Gra. 99; vid. 6 & 7 Vict. c. 18, s. 78; et vid. 7 & 8 Will. 3, c. 25, and 10 Ann. c. 23, against *occasional* voters; East Grinstead case, 1 Peckw. El. Cas. 310; vid. 2 C. B. 132, 3 Geo. 3, c. 15.

(n) 22 Geo. 3, c. 41; 7 M. & Gra. 97. 109. 120.

[*413] rent actually yielded by it.(o) *But this decision left doubtful the validity of the votes, had it been shown that the vendor from whom the property actually passed (the legal estate never having been in the case just mentioned, in the intermediate party, who therefore could not be considered as the vendor) had conveyed with the intention and in order to multiply voices, under the stat. of Will. 3, or "fraudulently on purpose to qualify to give a vote" under the stat. of Geo. 2. Later decisions however have gone the length of settling that a conveyance of land by one vendor to several vendees for a bonâ fide consideration, is valid, though the avowed object of the vendor is to multiply, and of the vendees to acquire, the right of voting.(p) So a deed of gift bonâ fide executed by a father to his sons, expressed to be in consideration of natural love and affection, is not within the stat. 7 & 8 Will. 3, c. 25, although the avowed object of the father was to confer votes upon his sons.(q) So a bonâ fide grant of rent-charge made by a father to his son in the same circumstances;(r) so a bonâ fide grant of rent-charge to a son and son-in-law, though made for a nominal consideration;(s) have all been held good. These cases apply equally to the provision of the statute (t) against conveyances of any land, messuages, &c., in any borough, to multiply votes; and may yet be applied to the multiplication of votes in boroughs not being counties of themselves, where the right of voting as burgrave tenants remains.(u)

It seems to have been considered, though perhaps the authority is not decisive, that multiplying votes by a *fraudulent* conveyance, and splitting estates for the same purpose, were offences at common law.(x)

(o) *Marshall v. Bown*, 7 M. & Gra. 188; *vid.* 7 & 8 Will. 3, c. 25, s. 7; *Hoyland v. Bremner*, 2 C. B. 84. The freeholder's oath, under 18 Geo. 2, c. 18, s. 1 (extended to counties of cities by 19 Geo. 2, c. 28), contained an allegation that such freehold estate had not been granted to the juror fraudulently, on purpose to qualify him to give his vote; and the 4th section of the latter act provides, "that no person shall vote in respect or in right of any freehold estate which was made or granted to him fraudulently, on purpose to qualify him to give his vote." Hence, although by the Reform Act, s. 58, the only questions which can be put to the voter at the time of polling do not relate to this point, any more than the oath which by that section the voter must take if required, and which is the only oath that can be put to him, yet the enactment just mentioned is not repealed, and therefore an estate granted "fraudulently, on purpose to qualify to give a vote" for the county of a city, &c., would not have that effect if the fraud and purpose were proved to the satisfaction of the revising barrister or the Court of Common Pleas.

A party voting in an election for a county of a city contrary to the true intent and meaning of the last cited enactment, "shall forfeit to any candidate for whom such vote shall not have been, and who shall first sue for the same, the sum of 40*l.*," to be recovered by action of debt, &c., 19 Geo. 2, c. 28, s. 4; and in every such action the proof shall lie on the defendant, s. 4. As to mode of proceeding and form of declaration in such action, s. 9. The action must be commenced within nine months after the fact; s. 10. The statute does not extend to counties of cities, &c., where the right of voting was in respect of burgrave tenure, or where the right of voting in respect of freehold did not require the same to be of the yearly value of 40*s.*; s. 13.

(p) *Alexander v. Newman*, 2 C. B. 122; *Riley v. Cropley*, *id.* 146; *Beswick v. Ashworth*, *id.* 152; *Beswick v. Aked*, *id.* 156; *Thornely v. Aspland*, *id.* 160; *Rawlins v. Bremner*, *id.* 166. (q) *Newton v. Hargreaves*, 2 C. B. 163.

(r) *Newton v. Overseers of Moberley*, 2 C. B. 203.

(s) *Newton v. Overseers of Crowley*, 2 C. B. 207.

(t) 7 & 8 Will. 3, c. 25, s. 3.

(u) *Vid.* Com. Dig. Parliament, D. 10. 12.

(x) *Onslow v. Rapley*, 1 Somers' Tracts, 374; 2 Heyw. El. Cas. 339.

As to bribery at elections for boroughs, the ordinary sources for information on the law of elections must be consulted. We may observe, however, that it has been held that treating the members of a corporation on the day of election, is bribery within the Treating Act, 7 Will. 3, c. 4.(y) We may mention here as a matter of curiosity, that the earliest precedent of punishment for the offence of corruption at a parliamentary election, occurs in the case of the borough of Westbury, which was fined by the House of Commons, A. D. 1571, for taking a bribe of 4*l.* from Thomas Long, for returning him member for the borough(z) An information has been granted for bribery in Berwick as for an offence at common law.(a)

*RESIGNATION OF OFFICERS. [*414]

THE principal points on the law of resignation of corporate offices have already been stated with reference to corporations in general. With respect to the office of councillor in a municipal corporation, it is enacted, that he, as well as all other corporate officers, may resign on payment of the fine, which he would have been liable to pay for non-acceptance of the same office:(b) provided that no person enabled by law to make an affirmation, instead of taking an oath, shall be liable to any fine for non-acceptance of office in any borough, by reason of his refusal, on conscientious grounds, to take any oath or make any declaration required by the said act, or to take upon himself the duties of such office.(b)

But in practice the above seems not to be the only mode by which a councillor may get rid of the office; for where a rule nisi had been obtained against a councillor for an information in the nature of a quo warranto, for exercising the office of councillor, and he afterwards resigned the office by deed-poll to the mayor, aldermen and burgesses, intending to attend a meeting of the council which stood for a future day, and there formally declare his resignation, and he then appeared in court, but did not defend his title, the court made the rule absolute, the councillor paying the costs of the application; but the court also ordered, that if it should be necessary to file the information, that, should be done at the prosecutor's expense, and that the defendant should disclaim if it became necessary (on his undertaking to do so), at the prosecutor's cost also.(c) This

(y) Sloan's case, 4 Com. Dig. 287.

(z) Com. Journ. 88; 1 Hall. Const. Hist. 267, 5th edit.

(a) 2 Burr. 860; 3 Burr. 1335. Debt; 3 Burr. 1423. 1335; Cowp. 383.

(b) 6 & 7 Will. 4, c. 104, s. 8. By s. 21 of the Municipal Corporations Act, every person authorised by law to make an affirmation instead of taking an oath, shall make such affirmation in every case in which by this act an oath is required to be taken; vid. 1 & 2 Vict. c. 5, and c. 15. As to the effect of acceptance of an incompatible office generally, vid. sup. p. 243; 4 B. & Ad. 9. The offices of councillor and recorder are incompatible; Municipal Corporations Act, s. 103.

(c) Reg. v. Morton, 4 Q. B. 146. The deed-poll was unnecessary and useless in the above case; for the officer being constituted by election only, without any writing under the common seal, might resign orally, provided the declaration

would probably be a less expensive mode of escaping from the responsibilities of the office than that of paying the fine of 50*l.* upon a formal resignation.

[*415]

*ALDERMEN.

THE next class of officers of whom we shall speak are the aldermen.

The aldermen are to be in number equal to one-third the number of the council in each borough,^(d) who are to be elected by the council from among the councillors, or the persons qualified to be councillors, on the 9th November, every third year: in this way; viz. on that day, every third year, one-half of the number of aldermen go out of office; the outgoing being always those who have been longest without re-election; but each alderman so going out is capable of re-election forthwith if then qualified, but he has no vote in the election of a new alderman.^(d) The mode of election is thus prescribed: every member of the council entitled to vote in that election may vote for any number of persons not exceeding the number of aldermen then to be chosen, by personally delivering at such meeting, to the mayor or chairman of the meeting, a voting paper containing the christian name and surname of the persons for whom he votes, with their respective *places of abode*^(e) and descriptions, such paper being previously signed with the name of the member of council voting; and the mayor or chairman of the meeting, as soon as all the voting papers have been delivered to him, shall openly produce and read the same, and immediately afterwards deliver them to the town clerk to be kept among the records of the borough; and in case of equality of votes among those entitled to vote, the mayor or chairman shall have a casting vote, whether or not he may be entitled to vote in the first instance.^(f) The aldermen still continue to be members of the council during their continuance in office as aldermen.^(g) Whenever an extraordinary vacancy, that is, a vacancy caused otherwise than by going out at the end of their three years, the council, within ten days after such

signifying his desire to resign was made, and his resignation was accepted, at a properly constituted corporate meeting, i. e. since the Municipal Corporations Act, at a meeting of the council; *Mayor of Cambridge v. Herring*, Lutw. 405; *R. v. Hughes*, 5 B. & C. 896. As to London, vid. per Holt, C. J., in *R. v. Mayor, &c.*, of Rippon, 1 Ld. Raym. 563.

^(d) Sect. 25; vid. sup. p. 355. The election of alderman previous to that of mayor on the 9th November is void; 11 A. & E. 869. 886.

^(e) i. e. the place where he resides, not the place where he transacts his business; *Reg. v. Deighton*, 5 Q. B. 896.

^(f) 7 Will. 4 & 1 Vict. c. 78, s. 14; vid. 10 A. & E. 178. An out-going alderman elected mayor at the quarterly meeting on the 9th November, and afterwards presiding at the election of aldermen, is nevertheless disqualified from voting originally for a new alderman; and as the sect. 69, which gives the casting vote, calls it a *second or casting vote*, the statute seems to have contemplated the chairman's having a second only where he had a first or original vote; vid. *Reg. v. Stanley*, 11 A. & E. 882. 886. But out-going alderman may vote at election of mayor, though the candidate for whom he votes be an alderman; *Reg. v. McGowan*, 11 A. & E. 869. He may be elected mayor, 11 A. & E. 869. ^(g) Sect. 26.

vacancy shall occur, on a day to be fixed by the mayor, shall elect some other fit person to fill such vacancy; and every alderman constituted in this way shall go out at the same time as the person in whose room he was chosen would have gone out in regular course, but he also may be re-elected if then qualified.^(h)

*The only persons from whom aldermen can be made, are either councillors or persons qualified to be councillors; there- [*416] fore, if a person is elected on the 29th October, 1841, to supply an extraordinary vacancy among the aldermen, not being on the burgess list or roll for the year ending the 1st November, 1841, the election is bad, and he is removable by quo warranto; for *at the time* of election he was not qualified to be a councillor for that year; and it makes no difference that he was on the list which was to be the burgess roll for the year 1st November, 1841, 1st November, 1842.⁽ⁱ⁾ If an extraordinary vacancy is not filled up within ten days after such vacancy occurs, a mandamus to an election will go,^(k) as well as when the regular elections are not made at the time appointed by the Municipal Corporations Act,^(k) or on the following day, not being Sunday;^(l) and a colourable election will not prevent the mandamus from issuing: thus if the person elected be incapable of the office, and be chosen because he was so, this is a void election; and the mandamus to proceed to election will issue notwithstanding;^(m) and a late enactment has given facilities with a view of rendering the proceedings more expeditious than heretofore, by enabling the person intending to apply for the writ to give notice in writing to the defendant ten days at least before the day specified in the said notice for making the application, and to deliver with the notice a copy of the affidavits about to be used in support of the application, in which case the defendant may show cause in the first instance; and if no sufficient cause be shown, the court may make the rule absolute in the first instance, or direct the writ to be peremptory in the first instance.⁽ⁿ⁾

The following persons are disqualified to be elected or *be* aldermen: persons in holy orders; the regular ministers of any dissenting congregation; persons not entitled to be on the burgess list; persons seised or possessed of real or personal estate to a less amount than 1000*l.*, or rated to the relief of the poor in the borough upon the annual value of less than 30*l.* in boroughs divided into four or more wards; persons seised or possessed of real or personal estate to the amount of 500*l.*, or rated to the relief of the poor in the borough upon the annual value of less than 15*l.*, in boroughs divided into less than four wards, or not divided into

(h) Sect. 27. The council will be liable (*personally* as it seems) to the costs incident to the mandamus to proceed to an election, if they allow the ten days to elapse without filling the vacancy; Reg. v. Mayor, &c., of Cambridge, 4 Q. B. 801. Vid. precedent of indictment for riot at election of aldermen, R. v. Atkins, 3 Mod. 3; Trem. P. C. 231. 233; 2 Show. 238; R. v. Tolney, Skin. 116; R. v. Pilkington, Skin. 117.

(i) Reg. v. Harvey, 3 Q. B. 475.

(k) 7 Will. 4 & 1 Vict. c. 78, s. 26, extending the powers given in 11 Geo. 1, c. 4, to elections under the Municipal Corporations Act.

(l) Vid. 7 Will. 4 & 1 Vict. c. 78, s. 25; vid. sup. p. 379.

(m) R. v. Mayor, &c., of Cambridge, 4 Burr. 2011; Corbet & Dan. Elect. Cas. 186, 187; Case of Bossiney, Stra. 1003; 7 Q. B. 437. 439; 3 Burr. 1454; Case of Aberystwith, Stra. 1157.

(n) 6 & 7 Vict. c. 89, s. 5.

wards at all; persons holding any office or place of profit other than that of mayor and sheriff in the gift or disposal of the council. *Also [*417] the office of clerk of the justices of the borough is incompatible with that of alderman, and so is the office of recorder.(o)

6 & 7 Vict. c. 89, s. 2, provides, "that where a greater number of persons shall have been elected to, and have taken upon themselves, the office of aldermen than is authorized by the Municipal Corporations Reform Act, or a greater number than is authorized by the said act shall claim to be aldermen of the borough; the council of such borough shall, at the quarterly meeting to be held the 9th of November next after the passing of this act, before proceeding to the election of the mayor, or to any other business, declare which of the said persons so elected, or claiming to be aldermen, to the number specified by the said act, shall be the aldermen of such borough; and thereupon the persons so declared shall be the aldermen of such borough, and the persons not included in the number so declared shall from thence ipso facto cease to be aldermen of the said borough respectively, or to exercise any of the functions of such office."

No person elected an alderman is capable of acting as such (except in administering the declaration about to be mentioned) until he shall have made and subscribed, before two or more aldermen or councillors, a declaration(p) to the effect that he accepts the office, and that he intends duly and faithfully to fulfil the duties of it; accompanied by a declaration of his possession of the requisite amount of property, if his qualification be an estate qualification;(q) and this latter declaration of qualification he may be called upon in writing, by any two members of the council, to renew once in every period of three years; and if called upon he must renew it.(q) The aldermen and councillors who may be called upon by the newly elected person to administer this declaration may refuse, if they are satisfied of his disqualification;(r) and on a motion for a mandamus to compel them, or either of them, to administer the declaration, it would be a good answer to show that the party was disqualified.(r)

"And(s) be it enacted, that if any person shall act as mayor, alderman,

(o) Sects. 102, 103. (p) Vid. sup. p. 407. - (q) Sect. 50; vid. sup. p. 407.

(r) Reg. v. Greene, 2 Q. B. 464, 465.

(s) Sect. 53. A person not disqualified to be elected or be an alderman by reason only of his having, or having had, directly or indirectly, by himself or his partner, any share or interest in any lease, sale, or purchase of any lands, tenements, or hereditaments; or any agreement for any such lease, sale, or purchase, or for the loan of money; or in any security for the payment of money only, 5 & 6 Vict. c. 104, s. 7; contracting with the council for lighting or supplying water, or insuring, not to disqualify 5 & 6 Will. 4, c. 76, s. 28; contracting for building, &c., gaol, does, 7 Will. 4 & 1 Vict. c. 78, s. 39, vid. sup. Uncertificated bankrupt not disqualified to be elected, though any alderman being declared bankrupt, or applying to take the benefit of an insolvent act, or compounding by deed with his creditors, or being absent from the borough for more than six months at one and the same time, unless in case of illness, shall immediately become disqualified, and shall cease to hold the office which becomes vacant; but on payment of debts in full, or obtaining his certificate, in the first two cases respectively, and in the last on returning from absence, he shall be eligible for re-election, if then otherwise qualified, R. v. Chitty, 5 A. & E. 609, and s. 52; such absence renders him liable to the same fine as for refusing to accept office, s. 52. The council are to

*or councillor, or auditor, or assessor for any borough, without having made the declaration hereinbefore required in that behalf, [*418] or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified according to the provisions of this act, or after he shall have become disqualified to hold any such office, he shall for every such offence forfeit the sum of 50*l.* such sum to be recovered with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, by action of debt, or on the case, in any of his majesty's superior courts of record; and every person so sued by reason of not being so qualified in respect of estate shall prove that he was at the time of so acting qualified as aforesaid, or otherwise shall pay the said penalty, without any further evidence being given on the part of the plaintiff than that such person has acted as the mayor, or as alderman, councillor, auditor or assessor (as the case may be) of such borough: provided always, that it shall be lawful for any defendant, by judge's order, to be obtained within fourteen days after he shall have been served with process in any such action, to require the plaintiff to give security for costs; and in such case all further proceedings in the said cause shall be stayed until the plaintiff shall give security to the satisfaction of the proper officer of the court for the costs of such action in case a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue such action, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff; and the defendant shall in either of such cases recover his full costs as between attorney and client: provided also, that no such action shall be brought except by a burgess of such borough, nor unless the burgess bringing the same shall, within fourteen days after the commission of the offence, have served a notice in writing personally upon the party committing such offence of his intention to bring such action; and in case the plaintiff in any such action shall obtain a verdict, the money so to be recovered shall, after payment of the costs and expenses attending the recovery thereof, be paid and apportioned as follows: (that is to say) one moiety thereof to the person so suing, and the other moiety thereof to the treasurer to be appointed by virtue of this act, to be by him applied in aid of the borough fund: provided always, that all acts and proceedings of any person in possession of the office of mayor, alderman, councillor, auditor or assessor, and acting as a mayor, alderman, councillor, auditor or assessor, shall, notwithstanding such disqualification or want of qualification, be as valid and effectual as if such person had been duly qualified."

The declaration must be made within five days after notice of election, or the party will be deemed to refuse the office.(*t*) *

declare the vacancy above mentioned by notice signed by three of them, and countersigned by the town clerk, and affixed in some public place in the borough, and the office thereupon becomes void, s. 52; and the council must proceed to fill it within ten days after the day of fixing up such notice, s. 27; vid. 7 A. & E. 963.

(*t*) Sect. 51; vid. 7 A. & E. 221. Semb. neglect to make either of the above declarations, or acting after the time for making them had elapsed, not having taken them, might be the subject of a criminal information; R. v. Haines, Skin. 583.

[*419] *But besides the above declaration, every alderman must also within one calendar month next before or upon his admission to office, make and subscribe the declaration imposed (9 Geo. 4, c. 17, s. 2,)(u) to the effect that he will never exercise any power, authority or influence derived from the office to injure or weaken the Protestant church, or to disturb it in the possessions of its rights and privileges. Omission or neglect to comply with this requisition renders the election void, and invalidates all acts done by such person in the execution of the office (9 Geo. 4, c. 17, s. 3), and that notwithstanding, as it seems, that the above section of the Municipal Corporations Act gives validity to all acts done by an alderman without having made the first of the declarations therein mentioned.(x)

Refusal to accept the office renders the party (being eligible and not exempt) liable to such penalty, not exceeding 50*l.*, as the council shall declare by bye-law, and such penalty is leviable by distress warrant under the hand of any justice having jurisdiction within the borough.(y)

After taking office, neglecting or refusing to perform the duties imposed by the Municipal Corporations Act, subjects to a fine of 100*l.* for every offence;(z) and this is the case whether the omission be wilful or not.(a) In boroughs divided into wards, the election of councillors is to be held in each ward before such alderman (with two assessors) as the councillors chosen in the ward shall yearly appoint in that behalf, who with his assessors is to have the same powers in regard to elections in such ward as the mayor and his assessors have for the whole borough where there is no division into wards;(b) and in case of illness or incapacity to act, the mayor may appoint another alderman.(c) In case of the death, absence or incapacity of the mayor at a time when it shall be necessary to execute the powers and duties imposed by the Municipal Corporations Act with respect to elections, the council are to select one of the aldermen to execute all such powers and duties.(d)

A writ of mandamus to receive his vote and allow him to act as alderman, seems to be the proper mode of raising the question whether he has been duly elected;(e) a mandamus to restore would fitly raise the question whether the office had been duly declared void by the council in either of the cases mentioned above.(f)

(u) Vid. sup. p. 408; Reg. v. Humphery, 10 A. & E. 365.

(x) Vid. 10 A. & E. 365; 14 East, 549; 4 Q. B. 801. Refusal to take the declaration is equivalent to refusal of the office; 10 A. & E. 368; 2 Show. 159; 3 Lev. 116.

(y) Sect. 51. If there be no such bye-law, probably the remedy by mandamus calling upon him to take on him the office, 1 B. & C. 585, or an indictment, Carth. 480, Salk. 142; or a criminal information might be had, 5 T. R. 86; R. v. Grosvenor, 1 Wils. 18; vid. 2 T. R. 731; and even if there were a bye-law imposing a fine which had been paid, strictly an information might be granted, unless it appeared that the meaning of the bye-law, as shown by usage, was that the fine should stand in lieu of service, 2 T. R. 731.

(a) King v. Burrell, 12 A. & E. 460.

(c) 7 Will. 4 & 1 Vict. c. 78, s. 16.

(e) Vid. sup. pp. 408, 409.

(f) Vid. sup. p. 409; R. v. Mayor of Canterbury, 1 Lev. 119; recognised R. v. Mayor, &c., of Oxford, Palm. 454; vid. Shuttleworth v. City of Lincoln, 2 Bulst.

(z) Sect. 48.

(b) Sect. 43.

(d) Municipal Corporations Act, s. 36.

*The Court of Queen's Bench have power to issue a mandamus respecting the election of an alderman of London, though the Court of Mayor and Aldermen claim cognizance as to the election. *(g)* [*420]

A custom of London that when the inhabitants of any ward shall three times elect and return to the Court of Mayor and Aldermen the same person to be alderman, who shall be by the said court, according to another custom of the said city, adjudged on such three returns not to be a fit person to support to the dignity, and discharge the duties, of the said office, the mayor and aldermen may elect and admit a fit person, being a freeman, out of the whole body of citizens to be alderman of such ward, is a valid custom in law. *(h)*

It has been denied to be a good ground of amotion of an alderman from office that he was above seventy years of age, *(i)* or that he wrote to the secretary of state charging the mayor with subordination of perjury; *(k)* but a conviction as a common drunkard will be a good ground. *(l)*

An information in the nature of quo warranto may be granted where it is desired to contest the right of a person to claim and use the office, provided the application is made within twelve calendar months after the election, or the time at which he shall have become disqualified; *(m)* and on the trial it will be a good cause of challenge to the array, that it was returned by an alderman or freeman, *(n)* though it has been held not to be a good cause of challenge to jurors that they were not freeholders, in a like trial in case of an alderman of a county of a city, the jurors being corporators. *(o)*

The power of resignation, and the other incidents of resignation, are the same as in the case of the mayor; *(p)* and the exemptions from liability to serve are also the same as in the case of mayor, councillor, &c. *(q)*

*THE MAYOR.

[*421]

THE mayor is to be elected out of the aldermen or councillors, before any other business is gone into, at the quarterly meeting of the council

122; Stamp's case, T. Raym. 12 a. As to returns to such writs, vid. 15 Vin. Abr. 188, et seq.

(g) R. v. Mayor, &c., of London, 4 Man. & R. 36.

(h) R. v. Johnson, in Dom. Proc., 6 Cl. & F. 1; vid. 11 Geo. 1, c. 18, regulating elections of aldermen in the city of London; vid. Hutchins v. Player, O. Bridg. 272.

(i) Com. Dig. Franchise, F. 31. Residence three miles from the borough not sufficient ground; R. v. Mayor, &c., of Doncaster, Sayer, 37; vid. R. v. Mayor, &c., of Portsmouth, 3 B. & C. 152.

(k) Carth. 174; or that he refused to pay a tax imposed by law on the whole of the inhabitants, R. v. Rippon, 2 Keb. 15. 25.

(l) Com. Dig. Franchise, F. 31. So that he has destroyed and torn certain records of such a court which was presented at the leet, is a good return to mandamus to restore; Town of Wigan v. Pilkington, 1 Keb. 597.

(m) 7 Will. 4 & 1 Vict. c. 78, s. 23.

(n) Reg. v. Deline, 10 Mod. 199.

(o) R. v. Higgins, 1 Ventr. 366.

(p) Vid. inf. p. 427.

(q) Vid. sup. pp. 401, 402; s. 51.

DECEMBER, 1853.—28

on the 9th of November in each year,(c) and an outgoing alderman may be elected.(d)

In case the election is not made within the time appointed by the Municipal Corporations Act, which enacts,(e) "that on the 9th day of November in every year, the council of the borough shall elect, out of the aldermen or councillors of such borough, a fit person to be the mayor of such borough, who shall continue in his office for one whole year;(f) and in case a vacancy shall be occasioned in the office of mayor of the borough during such year, by reason of any person who shall have been elected to such office not accepting the same, or by reason of his dying or ceasing to hold the said office, the council of the borough shall within ten days after such vacancy, elect, out of the aldermen or councillors of the said borough, another fit person to be the mayor thereof for the remainder of the then current year;" or in case the election turns out to be void for irregularity, the corporation may proceed to the election, and elect the next day, not being Sunday; if it be Sunday, then on the Monday next following.(g) If the insignia of the office are withheld by the predecessor, a mandamus to deliver them up may be obtained.(h) An outgoing mayor may now(i) in all boroughs be re-elected mayor as often as the council please.(k) There appears to be no essential change intended by the statute to be made in this office, which remains the same as formerly; for he is made capable in law to do and suffer all acts which the chief officer of such borough might lawfully do, &c., at the passing of this [*422] act.(l) *With respect to the question of what is a sufficient acceptance of the office to satisfy the statute, it has been held that where a person was elected in his absence (from the borough) on the 9th

(c) Sects. 49, 69. The meeting for the election of mayor ought to be the first, and, as it seems, the only meeting on that day, *Reg. v. McGowan*, 11 A. & E. 885; and a prior election of an alderman is void, *Reg. v. Dudley*, 11 A. & E. 869, 886; but semb. he must be removed by *quo warranto*, 12 A. & E. 712. Bribery at the election is an offence at common law for which a criminal information may be had; *Spinage's case*, cited 3 Burr. 1339; *vid. R. v. Plympton*, 2 Ld. Raym. 1377; 4 Burr. 2501; 8 Mod. 186; 11 Mod. 387; Year Book, 22 Edw. 4, fol. 30. A criminal information will be granted for the disturbance of the election; *R. v. Soley*, 11 Mod. 115.

(d) *Reg. v. Maddy*, 11 A. & E. 869, 886.

(e) Sect. 49. The statutory exemptions, s. 51, have been given above, p. 401. An attorney is exempt from serving the office; *vid. cases cited argu.* 4 Burr. 2111.

(f) And until his successor shall have accepted the office, and made and subscribed the declaration; 6 & 7 Will. 4, c. 105, s. 4. Therefore he might, if it were absolutely necessary, adjourn the meeting for the election of his successor, and preside at the adjourned meeting; for the objection that the presiding officer cannot adjourn a meeting to a day on which he is no longer in the office that gives him right to preside, does not apply; 5 A. & E. 613; *Cas. T. Hardw.* 23.

(g) 7 Will. 4 & 1 Vict. c. 78, ss. 25, 26. If it be declared by a statute that an election shall be void in case the party does not do some act, &c., if he has been admitted he can only be removed by *quo warranto*; *Reg. v. Mayor, &c., of Cambridge*, 12 A. & E. 712.

(h) *Crawford v. Powel*, 1 W. Bla. 229; 2 Burr. 1013; *Stra.* 537; *R. v. Owen*, 5 Mod. 314.

(i) 3 & 4 Vict. c. 47, s. 1.

(k) Sect. 49, and 6 & 7 Will. 4, c. 105, s. 4.

(l) Municipal Corporations Act, s. 6. Therefore where he was escheator before by grant or prescription, he may still plead the grant, or prescribe, *vid. Ley's R.* 5; and the same will be the case whatever was the title of the former chief officer of the borough, for whether the office was called mayor or bailiff, &c., the power and authority was the same, *R. v. Thornton*, 4 East, 308.

November, 1842, and he returned on the 23rd November, when he had official notice of his election, and within five days after his return he made the declaration, and took upon him the office, that was a sufficient acceptance of the office.(m)

The refusal to accept office (and refusal to take the declarations amounts to that,)(n) subjects a person duly elected mayor to a fine not exceeding 100*l.*, to be declared by a bye-law,(o) and the same remarks apply as to other remedies as were offered under the heads of Alderman and Councillor. Previous to the Municipal Corporations Act, it was not a sufficient excuse that he resided four miles from the borough, having only a banking-house and no residence there, and that he was an acting magistrate for the county.(p)

The disqualifications for election, common to the mayor with other officers, stated by the statute, have been already pointed out;(q) but it may be useful to mention some of the old decisions, as the principles laid down in them may serve for guides hereafter. A retired baker, when the mayor had the correction of the assize of bread, was held not ineligible on that account to the office.(r) A spirit dealer, though disabled from concurring in granting licences, under 26 Geo. 3, c. 13, is not disqualified from being mayor.(s). The corrupt or malicious refusal of a license is ground for a criminal information; and in one case, two borough justices were committed for a month, and till they paid a fine of 50*l.* each, for such offence.(t)

In ancient times it was held that an infant might be a mayor;(u) but that is no longer the law.

We may here state, that, in speaking of committals for contempts of the mayor, sitting judicially, either as judge of a borough court of record of any kind, or as a justice of the peace, the most legal and proper made of committal is intended, viz., first to impose an adequate and proportionate fine, and if it is not paid, to commit until the payment.(x)

*The duties of the mayor are the following:—He is to preside, *if present*, at all meetings of the council;(y) to call meetings of the council when he sees fit;(y) and if he refuses, when required in writing by five members of the council, they may of themselves convene a meeting;(y)—especially to convene meetings of the council to supply

(m) Vid. s. 51, sup. p. 418; Reg. v. Preece, 5 Q. B. 94.

(n) Read's case, 3 Lev. 118; Mayor of Exeter v. Starre, 2 Show. 159; Reg. v. Humphrey, 10 A. & E. 368; Langham's case, March, 179. (o) Sect. 51.

(p) R. v. Leyland, 3 M. & Selw. 184.

(q) Vid. sup. pp. 396, 397, 401, 416.

(r) R. v. Deane, 2 Chit. R. 370.

(s) R. v. Smith, 2 M. & Selw. 597.

(t) R. v. Hann, 3 Burr. 1716, 1786; per Ld. Mansfield, C. J., in R. v. Davie. Dougl. 568.

(u) 18 Edw. 3, fol. 33; 26 Edw. 3, fol. 63; March, R. 40; R. v. Weeks, 2 Kelynge, 290; Cro. Car. 557; 5 B. & A. 81; Cowp. 222.

(x) What not such a contempt as justifies a fine of 5*l.*, Berrington v. Brooks, T. Jon. 229; et vid. R. v. Mayo, 1 Keb. 508. Though no one of a number of causes be of itself sufficient to justify fining, all together may; 1 Keb. 451. Calling him a fool, if said of him in his place and exercise of office, is such a contempt; Moor. R. 247, pl. 389. Qu. whether debt lies for a fine imposed for contempt; Bathurst v. Coxe, 1 Keb. 451.

(y) Sect. 69. The words, "if present," show that the presence of the mayor at

vacancies in the offices of alderman and councillor;(z) to make such arrangements as may seem to him to be expedient for taking the poll at all elections within the borough;(a) to declare and publish the result of each election,(a) and such publication must not be made later than two in the afternoon of the day next but one following the day of the election,(b) a publication made after that time being void;(c) he is to preside with two assessors at the election of councillors,(d) except where the borough is divided into wards;(e) to examine all the claims to be admitted and inrolled on the freemen's roll;(f) to revise the burgess lists, with the assistance of two assessors, and upon due proof to insert and expunge names and correct mistakes, and finally make them up for the burgess roll;(g) and when holding such a revision court he has power of adjourning and administering an oath,(h) and he is to sign the burgess lists in open court.(h)

The circumstances under which mandamus will go to compel the performance of his duties in these respects, have been stated and explained in treating of the burgess roll. When the lists are signed, he is to deliver them to the town clerk, who from them is to make out the roll.(i)

The voluntary absence of the mayor on an occasion when his presence is necessary by the constitution of the corporation, or under the Municipal Corporations Act, to make a legal assembly in order to proceed to an election of officers is indictable;(k) or the mayor in such case may be proceeded against by way of criminal information.(l) The election under such circumstances is void; but a presiding officer leaving the assembly before other kinds of business, which has been regularly commenced, are finished, does not vitiate such business; though if he de- [*424] signedly hinders the election of his successor, on conviction, *he is to suffer six months' imprisonment, and is disabled from holding any office in that corporation.(m)

He is to be a justice of the peace for the borough for the period of his mayoralty, and one year more; he is also returning officer in elections of

corporate meetings is no longer absolutely necessary as heretofore; *R. v. Duffin*, 2 Barnard. B. R. 370. Mandamus will not lie to compel him to put a question at the meeting; *Ex parte Garrett*, 3 B. & Ad. 252; *vid. Merew. & St.* 2052.

(z) 7 Will. 4 & 1 Vict. c. 78, s. 13.

(a) Municipal Corporations Act, s. 33. At parliamentary elections the expense for booths is not to exceed 25*l.* for any one parish, district, or part of any borough; *vid. Fuller v. Patrick*, 18 Law J. (N. S.) Q. B. 236, as to contracting for the erection of the booths. He is declared incapable of being elected member of parliament, or of returning himself member of parliament for the borough; *Resol. of House of Commons*, 2d June, 1685; *vid. inf. note (n).*

(c) *Reg. v. Mayor of Leeds*, 11 A. & E. 512.

(e) Sect. 43.

(f) Sect. 5.

(h) Sect. 19. Neglect of duty as to the revision makes him liable to a fine of 10*l.*, s. 48.

(i) Sect. 22.

(k) 11 Geo. 1, c. 4, s. 6; *vid. R. v. Corry*, 5 East, 378; *R. v. Buller*, 8 East, 393; *vid. 11 East*, 87.

(l) *R. v. Mayor of Tiverton*, 8 Mod. 186.

(m) 11 Geo. 1, c. 4, s. 6; mandamus to proceed to election of successor, *R. v. Mayor of Cambridge*, 4 Burr. 2008. In a case where the mayor disobeyed the writ, the court imprisoned him for three months, and ordered him to pay all costs; *R. v. Mayor of Truro*, cited 1 H. Bla. 209. As to making mayor de facto party to the rule to show cause why a mandamus to elect should not issue, *R. v. Bankes*, 1 W. Bla. 445; *S. C.* 3 Burr. 1452; *vid. tam. Reg. v. Phippen*, 7 A. & E. 969, 970.

members of parliament for the borough.(n) In case of an equality of votes at an election of aldermen, he is to have a casting vote, whether or not he had a vote in the first instance.(o)

The above are the principal and nearly all the duties of the mayor; other duties will be mentioned more appropriately when we come to speak of the Borough Fund, the Borough Rates, the Watch Rates, &c.(p)

Penalties under the Weights and Measures Act(q) are to be sued for before the mayor, exclusively of the other justices of the borough; and he had the sole power of appointing overseers of the poor in the borough.(r)

The office of keeper of the borough gaol is not incompatible with that of mayor;(s) in many old charters the mayor is constituted keeper of the gaol; it has even been declared to be incident to the office of mayor to be such keeper;(t) but in such cases he is keeper, rather as the sheriffs of counties are by law keepers of the county gaols, than as actual gaoler thereof; and it has been held that where he is such keeper, he may discharge the actual personal duties by the agency of inferior officers.(u)

A writ of mandamus may always be had to compel the mayor to perform any duty which he has distinctly refused, as mayor, to perform.(v)

The mayor is to have precedence, during the time of his mayoralty, in all places within the borough;(x) and is to have such salary as the council shall think reasonable;(y) and it has been said that if he dies pending an action by the corporation, the writ abates, for that in the vacancy of the head the corporation is suspended;(z) but this is no longer the law, if it ever was so.

*The mayor is liable in an action on the case to the party injured by his refusal to grant a poll at the election of a corporate officer.(a) [*425]

When sitting in a court of justice, or as a justice of the peace, he may commit a party for a contempt; ex. gra. for calling him a fool;(b) but he cannot commit for a contempt out of court, even though there

(n) Municipal Corporations Act, s. 57; vid. sup. p. 423, note (a); and therefore is not eligible as member for the borough, 4 Inst. 48. He may act under the statute of Forcible Entry, 8 Hen. 6, c. 9, s. 6, as mayor and not as justice of the peace; Reg. v. Layton, Salk. 106, 353.

(p) 6 & 7 Will. 4, c. 104, s. 5.

(o) 7 Will. 4 & 1 Vict. c. 78, s. 14.

(q) 5 & 6 Will. 4, c. 63, s. 33.

(r) Reg. v. Preston, 18 Law J. (N. S.) Mag. Cas. 10; and he was liable to a penalty of 5*l.* if no appointment be made, 43 Eliz. c. 2, s. 10. But this is now repealed, and the borough justices are given the sole power of making such appointments, except in London and places under local acts; 12 Vict. c. 8.

(s) Gabriel v. Clark, Cro. Eliz. 76; Crane v. Holland, Cro. Car. 138; S. C. W. Jones, 193; Hammond v. Peacock, 1 Exch. 42.

(t) Smith v. Helliard, Cro. Eliz. 168; 14 Vin. Abr. 11; Dunne v. Palies, 2 Rol. Abr. 806; vid. Charter, 16 Law J. (N. S.) Mag. Cas. 140.

(u) Reg. v. Bishop of Bath and Wells, 5 Q. B. 161; as to meaning of keeper of gaol under 2 & 3 Vict. c. 56, s. 15, vid. 5 Q. B. 155; et vid. inf. GAOLS.

(v) R. v. Benn, 6 T. R. 198.

(x) Sect. 57.

(y) Sect. 58.

(z) Vid. Wood v. Mayor, &c., of London, Salk. 397; Co. Litt. 263; 6 Vin. Abr. 314, pl. 21.

(a) Turner v. Starling, 1 Vent. 206; Hunt v. Dowman, 2 Rol. 21; vid. Herring v. Finch, 2 Lev. 250.

(b) Simons v. Sweete, Cro. Eliz. 78; vid. acc. 11 Rep. 97; Hardr. 182.

be a custom to support such committal; (c) and he may have an action for words said of him when sitting as a justice of the peace, or, as it seems, in the execution of his office generally. (d)

He is rendered incapable of acting until he has duly made and subscribed the declaration of acceptance of office, and of his intention duly and faithfully to fulfil the duties thereof, &c.; (e) and the penalty for acting as mayor without having made such declaration, or without being duly qualified at the time of making such declaration, is 50*l.*; but the acts done by him are good notwithstanding. (f)

He must also, within one calendar month (g) next before or upon his admission into the office, make the declaration ordered by 9 Geo. 4, c. 17, s. 2, (g) or the election will be void by sect. 3 of that statute; and as it seems acts done by him as mayor, without having previously made such declaration, would be invalid, (h) at least until the passing of, and his compliance with, the Annual Indemnity Act; for the provisions in that statute do not seem to be inconsistent with or contrary to anything in the Municipal Corporations Act; and by that statute it is distinctly enacted, that it shall not be lawful for a mayor who has not taken the declaration imposed by it to do any act in the execution of his office. (i) The terms of the declaration to be taken by Quakers, Moravians, and Separatists, are stated in later statutes; (k) and there is another modification of it made in favour of Jews who have accepted the office. (l) Roman Catholics elected to this or any other corporate office are required, within one calendar month next before or upon their admission, to take the oath appointed, instead of the oath of supremacy and abjuration, &c. (m)

We may observe, that with respect to all but judicial acts done by a mayor *de facto*, it had been held, before the Municipal Corporations [*426] Act, that they were good (but that related only to a person who came in by colour of election; (n) the acts of an usurper are void;) and so ministerial acts affecting strangers, compulsory upon him, or indispensable for the interests of the corporation, were held to be valid. (o)

(c) Dean's case, Cro. Eliz. 689; *vid.* Prince's case, Hardr. 182.

(d) Stra. 617; 3 Wils. 181.

(e) Sect. 50; *vid.* sup. p. 407. Previous to the act, he was incapable of acting until he was sworn in; *Pindar v. Regem*, 3 Bro. P. C. 173; Mayor of Penryn's case, Stra. 582; 2 East, 78, 79. If the parties refuse to administer the declaration, a mandamus might have been had; *Stephen's case*, T. Raym. 431.

(f) Sect. 53; *et vid.* per Coleridge, J., in *Reg. v. Maddy*, 11 A. & E. 881. Not being entitled to be on the burgess list is not a disqualification, provided he is on the burgess roll at the time of election; 6 & 7 Will. 4, c. 104, s. 7.

(g) *R. v. Humphery*, 10 A. & E. 365; *vid.* sup. p. 408.

(h) *R. v. Parry*, 14 East, 549; *Reg. v. Mayor of Cambridge*, 4 P. & Dav. 270; S. C. 12 A. & E. 702. As to the effect of the Annual Indemnity Acts in rendering the admission good *ab initio*, if the office be not forfeited by judgment of ouster previous to the passing of such act; 10 A. & E. 350, 351; 2 B. & C. 34; 14 East, 549; *Reg. v. Mayor, &c., of Cambridge*, 12 A. & E. 702.

(i) 9 Geo. 4, c. 17, s. 3.

(k) 1 & 2 Vict. c. 5, s. 1, and c. 15.

(l) 8 & 9 Vict. c. 52, s. 1.

(m) 10 Geo. 4, c. 7, s. 14. In case of refusal election void; 9 Geo. 4, c. 17.

(n) *Knight v. Mayor of Wells*, Nels. Lutw. 156, citing Yearb. 9 Hen. 6, fol. 32; *vid.* *tam*, per Holt, C. J., 12 Mod. 423. Case for false return to mandamus against mayor *de facto*; Nels. Lutw. 156.

(o) *R. v. Lisle*, Andr. 173; *vid.* 3 B. & A. 271; Cro. Eliz. 533. 699; 3 Keb. 721

He is rendered incapable of holding any public office by going to attend public worship in any meeting-house, &c., of Nonconformists to the Established Church in his formalities; (*p*) and is further made liable to a forfeiture of 100*l.* for such offence. (*q*)

The same prohibition against dealing by way of trade with the council holds good against the mayor as in the other cases already stated; (*r*) and against being interested in any contract for building, &c., the borough gaol. (*s*) But besides these disabilities the mayor, as an integral part of the corporation, cannot take a lease or grant of lands from the corporation; for then he would be both lessor and lessee, which the law does not allow, as before explained; and although the corporation acts by the council, yet nevertheless every act of the council is to be considered as the act of the corporation; and therefore it seems that the above common law doctrine still applies. (*a*) Nor can a mayor and corporation make a bond to the mayor, for he cannot be obligor and obligee. (*b*)

With respect to amotion from office, there is no provision in the Municipal Corporations Act beyond an enactment to the effect that he is disqualified, and shall cease to hold the office, upon being declared bankrupt, or applying to take the benefit of any insolvent act, or compounding by deed with his creditors, or being absent from the borough for more than two calendar months at one and the same time, unless in case of illness, and in case of such absence shall be liable to the same fine as if he had refused to accept the office. (*c*) However, if after bankruptcy or insolvency, or having so compounded with his creditors, he obtains his certificate, or pays his debts in full, he is eligible to be re-elected, and so on return from absence, (*d*) provided he shall be then otherwise qualified; and the mode of *declaring* the office vacant in such case is the same as in the cases of alderman and councillor, (*e*) and the exemptions from serving are the same as have already been stated in those cases. (*f*) But there can be no doubt that the council *might amove upon any of the common law grounds stated above (*g*) as applicable to all cases of corporate offices; or that in [*427] such case, upon showing that the amotion had been informal or irregular, he would have a mandamus to restore him to the exercise of the office for the residue of the official year. (*h*) He might, for instance, in all

(*p*) 5 Geo. 1, c. 4, s. 2.

(*r*) Vid. sup. pp. 396, 397.

(*a*) Vid. Wood v. Mayor, &c., of London, Salk. 397.

(*b*) Yearb. 21 Edw. 4, fol. 68, Mayor of Newcastle's case.

(*c*) Vid. R. v. Chitty, 5 A. & E. 609, s. 52; vid. sup. p. 417. If a mayor, having done or omitted to do any thing which rendered his election void, were to sit as judge in a borough court, a trial, &c., before him would be coram non iudice. Ipsley v. Turk, 2 Mod. 193; and the objection may be taken in error although contrary to the record which admits him to be judge, S. C. 3 Salk. 249; vid. Smith v. Reg. 18 L. J. (N. S.) Mag. Cas. 211. (*d*) Sect. 52.

(*e*) Id.; vid. sup. p. 417. If the council refused in such case to declare, either a mandamus to them to declare it, or, perhaps preferably, a quo warranto information against the mayor would go; vid. 12 A. & E. 712.

(*f*) Sect. 51; vid. sup. pp. 401, 402.

(*g*) Vid. sup. AMOTION.

(*h*) 1 Siderf. 33.

probability, be amoved by the council for attending public worship in a Nonconformist meeting, dressed, &c., in his formalities; at any rate, after conviction of the offence; *(i)* for the conviction disables to hold the office. Probably, also, in case of outlawry, the same would be the law, at least where in such case he is ipso facto deprived of the estate qualification, as arising from personal property, but the corporation may bring an action notwithstanding the outlawry of the mayor. *(k)* An information in the nature of a quo warranto is the proper mode of contesting the title of a mayor who has used the office, but it must be applied for within twelve calendar months from the election; *(l)* and it would seem, that where the same person has been re-elected without interval, the application must be within twelve months of the first election, unless the disqualification has arisen since the second election. Where a mayor refuses to defend his right in a quo warranto, other corporators, whose rights depend on his or the corporators, may be admitted to defend, upon engaging to indemnify the mayor against all costs, &c. *(m)*

Like every other corporate officer, for whose refusal to accept and take upon him the duties of the office, a fine has been fixed by bye-law, he may resign upon payment of such fine. *(n)* Where a fine has not been so fixed, his resignation remains as at common law, i. e. dependent upon the pleasure of the corporation, and inoperative unless they choose to accept it.

With respect to the general responsibility of the mayor for acts done in his office, it has already been noticed that he is liable to parties injured by his misconduct or refusal to perform his duties with regard to elections. *(o)* In the boroughs which return members of parliament, other than the borough of Berwick-upon-Tweed, and other cities and towns which are counties of themselves, the mayor is the returning officer, and is as such liable in case at the suit of a voter for allowing a scrutiny, *(p)* or at the suit of a candidate for making a false return of member of parliament, whereby plaintiff was injured, &c. *(q)* He is also [*428] *liable to an action where he issues a warrant respecting rates, &c., without jurisdiction. Thus where the council had made the assessment of a borough rate without authority, and the mayor issued his warrant to levy the amount assessed upon a township in the borough by distress on the goods of the overseer, whose goods were seized accordingly, it was held that the overseer had a right of action against the

(i) i. e. the judgment of the court pronounced upon an indictment; *Burgess v. Boutflower*, 7 M. & Gra. 481; vid. 5 Geo. 1, c. 4, s. 2, and 10 Geo. 4, c. 7, s. 25.

(k) 22 Vin. Abr. 376, pl. 8; id. 375, pl. 6; Co. Litt. 128.

(l) 6 & 7 Vict. c. 89, s. 1. As to what the rule nisi must contain, 5 K. B. 95.

(m) *R. v. Dawes*, 4 Burr. 2277.

(n) 6 & 7 Will. 4, c. 104, s. 8.

(o) Vid. sup. p. 425. Semb. that an action lies against him for arbitrarily refusing the vote of a burgess for the incoming mayor; vid. 2 Lev. 250; 1 Com. Dig. 223; *Ashby v. White*, 2 Ld. Raym. 957. So for destroying voting papers; *Shaw's case*, 2 Mod. 228.

(p) Sect. 57; *Pryce v. Belcher*, 4 D. & L. 238; S. C. 3 C. B. 90; 6 & 7 Vict. c. 18, s. 82.

(q) *Onslow v. Rapley*, 8 Lord Somers's Tracts, 270—276; S. C. 2 Vent. 37. Declaration, 14 How. St. Tri. 707.

mayor, and that the proper mode of action was trespass and not case, because the mayor had no jurisdiction to issue the warrant.(*r*) All acts of a mayor *de facto*, not being judicial, are good and valid.(*s*) An action on the case will also lie by the party injured against the mayor for procuring a false return to be made to a mandamus to admit a person to office in the borough,(*t*) and an attachment may be granted, as for a contempt upon the court,(*u*) against a mayor who knowingly transmits to the court such a return. It has even been held that an indictment for perjury might be maintained against a mayor who made a false return, for breaking his general oath taken upon admission to office;(x) but it is laid down, on the contrary, that a person shall not be charged in any judicial court for the breach of a general oath which he took when he became officer, minister, citizen, Burgess, &c.(*y*) However, as no oath is now required with respect to the duties of the office, and there is no provision making the breach of the declaration perjury, these cases no longer apply. Refusal to obey a writ of habeas corpus directed to a mayor has been punished as a contempt by the court, and a writ of attachment having issued against him, he was imprisoned and fined;(z) and a return to a habeas corpus, alleging that the prisoner in his hall, with a spit, insultum fecit, et conatus fuit eum vulnerare, was insufficient for not showing the certain cause, the nature and the duration of the imprisonment.(a)

An acquittance of a debt due to the corporation, signed by the mayor alone, and not sealed with the corporate seal, has been held void in law, but (it is added) was allowed in conformity to 100 precedents shown;(b) but this is certainly not the law at present,(c) for acquittance of a debt due to the corporation must be under the common seal; but if the mayor were to give a bond for money which was shown to have come to the use of the corporation, the latter might be liable upon the bond, though it were not sealed with the common seal.(d) [*429] A release by the mayor of rent due to the corporation is void and inoperative.(e)

With respect to the protection afforded by the law to a mayor, as such, it was very early held that the corporation may have an action for the

(*r*) *Fernley v. Worthington*, 1 M. & Gra. 491.

(*s*) Yearb. 9 Hen. 6, fol. 32, pl. 3. For other points as to what may be done by officers *de facto*, vid. OFFICERS; *R. v. Lisle*, Andr. 163—166.

(*t*) *Vaughan v. Lewis*, Carth. 227. 229; Mayor of Orford's case, Salk. 669; *R. v. Mayor of Ripon*, Salk. 433. Each person injured must bring a separate action; *Case of Andover*, Salk. 433. The action must be in Q. B.; Salk. 428.

(*u*) *R. v. Hoskins*, Cas. Temp. Hardw. 188. So, if he makes no return after being ruled to return, an attachment will go; *Mayor of Coventry's case*, Salk. 429; *R. v. Mayor of Oxford*, Latch, 229.

(*x*) *Harris's case*, Noy, R. 92. But an information may be had, *R. v. Barton*, Sayer, 146; and the venue cannot be changed, *id.*; vid. *R. v. Mayor of Abingdon*, Salk. 431, 432.

(*y*) *Bagg's case*, 11 Rep. 87, 3d Resol. (z) *Bowme's case*, Cro. Jac. 543.

(a) *Hodge v. Mayor of Liskerret*, 2 Bulst. 139; 14 Vin. Abr. 223; vid. *City of London v. Coates*, 1 Ventr. 115.

(b) Bro. Abr. Corporations, pl. 87; Yearb. 2 Ric. 3, fol. 7; 16 Vin. Abr. 500, pl. 2; Finch, L. 40. (c) *Jenk. Cent.* 162, 163, pl. 9.

(d) *Longo Quinto*, Edw. 4, 73, a; 7 Rep. 10 b. (e) Yearb. 34 Hen. 6 fol. 21.

false imprisonment of the mayor, *(f)* when he is imprisoned as head of the corporation, and not as a private person; or he may bring the action himself. *(g)* A criminal information may be granted for assaulting a mayor in the execution of his office; but it will be an answer, on showing cause, to make out that the mayor gave the first blow, and so was the original peacebreaker, *(h)* or the corporation may prosecute an indictment against the party, and may, as it seems, discharge the expenses out of the borough fund. *(i)* There is also authority to show that an information will lie against a person for using slanderous language of a mayor, the words being spoken of him (even though not to him) in the execution of his office; *(k)* and for words spoken to him of a slanderous character, in the execution of his office, an indictment may be brought, *(l)* especially if they tend to a breach of the peace; or where the words are contemptuous and derogatory, the party may be bound to his good behaviour, *(m)* or may be committed for the contempt, if the mayor were sitting in a public court of justice. *(n)* If they are said in his absence he may have an action on the case. *(o)* In an action against him for anything done in the execution of his office, the mayor is expressly within the stat. 7 Jac. 1, c. 5, and may therefore plead the general issue (subject to the rule for adding the words *by statute* in the margin of the plea delivered), and give the special matter in evidence; but on recovering a verdict, he is no longer entitled to double costs under that statute, a later enactment *(p)* having abolished double costs generally, and substituted "such full and reasonable indemnity as to all costs, charges and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in *like [*430] manner, and by the same authority as any other taxation of costs by such officer." But the action must still be laid, when brought either against the mayor for an act done in the execution of his office, or against his assistants on the occasion, or for anything done touching or concern-

(f) Yearb. 21 Edw. 4, fol. 14, B., fol. 70. The oldest charter of municipal incorporation extant is said to be that to Kingston-upon-Hull, dated 18 Hen. 6, A. D. 1439; 2 Merew. & St. Hist. Bor. 857. 859. 1032; vid. tam. 1 Rep. Corpor. Com. 1413; and charter of 20 July, 39 Hen. 3, to Nottingham, Placita de Quo. Warr., p. 620, 621. Appleby had a mayor and commonalty, temp. Edw. 1, Placita de Quo. Warr., p. 792; Bristol in Hen. 6, 5 B. & C. 417.

(g) Pritchard v. Papillion, 1 Lutw. 68.

(h) R. v. Symonds, Cas. Temp. Hardw. 240. The mayor is conservator of the peace in every place where there is a mayor, and may keep the peace from being broken as against himself, Hodges v. Hawkin, 2 Bulst. 140; and words said to him in the place and exercise of his office, which disable him to do his office, i. e. which, if true, would show he was unfit for the office, are good ground for committing the party, Anon., Moor. 247, pl. 389.

(i) Vid. sup. p. 197; 4 Q. B. 893.

(k) R. v. Darby, 3 Mod. 139; S. C. Carth. 14; vid. tam. note at end of the report in 3 Mod. Leach's edit.

(l) R. v. Pocock, Stra. 1157, 1158; R. v. Summers, 1 Lev. 139; Reg. v. Langley, 3 Salk. 190; R. v. How, Stra. 699; vid. 4 B. & C. 905; 3 Q. B. 183, as to proper certainty in the indictment.

(m) Bagg's case, 11 Rep. 95; R. v. Burford, 1 Vent. 16.

(n) Simons v. Sweete, Cro. Eliz. 78; vid. Cro. Eliz. 689; Hardr. 182.

(o) Hollis v. Briscoe, Cro. Jac. 58; Aston v. Blaggrave, Stra. 617.

(p) 5 & 6 Vict. c. 97, s. 2.

ing his office, &c., within the county where the trespass or fact shall be done and committed, and not elsewhere.(q)

To say of the mayor and aldermen that they are villains, is indictable, if applied to them in the execution of their offices;(r) and an information has been granted for a libel on an alderman of London, contained in a petition presented by the defendant to the common council of London.(s) But a custom to disfranchise or remove from a freehold office, for speaking opprobrious words of an alderman, is bad even in London;(t) for, as has been frequently observed, it is a general rule, founded on the most important statutory enactments ever passed in this country, that a man cannot be removed from his freehold except by due process of law,(u) which in most cases is by a verdict of a jury, and in these cases of freehold offices, by such verdict given at the trial of issues on an information in the nature of *quo warranto*.(x)

If the mayor be desirous of executing a writ of *mandamus*, but the majority of the corporation are desirous of returning an excuse, a motion on their behalf, that the mayor may be ordered to deliver the writ to the rest of the corporation for that purpose, will not be granted.(y)

During the vacancy of the mayoralty, whether by death or other accidental cause, or (as it seems) upon the statutory declaration of the vacancy, the corporation, at common law, could not do any other act except electing a successor.(z) However, this is now of minor importance, both because, in case of a vacancy, the council are to elect a successor within ten days;(a) and with respect to elections, they may appoint an alderman to fulfil all such powers and duties as are provided in the act, in the place of the mayor.(b) But if a bond were made to J. S., the mayor, and the aldermen and burgesses, solvendum to the mayor, aldermen and burgesses, and J. S. were to die, the corporation could sue upon it nevertheless.(c)

*ASSESSORS OF THE BOROUGH. [*431]

IN boroughs, whether divided into wards or not, the burgesses, on the 1st of March in every year, are to elect, from the persons qualified to be councillors, two burgesses, who shall be and be called the assessors of

(q) 21 Jac. 1, c. 12, s. 5. For acts done by the mayor as a justice of the peace, the action must be in case, and one calendar month's notice must be given; the venue must be as above, and the defendant may plead and give evidence as above also; vid. 11 & 12 Vict. c. 44; et vid. 11 & 12 Vict. cc. 42, 43. The statutes extend only to things done as justice of the peace, not to the mayor's acts as mayor; *Herring v. Finch*, 2 Lev. 250, qu. tam.

(r) *R. v. Cranfield*, 5 Mod. 203.

(s) *R. v. Barber*, Stra. 444.

(t) *Clark's case*, 1 Vent. 327; vid. *Lumley v. Wright*, Palm. 455; per Glyn, C. J., Styl. 480.

(u) Mag. Chart. c. 29; stat. 28 Edw. 3, c. 3. Answer of all the judges, 1 Anders. 154—158.

(x) 5 Bac. Abr. 251.

(y) *R. v. Mayor, &c., of Norwich*, Salk. 432.

(z) Yearb. 21 Edw. 4, fol. 58, A.

(a) Sect. 49.

(b) Sect. 36.

(c) *Vid. Sidney Sussex College v. Davenport*, 1 Wils. 184.

such borough, and continue in office till the 1st day of March in the year following.^(d) The election is to be in the form and manner provided for the election of councillors.^(e) The town clerk, treasurer, and every burgess who is of the council, is ineligible for the office of assessor of the borough.^(f) The assessors, while in office, are ineligible for election as members of the council.^(g) The assessors of the borough, together with the mayor, constitute the court for the revision of the burgess lists, which is to be held at some time between the 1st and the 15th of October inclusive in each year.^(h) Every assessor, as soon as conveniently may be after his election, is required to appoint a deputy to act for him, in case of illness, or incapacity to act, at any election or any revision of the burgess lists,⁽ⁱ⁾ which he must signify to the council in writing, to be recorded in the minutes.

An omission to appoint assessors at the proper time may be remedied by an election under the Municipal Corporations Act Amendment Act,^(k) which election will be valid.^(k) Therefore, every kind of vacancy in the office of assessor must be filled up in ten days (s. 47), otherwise the Court of Queen's Bench will grant a mandamus to compel an election.^(l) No person elected an assessor for any borough shall be capable of acting as such, except in administering the declaration following, until he shall have made and subscribed, before any two or more aldermen or councillors, a declaration in words or to the effect following:—"I, A. B., having been elected assessor for the borough of —, do hereby declare that I take the said office upon myself, and will duly and faithfully fulfil the duties thereof according to the best of my judgment and ability."^(m) It would seem that an assessor is not a "person placed, elected or chosen in or to any office of magistracy, or place, trust, or employment relating to the government of a borough," within the 9 Geo. 4, c. 17, s. 2, so as to make it necessary that he should take the declaration thereby imposed [^{*432}] in lieu of the sacramental test. *But however this may be, a person acting as assessor, without having made and subscribed the declaration above cited, or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified according to the act, or after he shall have become disqualified to hold any such office, is liable to a penalty of 50*l.* for every such offence.⁽ⁿ⁾ But though he acts without such qualification, yet all acts of a *de facto* assessor are good and valid.^(o) Besides the assessors of the borough, each ward, in boroughs divided into wards, must elect on the 1st March each year two assessors of the ward from the persons qualified to be councillors, before whom, together with the alderman, all ward elections shall be conducted. The alderman and his assessors are to have the

(d) Sect. 37, and 7 Will. 4 & 1 Vict. c. 78, ss. 4. 6.

(e) Sect. 32; vid. sup. p. 398.

(f) Sect. 37.

(g) 7 Will. 4 & 1 Vict. c. 78, s. 15.

(h) Id., s. 18. They are an essential part of the court; per Lord Denman, C. J., 7 Q. B. 54.

(i) 7 Will. 4 & 1 Vict. c. 78, s. 17.

(k) Id., s. 26, and s. 3; 7 Q. B. 46.

(l) 7 Will. 4 & 1 Vict. c. 78, s. 26; Reg. v. Mayor, &c., of Weymouth, 7 Q. B. 46.

(m) Sect. 50.

(n) Sect. 53.

(o) Sect. 53; vid. 7 Will. 4 & 1 Vict. c. 78, s. 1.

same power in the ward elections as the mayor and the assessors of the borough, in boroughs where there is no division into wards (*p*)

A member of the council is disqualified from being assessor of the borough. (*q*)

As the assessors are an essential part of the court of revision, (*r*) it would seem that a mandamus to insert a name on the burgess roll ought to be directed to the mayor *and* assessors, and such is now the practice.

*THE TOWN CLERK.

[*433]

THE town clerk is appointed by the council, to hold his office during pleasure, and may be an attorney of one of the superior courts at Westminster, any law, statute, charter, or usage, to the contrary notwithstanding; (*s*) and the appointment ought to be made under the common seal. (*t*) Therefore the entry of it in the minute book of the council, is not sufficient evidence of the appointment having been made. (*u*)

The council shall take such security for the due execution of his office as they shall think proper, (*x*) and his salary is to be such as they think fit to order, (*x*) and is payable out of the borough fund. (*y*) Within one calendar month next before or on his admission, he must make and subscribe the declaration under 9 Geo. 4, c. 17, s. 2. (*z*)

The office is a new office, and entirely different from the old office of the same name, (*a*) but it is still, as before, (*b*) a merely ministerial office.

His duties are the following:—

The voting papers at the election of aldermen are to be delivered to the town clerk, to be kept among the records of the borough. (*c*)

(*p*) Sect. 43; vid. 7 Will. 4 & 1 Vict. c. 78, s. 4, repealing the provision in sect. 43 respecting assessors of the mayor's ward.

(*q*) Municipal Corporations Act, s. 37.

(*r*) 7 Q. B. 54.

(*s*) Sect. 58. An infant not eligible to the old office of town clerk; Claridge v. Evelyn, 5 B. & A. 81.

(*t*) Reg. v. Mayor, &c., of Stamford, 6 Q. B. 433; vid. Arnold v. Mayor, &c., of Poole, 2 Dowl. N. S. 574. If it has been lost, &c., the General Annual Indemnity Act operates to cure the loss, &c., vid. s. 5 in each of the stats. 3 Vict. c. 16, 8 & 9 Vict. c. 24, 9 Vict. c. 13, 10 Vict. c. 18.

(*u*) 6 Q. B. 433. The appointment ought to express the amount of salary, so that the corporation may be sued, in case the borough fund prove inadequate; 4 M. & Gra. 860; 6 Q. B. 443. Vid. tam. next note.

(*x*) Sect. 58. He cannot, it seems, sue the corporation for his salary, but may have a mandamus; vid. per Patteson, J., 6 Q. B. 439, citing Jones v. Mayor, &c., of Carmarthen, 8 M. & W. 605. Qu. May he not proceed to judgment, and sue out *elegit*, as in Doe v. Roe, 1 Q. B. 701; vid. n. (*u*).

(*y*) Sect. 92. Vid. 8 M. & W. 615.

(*z*) Vid. sup. p. 425, MAYOR; and it will be no excuse that it was not tendered, R. v. Mayor, &c., of Oxon, Salk. 429.

(*a*) Per Coleridge, J., in R. v. Mayor, &c., of Bridgewater, 6 A. & E. 348.

(*b*) Com. Dig. Franchise, F. 27.

(*c*) 7 Will. 4 & 1 Vict. c. 78, s. 14. Still these voting papers are not records; Reg. v. Ledgerd, 8 A. & E. 535.

He is also to have charge of the voting papers in the elections for councillors, and is to keep them for six months after the election,^(d) and to allow inspection to every burgess on payment of one shilling for every search for the voting papers of each year;^(d) but it seems he is not obliged to allow two burgesses at once to inspect, or to give more than one of the papers to one person at the same time, but he is bound to allow any burgess who brings a list of his own to compare it with the papers produced by him, and mark it accordingly.^(e)

[*434] *To keep a copy of the particulars of the division of the borough into wards among the public documents of the borough.^(f) All the charters, deeds, muniments, and records of the borough, or relating to the property thereof, shall be kept in such place as the council from time to time shall direct, and the town clerk shall have the charge and custody of, and be responsible for, the same.^(g)

To deliver at the pleasure and direction of the council during his continuance in office, or within three months after the expiration of it, a true account in writing of all matters committed to his charge by virtue of the act, and also of all moneys that have been by him received by virtue, or for the purposes, of the act, and the portion thereof paid and disbursed, and for what purposes, and also a list of debtors to the corporation for purposes of the act, and the sums owing by each respectively, and to pay all that remains due from him to the treasurer for the time being, or to any person authorised by the council to receive the same, and a remedy by distress, under warrant of two justices, &c., is given; the remedy by action, as an alternative, being reserved.^(h) If he have not sufficient goods to satisfy the said moneys and the charges of the distress, or if it shall appear to the justices that he has refused or wilfully neglected to render such accounts, or the vouchers relating thereto, or such list as aforesaid, or that any books or papers relating to the execution of this act remain in his hands, custody, or power, and that he has refused or wilfully neglected to deliver the same, or to give satisfaction respecting the same as aforesaid, then the justices are required to commit him to the common gaol, &c. &c. But in case of want of sufficient distress, he cannot be committed for more than three months.⁽ⁱ⁾ An action on the case lies against him for breach of any of the above duties, notwithstanding the summary remedy given above, and trover may also be maintained for documents withheld, &c.^(k) But the corporation cannot bring the action, and also avail themselves of the remedy before justices.^(l)

(d) Sect. 35. N. B. 12 Geo. 3, c. 21, s. 2, and 32 Geo. 3, c. 58, gave right of inspection at any time between 9 a. m. and 2 p. m., except on Christmas Day, Good Friday, and Sunday.

(e) R. v. Arnold, 4 A. & E. 657; vid. 5 A. & E. 376; so Reg. v. Blagge, Bail Court, 1846.

(f) Sect. 39.

(g) Sect. 65.

(h) Sect. 60. County magistrates may act; 6 A. & E. 550, note.

(i) Sect. 60. As to the recovery of corporation documents, &c., from officers, vid. sup. p. 382—385; R. v. Round, 4 A. & E. 139; Reg. v. Payne, 2 Jurist, 47.

(k) Mayor, &c., of Lichfield v. Simpson, 8 Q. B. 65; vid. s. 60. A mandamus to deliver up documents might probably be had, upon its being shown that the remedy by action, and the summary remedy, were both inadequate, and that irreparable mischief might be done if the writ did not issue; vid. Crawford v. Powell, 2 Burr. 1013; Stra. 537; 1 W. Bla. 50; Stra. 948.

(l) Sect. 60.

He has a lien on papers of the corporation, with respect to which he has done work as a solicitor, for his charges, as such, provided the papers be not such as it is incumbent upon him to prepare according to the provisions of any act of parliament.^(m) He has no lien on such papers of the corporation as he holds merely as town clerk.⁽ⁿ⁾

*To draw up and enter in a book minutes of the proceedings at all meetings of the council. The entry ought to be made at [*435] the meeting, and the minutes are *then* to be signed by the chairman.^(o)

To admit and enrol freemen on the freemen's roll, and to keep a true copy of such roll, to be perused by any person, without payment of any fee, at all reasonable times, and to deliver a copy thereof to any person requiring the same, on payment of a reasonable price for such copy.^(p)

To cause to be printed the overseers' list of burgesses delivered to him, and deliver a copy of all such lists to any person requiring them, on payment of a reasonable price for each copy; and cause a copy of all such lists to be fixed on or near the outer door of the town hall, or in some public and conspicuous situation within the borough, on every day during the week next preceding the 15th of September in every year.^(q)

To cause lists of persons claiming to be burgesses, and of persons objected to, as not being entitled to be retained on the list, to be fixed on or near the outer door of the town hall, or in some public and conspicuous situation within such borough, during the eight days next preceding the 1st of October in every year, and keep a copy of such several lists, to be perused by any person without payment of any fee, at all reasonable hours during the said eight days, Sunday excepted, and deliver a copy of each list to any person requiring the same, on payment of a sum not exceeding one shilling for each copy.^(r)

To produce the burgess lists, and the lists of persons claiming and objected to, at the Court of Revision.^(s)

To keep the revised lists, and cause the burgess lists, revised and signed by the mayor, to be fairly and truly copied into one general alphabetical list, in a book to be by him kept for that purpose, with every name therein numbered, beginning the numbers from the first name, and continuing them in a regular series to the last name; and to cause such books to be completed on or before the 22d of October in every year, and to deliver such books, together with the lists, at the expiration of his office, to the person succeeding him in such office.^(t)

To cause to be written or printed copies of the burgess roll in every year, and deliver such copies to all persons applying for the same, on payment of a reasonable price for each copy.^(u)

To cause a sufficient number of forms of precepts, notices, and lists of claimants, and voters for members of parliament in boroughs return-

(m) *R. v. Sankey*, 5 A. & E. 423; *Jones v. Mayor, &c.*, of Carmarthen, 8 M. & W. 605. He cannot recover for work done for the corporation, unless he have a retainer under seal; *Arnold v. Mayor, &c.*, of Poole, 2 Dowl. N. S. 574.

(n) *R. v. Sankey*, 5 A. & E. 423. An action of trover would probably lie if he detain *papers*, &c., of the corporation; *Anon.*, 2 Chit. R. 255; *vid. sup.* p. 385.

(o) Sect. 69. 8 A. & E. 266. (p) Sect. 5. (q) Sect. 15. (r) Sect. 17.

(s) Sect. 18. (t) Sect. 22. (u) S. 23. As to ward lists, *sup.* p. 404.

ing members, to be printed under the Registration of Voters Act; ^(x) and to issue his precept, with a sufficient number of such printed lists, &c., to the overseers. ^(x) To prepare and publish the lists of freemen [*436] ^(y) entitled to vote for members, ^(y) and also lists of those objected to. ^(z) To publish notice of the time and place of holding the revising barrister's court, and of the parishes allotted to each court, if to be held at different times and places. ^(a) To attend the revising barrister's court. ^(b) To cause the revised lists to be copied and printed in a book, which he is to sign, and deliver the same to the returning officer of the borough. ^(c) To account for and pay over proceeds of sales of the register, and of fines imposed by the barrister. ^(d) To prepare an annual statement of receipts and expenditure upon highways under the management of the council, and transmit to the secretary of state, under penalty of from five to ten pounds. ^(e)

All fees received by him on account of inspections of burgess rolls, &c., &c., are to be paid over to the treasurer of the borough.

Various duties are imposed upon the town clerk in every borough by the Parliamentary Reform Act, ^(f) the Highways Act, ^(g) the Prisons Act, ^(h) and other statutes; but the town clerk cannot claim any payment for the performance of duties cast upon him by act of parliament. His salary is considered a compensation for all loss of time, &c.; but he is entitled to be repaid money actually disbursed for the preparation of ward lists, &c. ⁽ⁱ⁾ From the principles laid down, it follows that he has no claim for charges in respect of revision of burgess lists, ward lists, election of councillors, assessors, or auditors, returns to secretary of state, drawing, copying, &c., bye-laws. ^(k) However, the town council may resolve to pay him, besides his salary, the usual charges for defending and bringing actions, &c. ^(k) But a resolution to increase his salary, in compensation for the loss of emoluments previous to the passing of the Municipal Corporations Reform Act, is not valid, unless under seal. ^(l) Nevertheless, if money have been paid him by the council in part pay-

^(x) 6 & 7 Vict. c. 18, s. 10; vid. interpretation clause, s. 101. Form of precept to overseers, schedule (B.), No. 1, of the above statute.

^(y) 6 & 7 Vict. c. 18, s. 14.

^(z) Sect. 18.

^(a) Sect. 33.

^(b) Sect. 35. May be made respondent in a consolidated appeal from barrister's decision, s. 44.

^(c) 6 & 7 Vict. c. 18, s. 48. Notice of objections, when to be sent to him, s. 100, how; *Cuming v. Toms*, 7 M. & Gra. 29; vid. 5 C. B. 45. Form, schedule (B.), No. 11, only applicable to household votes, 5 M. & Gra. 5.

^(d) Sect. 53. Expenses, sect. 55.

^(e) 12 & 13 Vict. c. 35, s. 2. As to his duty under the Prisons Act, 5 & 6 Vict. c. 98, vid. s. 21.

^(f) 2 Will. 4, c. 45, sects. 29. 33. 44. 46. 47. 50.

^(g) 12 & 13 Vict. c. 35.

^(h) 5 & 6 Vict. c. 98, s. 21.

⁽ⁱ⁾ *Vid. Jones v. Mayor, &c., of Carmarthen*, 8 M. & W. 605. 612.

^(k) *Thomas v. Mayor, &c., of Swansea*, 2 Dowl. N. S. 470, where see list of charges in respect of revision of burgess lists disallowed. His actual disbursements in performing the duties under the Municipal Corporations Act is all that he is entitled to beyond his salary; id. *ibid.*

^(l) *Reg. v. Mayor, &c., of Stamford*, 6 Q. B. 433. As to compensation bonds, *Parr v. Att.-Gen.*, 8 Cla. & F. 409; no interest payable on, *Reg. v. Mayor, &c., of Warwick*, 15 Law J. (N. S.) Q. 306. What offices compensation due for; *Att.-Gen. v. Corporation of Poole*, 8 Beav. 75; vid. 12 A. & E. 702; 2 Q. B. 895; 3 Q. B. 285.

ment of his general account, and he have appropriated it in discharge of business done as their attorney, though without a sufficient retainer, and besides have applied it in discharge of extra costs incurred as town clerk; held that such appropriation might stand good.(*m*)

*With respect to general liabilities:—

Where a corporation permitted the town clerk to appropriate [*437] charitable funds, of which they were trustees, both the corporation and the town clerk were held liable in equity for the breach of trust.(*n*)

Where a town clerk, acting under orders from the council under seal, adopts the proceedings necessary to show cause against certiorari to remove an order, and the order is quashed upon the removal, and the costs ordered to be paid by the prosecutors, he is held not to be liable for such costs.(*o*) He cannot be also treasurer,(*p*) nor auditor, nor assessor;(q) and he is exempt from serving on juries.(*r*)

With respect to the amotion of the town clerk, one or two decisions are found to throw considerable light upon the question of what is meant by the appointment being at the pleasure of the council.

Where the appointment of A. was only by resolution of the council, and not under seal, subsequent resolutions rescinding the former, and appointing B., were held to be a sufficient amotion of A.(*s*)

The misconduct charged, in order to justify his dismissal, must be specially connected with the execution of his office,(*t*) and the result of improper motives;(t) and a refusal to give up to the council documents placed in his custody by the terms of a charitable trust, is not a good ground of dismissal.(*u*)

As has been said, the office is an entirely new office, and therefore the old cases, deciding what offices were in their nature incompatible with the old office of town clerk, cannot be expected to be applicable, at least to the full extent of them; therefore little can be safely laid down on the subject of such incompatibility; but this we may observe, that where a town clerk has been appointed to any incompatible office against his will, such appointment does not ipso facto vacate the town clerkship, and he may have a mandamus to restore him to the town

(*m*) *Arnold v. Mayor, &c., of Poole*, 2 Dowl. N. S. 574.

(*n*) *Att.-Gen. v. Corporation of Leicester*, 7 Beav. 176.

(*o*) *Reg. v. Dunn*, 5 Q. B. 959.

(*p*) Sect. 58.

(*q*) Sect. 37.

(*r*) Sect. 122. A member of the court of record of the borough may be elected town clerk, but the offices are incompatible; *Milward v. Thatcher*, 2 T. R. 81. N. B. His election (merely, without acceptance), to an incompatible office, whether inferior or superior, does not vacate the town clerkship; *Dyer*, 332, B; 2 T. R. 777; 3 Burr. 1616.

(*s*) *Reg. v. Thomas*, 8 A. & E. 183; *R. v. Mayor, &c., of Canterbury*, Stra. 674; *Com. Dig. Franchise*, F. 27.

(*t*) *Reg. v. Mayor, &c., of Newbury*, 1 Q. B. 751, 762; *Bagg's case*, 11 Rep. 93 b; *vid.* 10 A. & E. 386.

(*u*) *Reg. v. Lords of Treasury*, 10 A. & E. 384. The question always arises on the return to the mandamus to restore or to grant compensation; for whenever a mandamus to restore goes with respect to an office held during pleasure, the facts are a sufficient return; 2 *Ld. Raym.* 1232; 2 *Show.* 69; *Cro. Jac.* 540; *Stra.* 115; 1 *Ld. Raym.* 710; 6 Q. B. 682. But the court will judge as to the reasonableness of the causes alleged; *R. v. Mayor, &c., of Maidstone*, 1 *Keb.* 812, 813.

clerkship,(*x*) there having been no acceptance of the incompatible office, without which the former office clearly does not become vacant;(y) [**438*] *and even such acceptance only operates as an absolute avoidance of the former office, where the holder of such office can divest himself of it by his own mere act, without the concurrence of another authority to his resignation or amotion;(z) and this a town clerk cannot do, for he must have the concurrence of the council in his resignation or amotion. But an election by the council to an incompatible office, would, of course, operate as against them as a signification of their assent to the town clerk's giving up the town clerkship.

A criminal information may be filed against him for misconduct in his office in a matter relating to the election of councillors.(a)

[**439*]

*THE TREASURER.

THE council are to appoint a fit person (not being town clerk nor a member of the council) to be the treasurer of the borough, at such salary or allowance as they shall think proper, and to take from him such security for the due execution of his office as they shall think proper.(b) The office is one for the usurpation of which an information in the nature of a *quo warranto* lies.(c)

The treasurer has charge of the borough fund, consisting of the rents and profits of all hereditaments, and the interest, dividends and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to the body corporate, every fine and penalty when paid and all other moneys payable to the use of the corporation.(d)

He does not hold the real property of the corporation.(e) Out of this fund he is to pay no money on account of the corporation, save only in such case as is provided by the act, or upon the order in writing of the council, signed by three or more members and countersigned by the town clerk, or by the order of the court of sessions of the peace for the borough, or of a justice of the peace acting in and for the borough in the discharge of his judicial duty, in such case as is provided for in the act, or in such case as a court of sessions of the peace for any

(x) *Baston's case*, Dyer, 332, B., note, cited Poph. 176; vid. *Siderf.* 305; 2 T. R. 81, 777; 9 B. & C. 419.

(y) *R. v. Patteson*, 4 B. & Ad. 22. Where the second office was incompatible, but not a corporate office, vid. *R. v. Godwin*, Dougl. 383, note; *Com. Dig. Office*, B. 6.

(z) *R. v. Patteson*, 4 B. & Ad. 24, 25, 26.

(a) *R. v. Nicholetts*, 5 A. & E. 376, and as to evidence.

(b) Sect. 58. The office was made annual by that section, but now, by 6 & 7 Vict. c. 89, s. 6, it is to be held during pleasure of the council; and in case of a vacancy from any cause, the office may be filled either at a quarterly meeting of the council, or a special meeting convened for that purpose, so that in no case the new appointment be delayed beyond twenty-one days from the happening of the vacancy. He may be dismissed *ad libitum*, *Com. Dig. Franchise*, F. 32; but only for reasonable cause, *R. v. Maidstone*, 1 Keb. 812, 813; vid. *sup.* p. 437.

(c) *Darley v. Reg.*, 12 Cl. & F. 520; vid. 1 Chit. R. 700.

(d) Sect. 92.

(e) *Per Coleridge, J.*, 4 Q. B. 906.

county, or a justice of the peace acting in and for the county, in the discharge of his judicial duty, may make an order of money on the treasurer of such county, or for the payment of the salaries granted to any recorder or police magistrate, as will be mentioned hereafter. *(f)*

Indictment, and not mandamus, is the proper mode of compelling him to pay out of the borough fund the costs of a witness under the order of a court of assize or judge. *(g)*

He is to receive on account of the borough fund all penalties and *forfeitures, except such as are recovered under the revenue laws, [*440] or the laws relating to trade and navigation. *(h)*

He is to invest in the purchase of government securities, for the use of the body corporate, the proceeds of the sale of advowsons and rights of presentation belonging to the corporation, and his receipt is made an effectual discharge: or, under the direction of the council, he may apply such proceeds towards the liquidation of any debt contracted by the corporation before the passing of the Municipal Corporations Act. *(i)*

He is to enter in books to be kept for that purpose true accounts of all sums of money by him received and paid, and to submit all the accounts, with all the vouchers and papers relating thereto, in the months of March and September in every year, to the auditors of the borough and a member of the council, to be named by the mayor, to be audited, and when audited he is to make out in writing, and shall cause to be printed, a full abstract of his accounts for the year, a copy to be open to the inspection of all ratepayers of the borough, and copies to be sold at a reasonable price to any ratepayer applying for them. *(k)* He must, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the council shall direct, deliver to the council, or their appointee, a true account in writing of all matters committed to his charge by virtue of this act, and of all moneys paid to and owing the corporation, and of all disbursements, and a summary remedy is given before two justices, &c., as in case of the town clerk. *(l)* Equity will enforce the due performance of the trust which the treasurer undertakes with respect to the borough fund; and it is no answer to a bill brought by the corporation against him for an account, that they have already proceeded against him before

(f) Sect. 59. As to the removal of the orders for payment by certiorari, Reg. v. Paramore, 10 A. & E. 281, 286.

(g) R. v. Jeyes, 3 A. & E. 416; R. v. Bristow, 6 T. R. 168. The reason is that he is an inferior officer, amenable to others than the court in the first instance, and that on indictment the prosecutor, on applying to the crown, gets the fine, and, therefore, an indictment in such case is a quicker and better remedy than mandamus; 3 A. & E. 424.

(h) Sect. 126. The stat. 7 & 8 Vict. c. 112, s. 62, relating to merchant seamen, is an act relating to trade and navigation, and, therefore, penalties recovered under it are not payable to the corporation; Seamen's Hospital Society v. Mayor, &c., of Liverpool, 18 L. J. (N. S.) Exch. 371.

(i) Sect. 139; 6 & 7 Will. 4 & 1 Vict. c. 104, s. 3.

(k) Sect. 93. Not accounting when called upon, or charging the corporation with payment of sums never laid out, have been held to be sufficient causes for amotion; R. v. Mayor, &c., of Doncaster, 2 Lord Raym. 1566. The accounts are to be made up to the last period of audit, and not further, or otherwise; 7 Will. 4 & 1 Vict. c. 78, s. 43.

(l) Vid. sup. p. 434, s. 60.

the justices under the section cited, and that the charge was then dismissed; also the sureties (*vid.* p. 439) are necessary parties to the suit; Mayor, &c., of *Berwick v. Murray*, 19 Law J. (N. S.) Chanc. 281; et *vid.* S. C. as to costs and evidence.

He is to pay the salaries of the police magistrates (if any) of the borough, on order of the council; (*m*) the expenses of the prosecution of offenders sent by the borough for trial at the assizes, to the county treasurer, (*n*) and the proper proportion of the borough in the other county expenses. (*o*)

He is to pay to the coroner of the borough such sums as the justices or council respectively may order, under 7 Will. 4 & 1 Vict. c. 68, s. 3, and he is also, by the 62nd section of the Municipal Corporations Act, to pay to the coroner such sums as the court of quarter sessions of the borough may order. His duties, with respect to payment of the debts of the old corporation out of the proceeds of church patronage sold by the corporation, will be noticed hereafter, when we come to speak of the borough property. (*p*)

[*441] *He is to transmit, before the 1st of March in each year, to the secretary of state, a statement of all moneys received and expended by and on account of the corporation, every such account being made up to the last period of audit. (*q*)

He is exempt and disqualified from serving on any jury summoned within such borough, and exempt from serving on any jury summoned to serve in the county wherein such borough is situate. (*r*)

The treasurer of a city, or a county of city, holds such an office *ad quo warrantum* lies for the usurpation of. (*s*)

[*442]

*THE AUDITORS.

On the first day of March in each year the burgesses are to elect from the persons qualified to be councillors, by a majority of votes, two burgesses as auditors of such boroughs, the election to be in the form and manner provided for the election of councillors. (*t*) No burgess is eligible who shall be of the council, or town clerk, or treasurer. In the election no burgess shall vote for more than one person to be an auditor. (*u*)

There is no provision in the act that auditors may be re-elected at the expiration of the year of office, as there is in the case of aldermen and councillors.

An auditor cannot be elected a councillor. (*x*)

No auditor is capable of acting as such until he shall have made and

(*m*) Sect. 99. (*n*) Sect. 114. (*o*) Sect. 117; *vid.* 10 Q. B. 127.

(*p*) *Vid.* INDEX; Municipal Corporations Act, s. 139; 6 & 7 Will. 4, c. 104, s. 3.

(*q*) 6 & 7 Will. 4, c. 104, s. 10; and 7 Will. 4 & 1 Vict. c. 78, s. 43.

(*r*) Sect. 122.

(*s*) *Darley v. Reg.*, 12 Cl. & F. 520.

(*t*) *Vid.* *sup.* p. 398. Every auditor is to continue in office until the 1st of March inclusive in each year; *vid.* *Kerr v. Jeston*, 1 Dowl. N. S. 538.

(*u*) Sect. 37.

(*x*) 7 Will. 4 & 1 Vict. c. 78, s. 15.

subscribed, before any two or more aldermen or councillors, the following declaration:—"I, A. B., having been elected auditor for the borough of —, do hereby declare that I take the said office upon myself, and will duly and faithfully discharge the duties thereof according to the best of my judgment and ability."(*y*) It does not appear that the auditors fall under the words of the act 9 Geo. 4, c. 17, s. 2, so as to make it necessary for them to make the declaration therein contained previous to acting. Every auditor acting without having made the above cited declaration, or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified, or after he shall have become disqualified to hold any such office, is liable to a penalty of 50*l.*, to be sued for by a burgess only, within three calendar months after the commission of such offence, who shall, within fourteen days after the commission of the offence, have served a notice of his intention to bring such action upon the party.(*z*) But all his acts and proceedings shall be valid, notwithstanding such disqualification or want of qualification;(*a*) and no person inrolled on the burgess roll of the borough for the time being, and acting as auditor, shall be liable to the penalty on the ground that he was not entitled to be on the burgess list.(*b*)

The auditors elected as above, together with a member of the council named by the mayor, on the 1st of March in every year, or in case of extraordinary vacancy, within ten days next after such vacancy, are to audit the accounts of the borough every year in the months of March and September, and, on finding them correct, are to sign them.(*c*)

*THE CLERK OF THE PEACE. [443]

IN every borough, having a separate court of quarter sessions, the council shall appoint a fit person to be clerk of the peace during his good behaviour.(*d*)

He cannot be appointed clerk to the justices of the borough, and he or his partner or clerk, or any person in his employ, is liable to a penalty of 100*l.* for acting as clerk to the justices.(*e*)

He is to give notice of the time and place of holding the quarter sessions of the peace ten days at least before the holding thereof.(*f*)

He is, seven days at least before the holding of the quarter sessions of the peace, to cause to be summoned a sufficient number of persons to serve as grand jurors at such sessions.(*g*)

He is to make out a list of grand jurors, and a panel of petty jurors.(*h*)

He is to take such fees as may be settled from time to time by the council, and ratified by the secretary of state.(*i*)

(*y*) Sect. 50.

(*z*) Sect. 53.

(*a*) Id.

(*b*) 6 & 7 Will. 4, c. 104, s. 7.

(*c*) Sect. 93.

(*d*) Sect. 103. This is a freehold office; *Owen v. Saunders*, 1 *Ld. Raym.* 161; *Harcourt v. Fox*, 1 *Show.* 426; *Davis v. Waddington*, 7 *M. & Gra.* 42.

(*e*) Sect. 102.

(*f*) Sect. 121.

(*g*) Sect. 124. The table having been first signed by the mayor, 11 & 12 *Vict.*

By 22 Geo. 2, c. 46, s. 14, every clerk of the peace and his deputy is prohibited from acting as a solicitor, agent, or attorney, and from suing out any process at any general or quarter sessions of the peace for any town corporate where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under a penalty of 50*l*. On an issue of not guilty, in debt for the penalty, it was held that an actual exercise of the office must be proved.^(h)

It has been held that a mandamus lies to restore a clerk of the peace who has been removed by the quarter sessions without a charge in writing having been exhibited against him;⁽ⁱ⁾ but this does not seem to be the law at present, both because the clerk of the peace is a ministerial officer, and amenable to others than the Court of Queen's Bench in the first instance,^(k) and because he may try the right to the office by means of an action, viz. for fees.^(l) The order of removal need not set out the evidence heard against him, provided he have had a copy of the complaint against him, and have been fully heard in his defence.^(m) But a mandamus will lie to compel him to do what he is required by a statute to do upon demand, &c.⁽ⁿ⁾

[*444]

*THE CORONER.

THE council of every borough, having a separate court of quarter sessions, shall, within ten days next after the grant of such court shall have been signified to the council, appoint a fit person, not being an alderman or councillor, to be coroner of the borough so long as he shall well behave himself in his office of coroner, and shall fill up every vacancy in the office, however caused, within ten days next after such vacancy shall have occurred, and none thereafter shall take any inquisition which belongs to the office of coroner, within such borough, save only the coroner so from time to time to be appointed. And every such coroner for every inquisition which he shall duly take within such borough, shall be entitled to the sum of twenty shillings, and also the sum of ninepence for every mile, exceeding two miles, which he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer out of the borough fund, by order of the court of quarter sessions for the borough.^(o) The coroner cannot be elected at a meeting of the council held by adjournment from a quarterly meeting, no sum-

c. 43, s. 30. Probably a mandamus would lie in case of his refusal to sign; vid. 4 T. R. 700; 6 A. & E. 353. ^(h) Faulkner v. Chevell, 10 A. & E. 76.

⁽ⁱ⁾ R. v. Evans, 1 Show. 282.

^(k) 3 A. & E. 424.

^(l) Harcourt v. Fox, 1 Show. 506.

^(m) R. v. Lloyd, Stra. 996.

⁽ⁿ⁾ 4 Burr. 1991. Infant may be; 1 Alc. & Nap. 431.

^(o) Sect. 62. In boroughs not having separate quarter sessions the coroner for the county or district is to act; sect. 64. The appointment of coroner made before the actual grant of quarter sessions, but ratified by the council afterwards, renders the office full, and the subsequent election of another person is invalid; Reg. v. Grimshaw, 16 L. J. (N. S.) Q. B. 389. It seems the appointment need not be under seal; S. C.

mons or notice having been previously served on the councillors stating that such business was coming on. (*p*). In case of illness or unavoidable absence, the coroner for the time being of any borough, town, or city, named in the Municipal Corporations Act, shall be empowered, and he is required by writing under his hand and seal, to appoint a fit person, being a barrister at law, or an attorney of one of the courts at Westminster, and not being an alderman or councillor, to act as deputy coroner during the illness or unavoidable absence of such coroner, but no longer, or otherwise. Provided always, that the mayor, or two justices of the borough, shall on each occasion certify under their hands and seals the necessity for the appointment of such deputy coroner, and such certificate shall state the cause of the absence of the coroner, and shall be openly read to every inquest jury summoned by such deputy coroner; and the particulars of every inquest holden before any deputy coroner shall be included in the return to be made by the coroner to the secretary of state. (*q*)

The coroner must execute writs in actions to which the sheriff of a *county of a city or town is party, (*r*) and so if the sheriff be in contempt the attachment must be executed by the coroner. (*s*) [*445]

The coroner must, within four months of holding any inquest, cause a full and true account of all sums paid by him to witnesses, &c., to be laid before the council, (*t*) and on or before the 1st day of February in every year shall make a return to the secretary of state of all the inquests he has held during the year. (*u*) The coroner of a borough had a right, provided the admiralty coroner had not held an inquest previously, to go on board any ship or vessel lying in harbour within the liberties of the borough, and hold an inquest on view of the body, &c., in such ship. (*x*) But now that coroner only within whose jurisdiction the body is lying shall hold the inquest in all cases. (*y*)

The proper mode of trying the right to the office appears to be, in all cases of borough coroners, and certainly is in cases of borough coroners appointed under charters granted since the Municipal Corporations Act, by information in the nature of quo warranto, (*z*) although the court will not *grant* one where the object of the applicants appears to be to try the legality of a charter granted under 7 Will. 4 & 1 Vict. c. 78, s. 49; (*a*) and it seems that this is not a corporate office within the statute 9 Ann. c. 20, which has been held to be confined to offices or franchises in corporations affecting corporate rights between party and party; (*b*) nor is he

(*p*) Reg. v. Grimshaw, 10 Q. B. 747.

(*q*) 6 & 7 Will. 4, c. 105, s. 6. As to the acts of deputy coroner, 10 Q. B. 674.

(*r*) R. v. Worcester, Skin. 91. Where there are two separate sheriffs, and not, as in Middlesex, two persons making one officer, process ought not to be directed to the coroner where one only of the sheriffs is interested, but to the other sheriff; Letsom v. Bickley, 5 M. & Selw. 144. (*s*) Anon., 2 Vent. 216.

(*t*) 7 Will. 4 & 1 Vict. c. 78, s. 3. (*u*) 5 & 6 W. 4, c. 76, s. 63.

(*x*) R. v. Solyard, Stra. 1097; vid. 4 Inst. 141.

(*y*) 6 & 7 Vict. c. 12. Inquisitions not to be quashed for want of form; 6 & 7 Vict. c. 83, s. 2; Reg. v. Gregory, 8 Q. B. 511.

(*z*) Com. Dig. Quo Warranto, A.; Reg. v. Davies, 11 A. & E. 953, note; Co. Entr. 527 b, 544; 12 Cla. & F. 537. As to costs, vid. sup. p. 259—262.

(*a*) Reg. v. Taylor, 11 A. & E. 949.

(*b*) R. v. Williams, 1 Burr. 407; vid. 10 B. & C. 230.

a corporate officer within 32 Geo. 3, c. 58, and, therefore, he may be removed after more than six years tenure of office for a defect in his election, or a disqualification existing at that time; (c) nor is he a corporate officer within the statute 9 Ann. c. 20, so as to entitle the relator to costs on judgment for the crown. (d) In one case an action on the case was brought to try the right to the office, (e) the plaintiff being the coroner for the county; and the *gravamen* being laid, "wrongfully intending to injure the plaintiff and to disturb and annoy him in his said office of coroner as aforesaid, and to deprive him of the same, and of the profits, fees and emoluments belonging thereto," &c.

The coroner may be removed in boroughs, it would seem, as well as in counties, by writ de coronatore exonerando; (f) and he is ipso facto discharged from his office of coroner upon being made sheriff. (g)

[*446]

*THE RECORDER.

EVERY council of every borough which shall be desirous that a separate court of quarter sessions of the peace shall be, or continue to be, holden in and for such borough, shall (h) signify the same by petition to his majesty in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay the recorder in that behalf. And it shall be lawful for his majesty, if he shall be pleased, thereon to grant that a separate court of quarter sessions of the peace shall be thenceforward holden in and for such borough, (i) to appoint for such borough, or for any two or more of such boroughs conjointly, a fit person, being a barrister of not less than five years standing, who shall be and be called the recorder of such borough or boroughs, and shall hold such office during his good behaviour; (k) and upon any vacancy in any such office to appoint another fit person, being a barrister of not less than five years standing, to be the recorder, in the place of the per-

(c) Reg. v. Grimshaw, 10 Q. B. 755.

(d) Reg. v. Grimshaw, 5 D. & L. 249.

(e) Rutter v. Chapman, 8 A. & E. 1.

(f) Jerv. Coroners, 63; Fitz. N. B. 163, n.

(g) Fitz. N. B. 163 k, note (a); vid. tam. R. v. Patteson, 4 B. & Ad. 22—26.

(h) Sect. 103. How to plead the application to the crown by petition for the grant, &c., Rutter v. Chapman, 8 M. & W. 1.

(i) In the counties of towns and cities, the recorder has the power of appointing inspectors of weights and measures, under 5 & 6 Will. 4, c. 63, s. 17; Reg. v. Recorder of Hull, 8 A. & E. 639.

(k) The recorder is a new officer, and as it seems not a corporate officer, but an officer of the crown; therefore the case as to what is good cause of amotion of the officer called, previous to the Municipal Corporations Act, recorder, do not apply, 434; 4 Burr. 2004; 9 Rep. 50 a; and the corporation have no power to amove him, for unless he happen to be a burgess, he is altogether a stranger to the corporation, R. v. Bird, 13 East, 367. Being appointed quamdiu se benè gesserit, his office is considered by the law to be for life, Cruis. Dig. Offices, s. 27; Davis v. Waddington, 7 M. & Gra. 42; and therefore, having a freehold in the office, the proper mode of removing him is by information in the nature of quo warranto, 7 A. & E. 215; 5 Bac. Abr. 251; or for a forfeiture of the office, sci. fa. to repeal the letters-patent by which he was appointed might be had; Anon., Dyer, 198, A. pl. 50.

son so making such vacancy; and the recorder for the time being of any borough shall be a justice of the peace of and for such borough, although he may not have such qualification by estate as is required by law in the case of any other person being a justice of the peace for a county. And such recorder shall have precedence in all places within the borough of which he may be the recorder next after the mayor thereof; and in such case it shall be lawful for his majesty to direct that an annual salary, not exceeding the sum stated in the petition of the council, shall be paid to such recorder by the treasurer of such borough, out of the borough fund. Provided nevertheless, that nothing in this act contained shall be construed to disqualify any such recorder from being appointed a barrister to revise any list of voters under the provisions of an act passed in the second year of his majesty, intituled "An Act to amend the Representation of the People of England and Wales,"^(l) or from being eligible *to serve in parliament, otherwise than is hereinbefore provided. [*447] "Provided also, that in every borough in and for which a separate court of general or quarter sessions of the peace is now holden, and of which the present recorder or deputy recorder is a barrister of five years standing, such recorder or deputy recorder, being qualified as aforesaid, shall be continued or appointed recorder under the provisions of this act. Provided also, that in the case of sickness or unavoidable absence, the recorder of any borough shall be empowered, under his hand and seal, with the consent of the council, to appoint a deputy recorder, being a barrister of five years standing, to act for him at the quarter sessions of the peace then next ensuing, and no longer or otherwise."

This last proviso has however been since repealed, and instead of it the law now is,^(m) "That in case of sickness or unavoidable absence, the recorder of any borough shall be and he is hereby empowered, under his hand and seal, to appoint a deputy recorder, being a barrister of five years standing, to act for him at the quarter sessions then next ensuing or then being holden, and not longer or otherwise: provided nevertheless, that such sessions shall not be deemed to have been illegally held, nor the acts of any deputy recorder invalidated, by reason of the cause of the absence of the recorder not being deemed to be unavoidable within the meaning of this act." "Provided nevertheless and be it enacted,⁽ⁿ⁾ that no recorder or person assigned to keep the peace within any such borough shall be capable of acting as recorder or justice of the peace within such borough, until he shall have taken the oaths^(o) provided to be taken by justices of the peace, except the oath as to qualification by estate, and

(l) 2 Will. 4, c. 45.

(m) 6 & 7 Vict. c. 89, s. 8. This is only a parol appointment; a statute which prescribes that a document should be under hand and seal, not being interpreted to mean a deed, unless it expressly declare that it is to be a deed; *Feltham v. Cudworth*, 2 Ld. Raym. 760; *Clarkson v. Boossey*, id. 967; and therefore may be revoked by parol; *Reg. v. Sutton*, 10 Mod. 74.

(n) Municipal Corporations, s. 104.

(o) These oaths may be taken before the mayor or any two aldermen or councillors of the borough, without suing out or obtaining any special dedimus or other commission or authority for administering such oaths; 6 & 7 Will. 4, c. 105. As to the declaration of Quakers, Moravians, and Separatists, vid. 1 & 2 Vict. cc. 5, 15.

until he shall have made before the mayor, or before any two or more of the aldermen or councillors of such borough (who is and are hereby authorized and required to administer the same,) a declaration to the following effect; that is to say, ‘I, A. B., do hereby declare that I will faithfully and impartially execute the office of recorder [*or* justice of the peace] for the borough of —, according to the best of my judgment and ability.’ (*p*) The recorder, and in his absence such person, being a barrister of not less than five years standing, as shall be appointed by the recorder under **his* hand and seal to hold the said court, shall [**448*] be the judge of the court of record of the borough (if not regulated by local act, or in which on the 20th August, 1836, a barrister of five years standing did not act as judge) and shall hold the court at such times as he in his discretion may think fit, or as his majesty shall think fit to direct; and every recorder or person so appointed shall be entitled to have such salary paid him out of the borough fund as the council shall fix by a bye-law.” (*q*)

[**449*]

*QUARTER SESSIONS.

“THE recorder of every borough shall (*r*) hold once in every quarter of a year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as his majesty shall think fit to direct, a court of quarter sessions of the peace in and for such borough, of which court the recorder of such borough shall sit as sole judge; and such court of quarter sessions of the peace shall be a court of record, and shall have cognizance of all crimes, offences, and matters whatsoever cognizable by any court of quarter sessions of the peace for counties in England; and the said recorder shall have power to do all things necessary for exer-

(*p*) No recorder by virtue of his office shall have power to allow, apportion, make or levy, or do anything whatsoever with relation to the allowance, apportionment, making or levying of any rate whatsoever; 6 & 7 Will. 4, c. 102, s. 8. But he may try appeals against the borough rate in the nature of a county rate, Municipal Corporations Act, s. 92; may reserve cases from the quarter sessions for opinion of the judge, Reg. v. Masters, 2 C. & K. 930.

(*q*) 6 & 7 Will. 4, c. 105, s. 9. And now in all boroughs in the schedules of the Municipal Corporations Act, every court of record may be holden in his absence, for all purposes, except the trial of issues in law or in fact, before any barrister or attorney of five years practice, appointed by the recorder under his hand and seal; 7 Will. 4 & 1 Vict. c. 78, s. 32; *vid. inf.* BOROUGH COURT OF RECORD; and for those purposes the court shall be holden at least four times in each year, with no greater interval between the holding of any two successive courts than four months, 2 & 3 Vict. c. 27, s. 2.

(*r*) Sect. 105. In the absence of the recorder and deputy recorder, the mayor, at the proper times for holding the court, is to open the court and adjourn over, and respite all recognizances until such further day as he shall then and there and so from time to time cause to be proclaimed, but he is not to do any other act; s. 106. After 1st May, 1836, all capital jurisdictions, and all other criminal jurisdictions belonging to any mayor, bailiff, alderman, recorder, or any other corporate officer or justice, before the Municipal Corporations Act, and all right in corporations to nominate justices, &c., abolished; s. 107. Chartered admiralty jurisdiction abolished; s. 108.

cising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court. Provided nevertheless, that no recorder, by virtue of his office, shall have power to make or levy any county rate, or rate in the nature of a county rate, or to grant any license,(s) or authority, to any person to keep an inn, alehouse, or victualling house, to sell exciseable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough."

The recorder is empowered to appoint a second court as follows:— "whenever(t) it shall appear to the recorder or other person presiding that the quarter sessions are likely to last more than three days, including the day of assembling, it shall and may be lawful for such recorder or other person presiding, at his discretion, but subject to the provisions hereafter contained, to order a second court to be formed, and to appoint by writing, under his hand and seal, a barrister at law of not less than five years' standing, to preside and try such felonies and misdemeanors as shall be referred to him therein, whilst the said recorder or other person is sitting in such quarter sessions. And for the effectual execution of the powers of this act, such recorder or other person so presiding shall be empowered in such case to call upon the clerk of the peace, and such clerk of the peace is in such case hereby authorized and required to appoint an assistant, and such recorder or *other person shall himself appoint an additional crier for such second court: and [*450] such barrister shall be styled assistant barrister,(u) and shall exercise for the time being, whilst the said recorder or other person is so sitting as aforesaid, the same powers as are exercised by the said recorder or other person presiding as aforesaid, and subject to the same rules and regulations; and the proceedings so had by and before such assistant barrister shall be as good and effectual in the case to all intents and purposes as if the same were had before the said recorder or other person so presiding as aforesaid, and shall be inrolled and recorded accordingly. Provided always, that if at any time during the sitting of such second court the recorder or other person shall be of opinion that it is no longer required, he may direct the assistant barrister, at a proper opportunity, to adjourn the same."

The proper mode of raising the objection that a grant of separate quarter sessions has not been properly made is by *scire facias* to repeal the letters-patent.(x)

With respect to the question of what are the matters properly cognizable in this court, some points have been decided which we may notice. Appeals against orders of justices of removal from places within the borough are exclusively cognizable here,(y) and the decision of the court

(s) He cannot try an appeal against a refusal of justices of the borough to grant such license; *Reg. v. Dean*, 2 Q. B. 96.

(t) 7 Will. 4 & 1 Vict. c. 19, s. 1.

(u) To have ten guineas a day remuneration for each day that he shall so preside, to be paid by the treasurer out of the borough on the recorder's certificate, provided that in no case shall the assistant barrister claim remuneration for more than two days; s. 2.

(x) *Reg. v. Boucher*, 3 Q. B. 641.

(y) *Reg. v. St. Edmunds, Sarum*, 2 Q. B. 72; *Reg. v. Justices of Suffolk*, 2 Q. B. 85; *vid. 12 & 13 Vict. c. 45, s. 2.*

is now made final, and incapable of being reviewed in any court by means of certiorari, or mandamus, or otherwise.^(z) But this would not prevent the issuing of a mandamus to compel the court to pronounce judgment in a case ripe for it.^(a)

An appeal from a refusal of justices to grant an ale license is not cognizable here.^(b)

The time for notice of appeal to this court, the statements of grounds of appeal, and various other matters relating to appeals, are now settled by a late statute.^(c)

Appeals against a borough rate, but only in the case of unequal apportionments of the rate among the parishes subject to the rate, or the total omission of parishes which ought to be so subjected; no appeal lies on behalf of persons aggrieved as individuals.^(d)

Appeals against orders of justices of the borough to pay the expense of removing a pauper lunatic to an asylum;^(e) but to each borough, when any pauper lunatic, in pursuance of the 8 & 9 Vict. c. 126, shall [*451] *be confined within a lunatic asylum belonging to the borough, or within any house duly licensed, or any hospital duly registered for the reception of lunatics within the borough, or shall be found wandering within such borough, and his settlement cannot be found out, that act is to apply, as though the borough were a separate county.^(f)

Generally, the recorder sitting in quarter sessions has cognizance of all matters whatsoever that are cognizable by any court of quarter sessions for a county in England,^(g) and therefore an action on the case for maliciously conspiring to indict for a misdemeanor before him will lie.^(h)

Notice of trial before him must state the day on which the trial is to take place.⁽ⁱ⁾

An action on the case will lie against him if he proceed to judgment after a certiorari delivered;^(k) and such proceeding is void.

Borough prisoners may be tried at the quarter sessions, notwithstanding that they may have been committed to the county prison under a contract, and although such gaol may be situate more than two miles from the borough;^(l) and where the county justices have committed prisoners to the borough gaol, the prisoners may be tried and sentenced at the

(z) 11 & 12 Vict. c. 31, s. 7. Court may amend order of removal; s. 6.

(a) Vid. cases cited Cas. Temp. Hardw. 215; vid. tam. 11 & 12 Vict. c. 44, s. 5.

(b) Reg. v. Deane, 2 Q. B. 96; vid. inf. p. 453.

(c) 12 & 13 Vict. c. 45.

(d) Reg. v. Recorder of Bath, 9 A. & E. 871; Municipal Corporations Act, s. 92. If the appeal be quashed by order of the recorder, such order is irremovable by s. 132; Reg. v. Justices of Ripon, 7 A. & E. 417. As to appeal from district borough and watch rates, 9 & 10 Vict. c. 110.

(e) Reg. v. Ludlow, 11 A. & E. 170.

(f) 12 & 13 Vict. c. 82, s. 3. Boroughs having or providing a lunatic asylum, not to be liable to contribute to the county lunatic asylum; s. 2.

(g) Reg. v. Ludlow, 11 A. & E. 170.

(h) 1 Com. Dig. 169; Fitz. N. B. 115, B.; J. Bridgm. 130.

(i) Farmer v. Mountford, 1 Dowl. N. S. 366.

(k) 1 Com. Dig. 219; per Lord Kenyon, C. J., 1 East, 302.

(l) 6 & 7 Will. 4, c. 105, s. 2; vid. infra, GAOLS.

borough quarter sessions for all offences of which that court has cognizance.^(m)

The question here arises, what remedy has a party upon an erroneous conviction, and does the Municipal Corporations Act, which takes away certiorari in case of all convictions, orders, warrants, or other matters made or purporting to be made by virtue of that act,⁽ⁿ⁾ apply to convictions, &c., made at the separate quarter sessions; and the answer seems to be, that it does not; for such convictions seem to be made, not wholly by virtue of that act, but partly by virtue of the common law authority vested in courts of quarter sessions to determine misdemeanors, &c. If, however, such convictions be removable by certiorari, it must be borne in mind that the Court of Queen's Bench cannot give judgment upon them; but that the practice is to admit the party to waive the issue below, and plead de novo, and go to trial upon an issue joined in the Court of Queen's Bench.^(o) But however the law stands with respect to convictions, &c., there is no doubt that indictments, presentments, &c., may still be removed by certiorari obtained on motion in term, or in *vacation, on a judge's fiat.^(p) And wherever the defendant is an officer of the crown, or for any other reason the crown is [*452] directly concerned, or choose to take up the defence, a certiorari must be granted on the demand of the attorney-general, without laying any special ground as a private prosecutor or defendant must do, and the writ may be granted in such case more than six months after the conviction, though 5 Geo. 2, c. 19, expressly directs that the application must be made within that time.^(q) A subject may have an indictment removed on affidavit that he cannot have a fair trial in the borough.^(r) Where the court makes an order, which is disobeyed, the Court of Queen's Bench, or any judge of that court, either in term or vacation, upon the application of the person entitled to enforce such order, and upon the production of a copy of such order, under the hand of the clerk of the peace, or his deputy, and upon proof of refusal or neglect to obey such order, may direct such order to be removed into the Queen's Bench, when such order has the effect of a rule of that court, and may be enforced in the same manner.^(s)

Boroughs, which have obtained a grant of separate quarter sessions, are exempted from assessment to the county rates by the following enact-

(m) 6 & 7 Will. 4, c. 105, s. 1. The court has now the power of amending an indictment by 12 & 13 Vict. c. 45, s. 10.

(n) Sect. 132. That the words do not extend to indictments, &c., but only to summary proceedings before a justice, &c., vid. *R. v. Battams*, 1 East, 298; nor to cases in which the crown has an interest, for there the king may demand the writ by his prerogative, *R. v. Tindal*, 4 Burr. 2458.

(o) *R. v. Baker*, Carth. 6; *R. v. Nichols*, 13 East, 412, n.; vid. *Reg. v. Dixon*, Salk. 150; 8 T. R. 218, n.; 4 Burr. 2458; 2 Burr. 749; 1 B. & C. 711. 714.

(p) 5 & 6 W. & M. c. 11; 5 & 6 Will. 4, c. 33. As to recognisances to plead, and, if issue be joined, to try at next assizes, vid. *Reg. Gen. K. B.*, Mich. T., 3 W. & M., set out 1 Show. 336; vid. *R. v. Ingleton*, 1 Wils. 139, as to costs, and *R. v. Smith*, 1 Burr. 54. The six days' notice of the issuing of the writ need not be given, as 13 Geo. 2, c. 18, s. 5, applies only to summary proceedings, &c.; *R. v. Battams*, 1 East, 298; vid. instance of such removal, *Reg. v. Mitchell*, 2 Q. B. 636.

(q) 1 East, 303, note (d); 2 T. R. 89.

(r) *R. v. Fawle*, Ld. Raym. 1452.

(s) 12 & 13 Vict. 45, s. 18.

ment, providing "that,(t) within ten days after the grant of a separate court of quarter sessions of the peace to any borough, the council of such borough shall send a copy of such grant, sealed with the seal of the borough, to the clerk of the peace of the county in which such borough, or any part thereof, is situated; and after the grant of such court to any borough, it shall not be lawful for the justices of the peace of any county, wherein such borough, or part of such borough, is situate, to assess any messuages, lands, tenements, or hereditaments, within such borough, to any county rate thereafter to be made; but every part of every such borough shall thenceforward be wholly free and discharged from contributing, otherwise than is hereinafter provided,(u) to any rate or assessment of any kind of and for the county in which any part of such borough is situated: provided nevertheless, that all arrears of such rates theretofore made may be levied and collected as if this act had not been passed."

It has been decided that the county justices have no authority to assess the borough after a separate court of quarter sessions has been once granted, although there might be objections to the proceedings taken for the purpose of procuring the grant, as amounting to a deception of the crown as to certain circumstances which are made by a statute indispensable *preliminaries to the grant, such objections not being taken [*453] by the crown, or by any of the inhabitants,(x) and being only available on a scire facias to repeal the grant. But where a riotous mob had demolished premises in a borough, having a court of separate quarter sessions, the borough was held liable, as part of the hundred, in an action on the case against the hundred in which it was situated, to pay a portion of the expense of compensating the party injured by virtue of the 7 & 8 Geo. 4, c. 31, s. 2, notwithstanding the above enactment.(y) The rate for the purpose of making such compensation is not strictly speaking a county rate, but a rate to be ordered by the county justice to be raised on the hundred over and above the general rate to be paid by such hundred in common with the rest of the county,(z) and therefore does not fall within the words "rate or assessment of any kind, of and for the county," &c.

The justices for the county in which any borough is situated, to which the crown shall not have granted a separate court of quarter sessions, shall exercise the jurisdiction of justices of the peace in and for such borough as fully as by law they or each of them can or ought to do in and for the county.(a) And, on the other hand, no part of any borough, in and for which a separate court of quarter sessions shall be holden, shall be within the jurisdiction of the justices of any county,(b) from

(t) Municipal Corporations Act, s. 112; vid. 8 & 9 Vict. c. 111, s. 23.

(u) Vid. *infra*, p. 456, s. 117.

(x) *Reg. v. Boucher*, 3 Q. B. 641.

(y) *Birley v. Inhabitants of Hundred of Salford*, 11 M. & W. 391.

(z) 7 & 8 Geo. 4, c. 31, s. 7.

(a) Municipal Corporations Act, s. 111; vid. 2 Q. B. 91. 95; 10 A. & E. 716.

(b) i. e. their jurisdiction exercised out of quarter sessions, per Patteson, J., 2 Q. B. 96. 105. 107.

which such borough, before the Municipal Corporation Act was exempt.(c) Nevertheless the county justices may hear and determine appeals against the refusal of borough magistrates to grant an alehouse license,(d) the recorder sitting in quarter sessions being prevented by the terms of the statute from hearing such appeals.

All fees for granting an ale license, received from the grantee by the justice or justices, are illegal, although there be an usage in the borough under which they have been paid;(e) and the money may be recovered back in an action for money had and received,(e) and the defendant in such case will not be entitled to notice of action, for the fee could not have been taken under colour of his office,(e) and this, although an usage of sixty-five years was shown; for that did not warrant the jury in finding an immemorial usage, inasmuch as the granting such licenses did not begin until the reign of Edward 6; though, if the evidence of usage had not been thus rebutted, or had not been explained, it would *have been amply sufficient to have supported a verdict of an immemorial usage in the borough.(f) The meeting of the jus- [*454] tices for the granting of such licenses must be held in Middlesex and Surrey within the first days of March, elsewhere between the 20th of August and 14th of September inclusive in every year.(g) It appears that a mandamus will not go to compel them to grant a license in a given case; for the granting or withholding the license is a matter of discretion,(h) and an appeal, as above stated, is given by statute against the exercise of their discretion by way of refusal.(i) The county justices are empowered to act in granting these licenses, whenever there are not present at least two borough justices who are not disqualified.(k)

With respect to the payment by boroughs of expenses of prosecuting prisoners at the assizes, it has been enacted as follow: "And(l) whereas by an act made in the seventh year of his late majesty George the Fourth, intituled 'An Act for improving the Administration of Criminal Justice in England and Wales,'(m) it was enacted, that all sums directed to be

(c) Sect. 111; and such borough is to be wholly free from contributing to any rate of any kind of and for the county, except for certain expenses of prosecutions, ss. 111, 113; vid. tam. as to liability to repair of bridges, Reg. v. New Sarum, 7 Q. B. 941. 956, *infra*, INDEX.

(d) Reg. v. Deane, 2 Q. B. 96; vid. s. 105. Who to bring the appeal, R. v. Middlesex Justices, 3 B. & Ad. 938; 9 Geo. 4, c. 61, s. 27; 11 A. & E. 139. As to notice of appeal, s. 29; 11 A. & E. 141, as to costs. As to the Cinque Ports, 6 & 7 Will. 4, c. 105, s. 11; Municipal Corporations Act, s. 135, 136.

(e) Morgan v. Palmer, 2 B. & C. 729.

(f) R. v. Jolliffe, 2 B. & C. 54. The appointment of justices in boroughs under charters is as old as Ric. 2; 1 Municipal Corporations Commissioners' Report, p. 17.

(g) 9 Geo. 4, c. 61, s. 1; R. v. Justices of Surrey, 5 D. & Ry. 308. As to the meeting and notice of meeting to grant licenses to sell spirituous liquors, vid. 9 Geo. 4, c. 61, s. 2; R. v. Downes, 3 T. R. 560. As to conviction for keeping open beerhouse at times prohibited by the justices in petty sessions, vid. Newman v. Earl of Hardwicke, 8 A. & E. 124; Newman v. Bendyshe, 10 A. & E. 11. Transfer of licenses, 5 & 6 Vict. c. 44, may be made at petty sessions.

(h) Giles's case, Stra. 881.

(i) 9 Geo. 4, c. 61, s. 27. As to licensing alehouses in the two universities, Reg. v. Archdall, 8 A. & E. 281; 9 Geo. 4, c. 61, s. 36; 5 & 6 Vict. c. 44, s. 6.

(k) 9 Geo. 4, c. 61, s. 7. As to Cinque Ports, s. 3.

(l) Sect. 113.

(m) 7 Geo. 4, c. 64.

paid by virtue of that act in respect of felonies and misdemeanors therein enumerated, committed in liberties, franchises, cities, towns, and places, which do not contribute to the payment of any county rate, should be paid as therein is directed: be it therefore enacted, that all sums directed to be paid by virtue of the last recited act in respect of felonies, and such misdemeanors as aforesaid committed, or supposed to have been committed, in any borough, in which a separate court of quarter sessions of the peace shall be holden, shall be paid out of the borough fund of such borough, anything in the said act contained notwithstanding; and the order of the court shall in every such case be directed to the treasurer of such borough, instead of the treasurer of the county." Then a subsequent statute, after enacting (*n*) that the expense of conveyance, safe custody, &c., of prisoners, for offences arising within the borough, sent by the borough quarter sessions to the county gaol, where there is no contract subsisting between such borough and county relative to such prisoners, shall be paid by the council of the borough, proceeds to provide (*o*) that the expenses of prosecuting such prisoners shall be defrayed by the treasurer of the borough in the manner directed in the above section of the Municipal Corporations Act by a rate to be levied for that [455] *purpose. The Municipal Corporations Act further provides, (*p*) "that the treasurer of every county in England and Wales shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance, and transport of all offenders committed for trial to the assizes in such county, from any borough in which a separate court of quarter sessions of the peace shall be holden, and the treasurer of every such county shall, not more than twice in every year, send a copy of the said account to the council of each of the said boroughs, and shall make an order for payment of the same on the council of such borough, and the council of every such borough shall forthwith order the same, with all reasonable charges of making and sending such account, to be paid by the treasurer of such county out of the borough fund; and in case any difference shall arise concerning the said account, it shall be decided by the arbitration of a barrister, to be named as is provided in the case of differences with respect to the payment of moneys under contracts made by authority of an act made in the fifth year of his late majesty George the Fourth, (*q*) intituled 'An Act for amending an Act of the last Session of Parliament relating to the building, repairing, and enlarging of certain Gaols and Houses of Correction, and for procuring Information as to the State of all other Gaols and Houses of Correction in England and Wales: ' provided that nothing herein contained shall be construed to alter or restrain the powers given by the last mentioned act of contracting with the justices of the peace, having authority or jurisdiction in and over any gaol or house of correction of the county wherein or where such borough is situated, or whereto it is adjacent, for the conveyance, support, or maintenance, in such last men-

(*n*) 5 & 6 Vict. c. 98, s. 18; vid. infra, GAOLS. What is not such special contract, 10 Q. B. 116.

(*o*) 5 & 6 Vict. c. 98, s. 19. As to order for their payment, 11 & 12 Vict. c. 42, Schedule, T. 2.

(*p*) Sect. 114.

(*q*) 5 Geo. 4, c. 85.

tioned gaol or house of correction, of prisoners committed thereto from such borough, save only that all such powers shall, after the 1st of May, 1836, be vested in the council of such borough in the name of 'the body corporate, whose council they are, and in none other; and for the purpose of making such contracts as aforesaid, the council of such borough, and none other, shall have power to make the orders required by the said last mentioned act to be made by the justices of the borough at the borough sessions."

The expenses to be charged on a borough, having separate quarter sessions, are to be estimated upon a calculation of the proportion which the expense of each prisoner bears to the total expenses of the gaol, and are not to be limited to the direct expenses incurred in respect of the individual prisoner.^(r)

It seems that this section is applicable only so far as it relates to contracts with county justices for the maintenance, &c., of borough prisoners, to boroughs which had, at the passing of the Municipal Corporations Act, prisoners of their own to maintain, and a gaol actually in *existence,^(s) that act contemplating that no grant of separate [456] quarter sessions would be made until the borough had a gaol of its own.^(t)

The council may contract for committing prisoners to the gaol of another borough, if there be sufficient accommodation, &c., in it;^(u) and the county justices may^(x) contract with the council of a borough in which there is a sufficient gaol for the committal of county prisoners thither.

Lastly, it is enacted,^(y) "that the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance and punishment, conveyance and transport, of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests, and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of the said act, intituled "An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs, in England and Wales, so far as respects the Election of Members to serve in Parliament,"^(z) was chargeable with, or liable to contribute in whole or in part to, the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have

(r) Reg. v. Johnson, 10 A. & E. 740. Where there is no contract, the actual expenses must be paid by the borough; Reg. v. Mayor, &c., of Birmingham, 10 Q. B. 129.

(s) Reg. v. Justices of Lancashire, 11 A. & E. 144; vid. 5 & 6 Vict. c. 98, s. 18.

(t) Reg. v. Birmingham, 10 Q. B. 127; and S. C. in error, 18 L. J. (N. S.) Mag. Cas. 176.

(u) Municipal Corporations Act, s. 115.

(x) 6 & 7 Will. 4, c. 105, s. 1. As to sect. 116, vid. 1 Exch. 41; 10 Q. B. 965.

(y) Municipal Corporations Act, s. 117.

(z) 2 & 3 Will. 4, c. 64.

been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this act had not passed, upon such borough, as the same shall be bounded, according to the provisions of this act; and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund: provided, that in case any difference shall arise concerning the last mentioned account, it shall be decided by the arbitration of a barrister, to be named as is provided in the case of differences with respect to the payment of moneys under contracts made by authority of the said act (5 Geo. 4, c. 85).”(a)

The council may also contract, under 5 & 6 Vict. c. 53, with the committee of a district prison in the manner pointed out hereafter;(b) [*457] *and the joint committee having under that act(c) appointed the district to be united to the borough for the purposes of that act, and the agreement for that purpose having subscribed, approved, and confirmed as therein directed; one court(d) shall be holden for the united district of the borough and the district of the county with which it shall be joined, and the jurisdiction of the court of such borough shall extend over the whole of such united district, and the recorder of that borough shall be the recorder for the united district, and shall hold courts of sessions of the peace for the united district, and the clerk of the peace of such borough shall, for all the purposes of the act, be the clerk of the peace of the united district, and all depositions, recognisances and other documents relating to prisoners committed to such district prison shall be returned to the clerk of the peace acting for the united district. But(e) the recorder of an united district is restrained from trying, at any court holden by him, any person or persons for any treason or felony, which, by 5 & 6 Vict. c. 38, the recorder of any borough is restrained from trying at any session of the peace.

By the last-mentioned statute, the recorder of a borough is restrained(f) from trying, at any session of the peace, or any adjournment thereof, any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously con-

(a) A borough in the first section of Schedule (A.) of the Municipal Corporations Act, having a separate court of quarter sessions, but not being before the Boundary Act (2 & 3 Will. 4, c. 64) liable to the county rate, cannot be called upon for any contribution to the county rate in consequence of a portion of the adjoining county being added to the borough by the Boundary Act and by s. 7 of the Municipal Corporations Act; vid. per Patteson, J., 7 Q. B. 948.

(b) Vid. inf. GAOLS.

(c) Sect. 6.

(d) Sect. 36. As to the mode of providing for the expenses of such court, vid. s. 42.

(e) Sect. 43.

(f) 5 & 6 Vict. c. 38, s. 1. In general qui tam informations on statutes may be filed and tried at borough quarter sessions; Farren v. Williams, Cowp. 369; vid. tam. 1 Vin. Abr. 201, pl. 4. The recorder's authority to try prisoners at quarter sessions is not determined by the fact of the judges sitting at assizes under the usual commissions of assize and oyer and terminer, even in the same borough; Smith v. Regin, 18 L. J. (N. S.) Mag. Cas. 207; vid. Brokesby v. Lord de Tiptost, Yearb. 21 Hen. 6, fol. 28, pl. 12. He has power to reserve cases for the opinion of the judges, under the stat. 11 & 12 Vict. c. 78, ss. 1 and 2; Reg. v. Masters, 2 C. & K. 930.

victed of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—

1. Misprision of treason.
2. Offences against the queen's title, prerogative, person or government, or against either house of parliament.
3. Offences subject to the penalties of *præmunire*.
4. Blasphemy and offences against religion.
5. Administering and taking unlawful oaths.
6. Perjury and subornation of perjury.
7. Making, or suborning any other person to make, a false oath, affirmation or declaration, punishable as perjury or as a misdemeanor.
8. Forgery.
9. Unlawfully and maliciously setting fire to crops of corn, grain or pulse, or to any part of a wood, coppice or plantation of trees, or to any heath, gorse, furze and fern.
10. Bigamy, and offences against the laws relating to marriage.
- *11. Abduction of women and girls. [**458*]
12. Endeavouring to conceal the birth of a child.
13. Offences against any provision of the laws relating to bankrupts and insolvents.
14. Composing, printing or publishing blasphemous, seditious or defamatory libels.
15. Bribery.
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such recorder has jurisdiction to try when committed by one person.
17. Stealing, or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein.
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any written document or instrument, being or containing evidence of the title to any real estate, or any interest in lands, tenements or hereditaments.

*COURTS OF RECORD.

[**459*]

WITH respect to the borough courts of record, it is enacted, (*g*), “that in every borough in which, by charter or custom, there is or ought to be holden a court of record for the trial of civil actions not regulated by the provisions of any local act of parliament, or in which, at the time of the passing of this act, a barrister of five years’ standing shall not act as judge or assessor, the recorder, or, in the absence of the recorder, or in

(*g*) Municipal Corporations Act, s. 118. Wherever there is a jurisdiction erected, with power to fine and imprison, that is a court of record; *Groenvelt v. Burwell*, Salk. 200; *vid. Calder v. Halket*, 3 Moo. P. C. 28.

case there shall not be a recorder, such officer of the borough, as by the charter constituting such court, or by custom, shall be the judge of such court, shall continue to be and act as such judge; and the council of such borough in every case, whether such court be regulated by the provisions of a local act of parliament or otherwise, shall have power for that purpose to appoint a necessary officer other than the recorder before whom such court is to be holden; and every such judge or assessor, other than the mayor, shall hold his office during his good behaviour, and the judge of every such court shall hold the said court (for the trial of issues of fact and of law, four times at the least in each year, and with no greater interval between the holding of any two successive courts than four months,^(h)) and at such places, (and with such rules of practice as the judge shall from time to time appoint,⁽ⁱ⁾) and with the same powers and jurisdiction as belonged to the said court on the 9th of September, 1835: provided always, that in every case in which such court had not before that date authority to try such actions as are hereinafter next mentioned, any such court in which a barrister of five years' standing shall act as judge or assessor, shall have authority to try actions of assumpsit, covenant and debt, whether the debt be by speciality or on simple contract, and all actions of trespass or trover for taking goods and chattels, provided the sum of damages sought to be recovered shall not exceed 20*l.*, and all actions of ejectment between landlord and tenant wherein the annual rent of the premises of which possession is sought to be recovered shall not exceed 20*l.*, and upon which no fine shall have been reserved or made payable." The jurisdiction of the court shall be extended so far [*460] ^{as the metes and bounds of the borough,^(k) and may be extended,} on the joint petition to the crown of the council and the county quarter sessions, over any adjacent district within the jurisdiction of such quarter sessions: ^(l) "provided^(m) also, that no action shall be tried by any such judge wherein the title of land, whether freehold, copyhold or leasehold, or other tenure whatsoever, or to any tithe, toll, market, fair or other franchise shall be in question, in any court, which, before the 9th September, 1835, had not authority to try actions in which such titles as last aforesaid were in question; and in case it shall appear in the course of any action in such court as last aforesaid, that any such

(h) 2 & 3 Vict. c. 27, s. 2. Evidence of reputation, and the declarations of deceased persons, are admissible on an issue whether the jurisdiction is that of a court of record, *Braine v. Dew*, 2 Peake, N. P. Cas. 204; what not such evidence, *Rogers v. Wood*, 2 B. & Ad. 245.

(i) 2 & 3 Vict. c. 27, s. 1. All personal actions brought in the borough courts of England and Wales shall commence by writ of summons, *id.* s. 3; and every notice of trial must state the day on which the trial is to take place; *Farmer v. Mountford*, 1 Dowl. N. S. 366. (k) Municipal Corporations Act, s. 118.

(l) 7 Will. 4 & 1 Vict. c. 78, s. 35.

(m) Municipal Corporations Act, s. 118. As to declaring in a borough court, *Cook v. McPherson*, 8 Q. B. 1030. The fundamental rule is, that every essential fact must be alleged to have arisen within the jurisdiction; and such allegation must be specific and not by implication; *Jaman v. Patie*, 1 Keb. 679; *Drake v. Beer*, 1 Keb. 528. 555; *Richardson v. Musgrave*, 1 Keb. 681; *Price v. Hill*, 1 Keb. 760; *Corbin v. Mercin*, 1 Keb. 798. 837; *Waddington v. Stones*, 1 Keb. 842; *Murley v. Smith*, 2 Keb. 155; *Anon.*, Cro. Car. 571. The omission of it is irretrievable; *City of Exon v. Morgan*, 1 Keb. 598.

title as last aforesaid is in question in such action, that then the jurisdiction of such court as last aforesaid in the matter of such action shall cease, and it shall be in the discretion of the court to award costs against the party commencing the same."

The recorder sitting in this court is a judge within the meaning of the Law Amendment Act, 3 & 4 Will. 4, c. 42, s. 17, so that a writ of trial may be directed to him, and it will be correct if it require him to summon a jury *of the borough*, truly qualified, &c., to try the cause.⁽ⁿ⁾ These borough courts, however, are not included in the words "all the king's court of record" used in a statute, for by such phrase the courts at Westminster are meant; and so the words "any court of record" in general mean the superior courts of record.^(o) Except where the town clerk acts as registrar of this court, the council are to appoint a registrar, and they are in all cases to appoint all other officers and servants proper for carrying on the business of the court; "provided that no registrar or other officer of such court shall, by himself or any partner, or by his or their clerks, practice as an attorney in such court, nor shall any such partner or clerk act as agent for any other attorney in such court: provided also, that unless disqualified as herein provided, every attorney of his majesty's superior courts at Westminster shall have full liberty to practise as an attorney in every such court."^(p) This last proviso, it is to be observed, only gives full liberty to attorneys of the superior courts to practise; it does not deprive the corporation of the right, where they had it, of appointing attorneys of the court in future: that would be an interpretation contrary to the words *and to the spirit of the clause.^(q) But although formerly the law was^(r) that no greater number of [*461] attorneys should be admitted to practise than by the ancient usage and custom of the court hath been heretofore allowed, yet this enactment is now expressly repealed,^(s) if it was not before repealed, by the Municipal Corporations Act, and therefore there is no limit whatever to the liberty of practising in one of these courts by an attorney admitted in one of the superior courts at Westminster and inrolled in this court.

(n) *Farmer v. Mountford*, 9 M. & W. 100; *vid.* 10 M. & W. 605; 11 M. & W. 826; 3 D. & L. 355.

(o) 1 Vin. Abr. 201, pl. 4; *Dyer*, 236, A.; 1 Vin. Abr. 202, pl. 7. The bringing a writ of error admits the court to be a court of record; *Bowyer v. Spey*, 3 Keb. 512. The same is implied in the words *Cur. Dom. Reg. tent' virtute litterarum patent.*; S. C.

(p) Municipal Corporations Act, s. 119. Registrar's fees, s. 124; *Quo Warranto* information lies for the office; 1 B. & C. 237; 5 D. & L. 257; 9 M. & W. 178.

(q) *Reg. v. Mayor, &c., of York*, 3 Q. B. 560.

(r) 2 Geo. 2, c. 23, s. 11; 3 B. & Ad. 779.

(s) 6 & 7 Vict. c. 73, Sched. Part. 1. Punishment of unqualified persons suing, prosecuting or defending, s. 35. In order to be entitled to practise, the attorney must sign the roll of attorneys of the court; 4 D. & L. 82; 12 M. & W. 441; s. 35; 5 M. & W. 1. Proof of qualification, 2 Exch. 442.

Formerly it was held that attorneys were not obliged to deliver signed bills, &c., one month before action if the business had been done in one of these courts, *Brickwood v. Fanshaw, Carth.* 147; S. C. 1 Show. 96; but now such delivery is made necessary for bills for any fees, charges, or disbursements in respect of business in any court of equity or in any other court; 6 & 7 Vict. c. 73, s. 37. This includes business done at the quarter sessions; 9 Bing. 388; 4 T. R. 496; 5 T. R. 694.

"All rules, orders and affidavits, and all other matters and things, except the trial of issues in law or in fact, in any way relating to the business of any borough court of record, not regulated by local act of parliament, of which the recorder or his deputy is or hereafter may become the judge or now (i. e. 17th July, 1835,) acts as assessor, which must now (i. e. 17th July, 1835,) by law be made, sworn or done by or before such recorder, or such deputy or other judge of the said court may be made, sworn or done, either in court or out of court, in the absence of the said recorder or his deputy, by or before the registrar of such court, or such other person, being a barrister at law or attorney of five years' standing, as the recorder shall appoint under his hand and seal."^(t) With respect to the making of rules for regulating the practice of the Borough Court, the result of the several enactments which have been made on the subject is this: that every judge of such court may from time to time make, alter, and revoke such rules for appointing the times of holding such court (provided that it shall be held for the trial of issues of fact and of law four times at least in each year, and with no greater interval between the holding of any two successive courts than four calendar months) for regulating the forms and manner of proceeding, the process, appearance, practice, and pleadings in such court, and for settling the reasonable fees of the attorneys of the court for business transacted therein, with a view to conducting the business of the court with most convenience and at the smallest reasonable expense, such rules, or any order revoking or altering such rules, only to be in force upon being allowed and confirmed by three of the judges of the superior courts [^{*462}] at Westminster.^(u) Unless by rules confirmed in this way, the court has no power to make rules to confess lease, entry and ouster in ejectment, but the party must actually seal the lease as at common law, where no such rules have been promulgated, and the court is not regulated by a local act giving power to make such rules.^(x)

It would seem that these enactments have been construed by the judges to give the power of granting new trials,^(y) although it had formerly been held that this court could not grant a new trial,^(z) and, indeed, laid down generally, that inferior courts could not grant a new trial on the merits.^(a) Still, where costs had been taxed, and a year had

^(t) 7 Will. 4 & 1 Vict. c. 78, s. 33. A rule for payment of money may be enforced by fi. fa. out of superior court, upon removal thither; 1 & 2 Vict. c. 110, s. 18. Form of fi. fa. Lawe's Rules p. 129.

^(u) Municipal Corporations Act, s. 118, explained and amended by 6 & 7 Will. 4, c. 105, s. 9, and by the Borough Courts Act, 2 & 3 Vict. c. 27. The courts at Westminster do not take judicial notice of the practice of this court, *Rider v. Edwards*, 3 M. & Gra. 202; *vid. Redham v. Waters*, Salk. 269; but they do of the limits of the powers belonging to the court, *vid. Chitty v. Dendy*, 3 A. & E. 324; though not that an inferior court is a court of record, *Cro. Jac.* 190; *Cro. Eliz.* 489.

^(x) *R. v. Mayor, &c., of Bristol*, 1 Keb. 690; *vid. 1 Keb.* 795; 2 Keb. 119.

^(y) *Vid. rules of borough court of Portsmouth*, confirmed by three judges; *Rawlins, Munic. Corpor. Act, App., Rule CII.*

^(z) *Brooke v. Ewers*, *Stra.* 113; *vid. Sayer*, 202; *Cas. Temp. Hardw.* 215; 13 *East*, 416, n.

^(a) *Blacquiere v. Hawkins*, *Doug.* 363; *R. v. Day, Sayer*, 202; *R. v. Urling*, *Fortesc.* 198; *Bayley v. Bourne*, *Stra.* 392.

elapsed, probably this court would be held to be disabled from granting a new trial; a judge of a borough court who, before the late enactment, had done so in such circumstances, was attached as for a contempt.^(b) But he might always have set aside a verdict for irregularity or surprise,^(c) or might have set aside an interlocutory judgment.^(d)

Where the power to hold a court of this kind is granted by charter to a corporation, they cannot lay it aside, even though they may possess no funds available for the discharge of the expenses of holding it; and a mandamus will go to compel them to hold it, even though it had been disused for 200 years;^(e) for in general it is not a ground for refusing a mandamus to perform a duty, that the corporation have no funds appropriated to the performance of the duty.^(f) On the other hand, the non-user of such court for a lengthened period would be a good cause of seizure into the hands of the crown of the franchise of holding the court.^(g)

The acting as judge, and holding the court without authority, though only on a single occasion, will subject the party so acting to an information in the nature of a quo warranto, at the suit of an individual, although the office not being within the statute of 9 Ann. c. 20, the court cannot give costs to the relator;^(h) but judgment may be given against the defendant of exclusion from the future exercise of the franchise.

*Against the judge of the court an attachment may be granted for improper conduct in his judicial proceedings,⁽ⁱ⁾ or a criminal [*463] information may be had for misconduct, ex. gra. discharging without due grounds a prisoner out of the borough gaol;^(k) and the party injured may have an action on the case against him, alleging and proving malice and want of probable cause;^(l) ex. gra. if he proceed to judgment and execution after the cause is removed into a superior court.^(m)

The Municipal Corporations Act, in providing⁽ⁿ⁾ that no conviction,

(b) *Hall v. Hill*, 7 Mod. 84; S. C. Salk. 201, 650.

(c) *Jewell v. Hill*, Stra. 499; vid. 13 East, 416, n.

(d) *Cavil v. Burnaford*, 1 Burr. 571.

(e) *R. v. Mayor, &c., of Wells*, 4 Dowl. 562; vid. *R. v. Mayor, &c., of Hastings*, 5 B. & A. 692, note, per Wilmut, J., 3 Burr. 1660; *M. & Steph. Hist. of Bor.* 1885; *R. v. Commissioners, &c., of Manchester*, 4 B. & Ad. 333; *R. v. Eastern Counties Railway Company*, 10 A. & E. 557; 17 Vin. Abr. 165, pl. 14, marg.

(f) *R. v. Commissioners, &c., of Manchester*, 4 B. & Ad. 333, note (a).

(g) Per Coke, C. J., in *Case of Leicester Forest*, Cro. Jac. 155.

(h) *R. v. Williams*, 1 Burr. 407, 408.

(i) *Reg. v. Hill*, Salk. 201; vid. *Street's case*, 7 Vin. Abr. 24, pl. 10. Ex. gra. not returning a writ of habeas corpus, *Vasper v. East*, 1 Show. 343; for proceeding after certiorari delivered to him, *Reg. v. Mayor, &c., of Carlisle*, 7 Mod. 38; *Cross v. Smith*, Salk. 149; vid. 21 Jac. 1, c. 23, s. 2.

(k) *Moravia's case*, Cas. Temp. Hardw. 135.

(l) 1 Com. Dig. 219; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 289. It is his duty on writ of error to return the record; *Yearb.* 1 Edw. 5, fol. 3; *Jordan v. Tompkins*, Styl. 131; *Spy v. Mill*, Styl. 203; *Adams v. Gay*, 2 Keb. 746; though in practice only a transcript is returned, vid. 1 A. & E. 608.

(m) 3 Leon. 99. After judgment in general the proceedings will not be removed by certiorari, *Kemp v. Balne*, 1 D. & L. 885; except to enforce the judgment, 8 M. & W. 129; *Hutt*, 118; 12 M. & W. 519; *Com. Dig. Dett.* A, 2.

(n) Sect. 132. In general every subject has a right to remove his suit into a supe-

order, warrant, or other matter made, or purporting to be made, by virtue of this act, shall be quashed for want of form, or be removed by certiorari, or otherwise, into any of the courts of Westminster, appears to abrogate the use of the writ of habeas corpus cum causâ, where the defendant was in custody by virtue of any conviction, &c., under this act; except, perhaps, where the custody was under an attachment out of this court, where the writ would still lie, though not to remove the proceedings, but only to state the cause why the party was in custody.(o)

The effect of the stat. 1 & 2 Vict. c. 110, since which a defendant cannot be held to bail in an inferior court, seems to be to abrogate the use of the writ of habeas corpus cum causâ generally as a means of removing causes from inferior courts.(p) Where a person was alleged to be unlawfully detained in custody by order, &c., of a court held by charter, and vested in a corporation, and a writ of habeas corpus cum causâ issued to ascertain the grounds of his detention, to which the corporation made no return, the Court of Queen's Bench fined the corporation, and issued an alias habeas corpus, and then a pluries, returnable immediately; and it seems that the members of the corporation, or such of them as were guilty of the contempt in not making a return to the [*464] writ, might have been attached.(q) On one occasion the *corporation of Berwick were fined 2000*l.* for contempt of this nature, and an alias habeas corpus being also not returned, the members of the corporation appear to have been attached.(r) At present the law seems to be settled, that an attachment cannot go against all the members of a municipal corporation.(r) Judgments and orders of the court for the payment of money may be removed by order of the court above, when execution will issue thereon out of the superior court.(s)

With respect to powers and jurisdiction, we may add to what has been already said,(t) that there is a well known distinction between a grant or a charter, empowering a corporation *tenere placita*, and a grant of *conuissance of pleas*. The latter entitles the inhabitants within the corporation limits to sue and be sued within the municipal boundaries, and not else-

rior court, *Anon.*, 1 Ventr.; but the certiorari must be delivered to the judge before issue or demurrer joined in the action, 21 Jac. 1, c. 23, s. 2.

(o) Vid. 2 Chitt. Archb. Prac. 1153, 8th edit.; Clapham's case, Cro. Car. 79. Third persons cannot object to the direction of the writ of certiorari, if the judge, &c., have waived the objection, and returned the record; *Daniel v. Phillips*, 4 T. R. 499. Directing to Cinque Ports, Municipal Corporations Act, sects. 134, 135; Cro. Car. 252, 264; *R. v. Winchelsea*, 3 Keb. 154.

(p) 2 Chitt. Arch. Prac. 1153. As to removing by order under 1 & 2 Vict. c. 110, sects. 11. 18. 28, vid. Lawes's Rules, 115. 129.

(q) Bourne's case, Cro. Jac. 543; vid. 2 Burr. 856; 1 Salk. 201, pl. 3. How to commence a declaration in superior court, where the cause has been removed, *Keene v. White*, 2 D. & L. 525.

(r) 2 Burr. 856; vid. sup. p. 231.

(s) 1 & 2 Vict. c. 110, sects. 11. 18. Forms of writs, Lawes's Rules, 119—129.

(t) Vid. sup. p. 459. As to power of amending process, *Morse v. James*, Willes, 125; *Wayne v. Thomas*, Willes, 568; amending generally, Com. Dig. Amendment. T—V. 3; 1 A. & E. 618; costs on removal by plaintiff, Reg. Gen. Mich. T. 1654, s. 22; by defendant, *Anon.*, 2 Show. 203; 3 Salk. 115; *Hullock*, Costs, 45.

where;(u) and such a grant may be pleaded to the jurisdiction of the courts of Westminster, if the court of the borough be one that can hold plea of the cause, but the defendant only can take advantage of the grant by way of pleading,(u) and the plea must show the exclusive jurisdiction. A general plea of an action pending for the same cause in an inferior court is no answer to an action in a superior court.(x) The grant of an exempt jurisdiction will not be operative without express words, and a non-intromittant clause.(y) Where a court has consuance of all pleas, and an action of debt is given by a statute in a new case, such action may well be brought there; but it is otherwise where a statute gives an action unknown to the common law.(z)

Formerly it was held, as is reported, that this court could not entertain an action for tolls claimed to be due either wholly, or in part, to the corporation;(a) but this seems only to be the law where the defendant is a stranger to the corporation,(b) and the action is brought since 9th September, 1835, in a court of this nature, which had not authority to try such actions previously.

As has been stated, all capital and criminal jurisdictions in boroughs are now abolished; but before the Municipal Corporations Act, it had been settled that proceedings partaking of the form of criminal proceedings, though in reality in the nature of civil actions, would not lie in a borough court of record. Thus an information tam quam on a penal statute could not be brought there.(c)

*It does not appear that equitable jurisdictions have been [465] abolished by the Municipal Corporations Act.(d)

Jurors in these courts may be summoned more than once yearly, when all who are qualified have been once summoned in that year;(e) and the court may fine a juror for non-attendance, after having been summoned, in a penalty of from 20s. to 40s., leviable by distress and sale.(f)

These courts, whether erected by charter or statute, have all necessary incidents, as officers to serve process, &c., though there be no special mention of these in the grant or statute.(g) But where the judge has power, by the constitution of the court, to enforce its process, a mandamus to compel obedience will not issue.(h) Appearance of

(u) *Cross v. Smith*, 2 Ld. Raym. 836; vid. 1 Keb. 473.

(x) *Laughton v. Taylor*, 6 M. & W. 695; 1 Com. Dig. 53.

(y) 3 T. R. 286. 288; 4 T. R. 456. (z) 14 Hen. 4, fol. 20, A.

(a) *Player v. Archer*, 2 Siderf. 105. 121; vid. *Sayer*, 255.

(b) 3 Burr. 1858; vid. tam. *Harris v. Wakeman*, *Sayer*, 254. The mayor of Hereford was "laid by the heels" for sitting in judgment in a cause where he himself was lessor of the plaintiff, though he was sole judge of the court; *Anon.*, Salk. 396. 201; vid. 7 Mod. 1; *Dyer*, 220, B, note.

(c) 1 Vin. Abr. 201, pl. 4; *Dyer*, 236, A.; *Miller v. Reg.*, Cro. Jac. 538; *Barnbee v. Goodale*, Cro. Eliz. 737; vid. *Gadley v. Whitecot*, Cro. Eliz. 544.

(d) Vid. *Earl of Derby's case*, 12 Rep. 114; et vid. inf. p. 468.

(e) 7 Will. 4 & 1 Vict. c. 78, s. 36. If a juror be fined and imprisoned by the judge without malice, &c., no action for false imprisonment lies; *Bushel v. Starling*, 3 Keb. 322. 358.

(f) 29 Geo. 2, c. 19.

(g) Com. Dig. Courts, P. 4. Mandamus lies to restore an officer of the court; *Hurst's case*, 1 Keb. 558. (h) *Reg. v. Conyers*, 15 Law J. (N. S.) Q. B. 300.

defendant is essential in every action; for before it is made judgment cannot be given.⁽ⁱ⁾

As regards declaring in these courts, the principal point to be observed is, that every part of the cause of action must always be shown to have arisen within the jurisdiction of the court,^(k) otherwise there will be ground of error. So important, and indeed indispensable, is this requirement, that where in debt brought in one of these courts on a bond, alleged in the declaration to have been made within the jurisdiction of the court, to which the defendant pleaded *non est factum*, thereby admitting the jurisdiction, and judgment was given against him, and he was taken in execution and escaped, and action was brought in a superior court for the escape, in which it was found by special verdict that the bond was *not* made within the above jurisdiction, the plaintiff [*466] *could not have judgment.^(l) Even in declaring for the escape, in the superior court, the plaintiff must allege the bond to have been made within the jurisdiction of the inferior court.^(m) The writ of error must be directed to A. B., Esq., judge of the Court of Record of the borough of —, and not to the recorder of the court, &c. Where the execution on the judgment had been levied before, but not paid over till after the allowance of the writ of error, the court above has no power to order the sum levied to be paid into court, to abide the result of the writ of error.⁽ⁿ⁾

The rules of pleading, and with respect to process and practice, must

(i) *Collins v. Page*, Styl. 124.

(k) 2 Inst. 231; et vid. *Cook v. McPherson*, 8th Q. B. 1630, as to account stated. Vid. *Williams v. Gibbs*, 5 A. & E. 208, that it is not sufficient that defendant promised to pay within the jurisdiction, unless it appear that the promise was made upon the account stated there, and so of other considerations; vid. *Stra.* 827; 1 T. R. 150; 1 C. M. & R. 302; *Cowp.* 18; 2 Wils. 16; 8 T. R. 127. Count for goods sold must lay the selling within the jurisdiction; *Crabb v. Bowdler*, 1 Show. 395; *Osbourne v. Jerome*, 2 Show. 248; vid. 1 Vent. 243; so of work done, money lent, &c., *Cudmore v. Lome*, 2 Show. 413; 2 Lev. 87; *Cro. Car.* 590; 3 Keb. 439; 2 Keb. 221. 291. 332. 353. 382. So of a bond that it was delivered within, &c., *Oliet v. Bessy*, 2 Show. 204; *Squib v. Hole*, 2 Mod. 29.

In justifying under process of such court, it is necessary to show that the precept was levied for matter within the jurisdiction; *Moravia v. Sloper*, Com. R. 574; *Rowland v. Veale*, *Cowp.* 18; vid. 1 C. M. & R. 304; 2 D. & L. 680; 6 C. B. 364; but not that the cause of action arose within, &c., 2 Mod. 59; *Cowp.* 18. 20.

In ejectment, the demise must be alleged to have been made within the jurisdiction; *Hutton v. Goodrick*, 1 Show. 7.

In an action on the case, the gist of the action though not the matter in aggravation, must be shown to have occurred within the jurisdiction; *Stanian v. Davis*, *Salk.* 404.

Plea of judgment recovered in superior court, *Pitts v. Knight*, 1 Wms. Saund. 97; same in borough court, *Murray v. Wilson*, *Sayer*, 17, 18.

Plea of release given out of jurisdiction must be verified by affidavit, *Collins v. Sutton*, Litt. R. 236; so of foreign plea generally, 1 Wms. Saund. 98, note (1); *Form*, Lill. Entr. 475; 3 *Salk.* 173.

Venire facias, vid. *Cro. Jac.* 493; in cases of counties of cities, &c., id. 308; 21 Vin. Abr. 162, 163; 2 Show. 466; *T. Jones*, 357; *Sayer*, 256.

(l) *Squib v. Hole*, 2 Mod. 29; *S. C.* 1 Freem. 193; vid. *Higginson v. Sheif*, Com. R. 153. Pleading below, so as to admit the jurisdiction, does not, nevertheless, give the court that jurisdiction, which in fact it does not possess; 2 Mod. 30.

(m) *Richardson v. Bernard*, Rol. Abr. tit. *Escape*, 809, l. 45.

(n) *Spencer v. Haggiadur*, 5 D. & L. 66; return, 2 Keb. 365. 673; *Cro. Jac.* 254.

chiefly be looked for in each case in the rules promulgated by the judge of the court, under the authority given by the late statutes.

A judgment of this court will be reversed on error, if the style of the court be not correctly set out,(o) or does not show by what authority it was holden, or omits the name of the judge;(p) or if the former be *ideo consideratum est*, without *per curiam*;(q) it will be set aside. The court above has no power to order a *venire de novo*.(r) When a *sci. fa.* is brought upon a judgment in a court of record of a borough, it was held it must appear in the writ itself how the judgment came into the superior court, whether by *certiorari* or writ of error, because the execution is different; for if it came by *certiorari*, the *sci. fa.* must set forth the limits of the jurisdiction, and pray execution within those particular limits, and must also set forth that the judgment was brought up by *certiorari*; but upon error the prayer must be for execution generally, the writ setting forth that the judgment came up on error, for in the latter case the execution may be general.(s) The general rule is, that they have no power to grant a *certiorari* to bring up the record of an inferior court *after* judgment,(t) except for the purpose of enforcing the judgment.(u)

The plaintiff may bring an action of debt in a superior court on a *judgment of a borough court, and will be entitled to his costs under 43 Geo. 3, c. 46, s. 4, if he produces affidavits showing [*467] satisfactory reasons why he proceeded by way of action, instead of removing the judgment, and issuing execution.(x)

The Municipal Corporations Act does not take away the writ of *certiorari*, except in cases of summary proceedings instituted under it, as is manifest from the ruling of the Court of King's Bench on a similar enactment.(y)

Though the point does not seem quite settled, there is good authority to show that parties and witnesses attending these courts are privileged, as in case of the superior courts.(z)

(o) *Jerratt v. Caldwell*, Cro. Jac. 184; *Johnson v. Underwood*, Cro. Jac. 493; vid. 10 Vin. Abr. 56; Cro. Car. 46; Cro. Eliz. 489; *Thyler v. Boron*, 1 Show. 145; *Mutford v. Walcot*, 1 Ld. Raym. 575; Cowp. 20; *Lucas v. Donne*, Cro. Eliz. 185.

(p) *Anon.*, Dyer, 262, B.; T. Raym. 395; 1 Keb. 388; *Yelv.* 46; 2 Keb. 263.

(q) 1 Keb. 529. 631. 839; *Cotton v. Hawkins*, 2 Show. 414.

(r) 1 T. R. 151; 3 B. & A. 605; vid. 6 Dowl. 243; 1 A. & E. 554; 2 Q. B. 636.

(s) *William v. Hardisty*, 3 Salk. 320; S. C. Ld. Raym. 216; Com. Dig. Execution, I. 1; *Risam v. Goodwin*, Hutt. 118; vid. Cro. Car. 34. The distinction seems arbitrary, and semb., is not law; *Fitz. N. B.* 243, B., qu. tam. *Alcock v. Merry*, 1 Keb. 749; 2 Inst. 23; 1 Siderf. 213, pl. 13.

(t) *Kempe v. Balne*, 1 D. & L. 885; *Walker v. Gaun*, 7 D. & Ryl. 769; *Fox v. Veale*, 8 M. & W. 129. But a conviction may be so brought up; *R. v. Baker*, Carth. 6; vid. *R. v. Nichols*, 13 East, 412, n.

(u) *Vid. Hanmer v. White*, 12 M. & W. 519; Com. Dig. Dett, A. 2; *Fitz. N. B.* 243, B. In error the judgment of the court of record will not be amended in the superior court in another term; 1 Keb. 229. And the court of error regards the document sent up to be the record, though in fact only a transcript; 1 A. & E. 608. 615; vid. *Danbery v. Parker*, 59.

(x) *Hanmer v. White*, 12 M. & W. 519, compared with *Revell v. Wetherell*, 3 C. B. 321; vid. tam. Hutt. 118; 1 Siderf. 213, pl. 13.

(y) *R. v. Battams*, 1 East, 304; vid. inf. p. 473, notes.

(z) Com. Dig. Privilege, A. 1.

A mandamus will not lie to enforce the process of the court, except where the judge has not power to compel obedience to its process; (*a*) but a mandamus will issue to hear and determine a cause within the jurisdiction which the judge refuses to hear. (*b*)

Besides this court mentioned in the Municipal Corporations Act, there may be, as it seems, others of various kinds in corporate towns.

Thus in various cities and towns an ancient court, called the Pie-Poudres Court (so termed from the speed thereof,) may be by custom and prescription, without fair or market, for any causes being transitory and personal, (*c*) and such court is a court of record, (*d*) and it may be prescribed for as being by custom, and by charters from the crown, the charters not determining the prescription where they grant precisely the same thing for they may be accepted either as grants or confirmations, (*e*) and may be pleaded as either; (*f*) for according to a practice which prevailed for some centuries, corporations were in the habit of obtaining a new confirmation of their liberties at each accession, and therefore if such subsequent grants annihilated the prescription, nothing could have been, in these times legally prescribed for by any corporation. A court may be prescribed for as being held time out of [*468] *mind, and also as having issued process time out mind, and it is no objection that this is making one immemorial thing to be subsequent to another; for customs may be time out of mind, and yet not coeval; (*g*) and so a custom time out of mind may be alleged for a court to be held from month to month; and also a custom time out of mind for the latter court to have process of summons, attachment, and distress. (*h*)

A custom in such courts to try issues by six jurors only will not be allowed. (*i*)

(*a*) Reg. v. Conyers, 15 Law J. (N. S.) Q. B. 300.

(*b*) 10 A. & E. 179. 248. Prohibition, 1 Keb. 946; 3 Keb. 17; 2 Keb. 673. 683. 845; 3 Keb. 256. 272. 354; Fitz. N. B. 45, F. 21; Clerk v. Andrews, 1 Show. 9; Anon., 1 Ventr. 333.

(*c*) Goodson v. Duffield, Cro. Jac. 313; S. C. 17 Vin. Abr. 278; in Gloucester, White v. Hunt, cited Cro. Jac. 313; in Canterbury, Penred v. Chambers, Cro. Eliz. 256; in Rochester, Cro. Jac. 313; vid. Yearb. 13 Edw. 4, fol. 8, B.; 8 Hen. 7, fol. 4, 5; 4 Inst. 272; Hodges v. Moyse, Cro. Car. 45; 2 Hawk. P. C. 34, c. 8, s. 10; Yearb. 9 Hen. 7, fol. 11; Hob. 63; Evans v. Roberts, 6 Mod. 61; vid. per Anderson, J., Cro. Eliz. 530. How to prescribe for such court, Cro. Jac. 313; Cro. Eliz. 256; Cro. Car. 45; 17 Vin. Abr. 278; Co. Litt. 113 b; Salk. 265. As to the three kinds of inferior jurisdictions, Crosse v. Smith, 3 Salk. 79. Justification to trespass under process out of one of them must show by what authority it was holden; Cholmeley v. Morton, 2 Show. 180. Executors will be presumed in equity to take notice of all judgments of courts of Pie Poudre; Searle v. Lane, 2 Vern. 88; vid. 1 Vern. 59, n. (1).

(*d*) 4 Inst. 272; Keilw. 99. May therefore commit for a contempt, but all such committals must be immediate, and flagrante crimine; Honges v. Hawkins, 2 Bulstr. 140; vid. 9 Rep. 119, 120. Semble action for slander of wares in the market lies in such court; Hall v. Jones, Moor. 623; 4 Inst. 272.

(*e*) Cro. Jac. 313; Co. Litt. 301 b. (*f*) Co. Litt. 301 b.

(*g*) Lovelace's case, Salk. 203; vid. 2 Keb. 721. Retorna brevium may be prescribed for; 17 Vin. Abr. 275, pl. 12. Action lies against sheriff of county who enters to execute process in such case; Villa de Derby v. Foxley, 1 Rol. R. 118.

(*h*) Yearb. 4 Edw. 4, fol. 13, pl. 22.

(*i*) Treddymmock v. Perryman, Cro. Car. 259.

A corporation cannot *prescribe* to have a court of equity.^(k) The Chancery at Chester and Durham were incidents to a county palatine having *jura regalia*; and London and the Cinque Ports have respectively acts of parliament granting such courts to them; and so of the two Universities, which possess courts of this nature.

Further statements with respect to several points of law relating to these customary and prescriptive courts in boroughs will be found under the head of CUSTOMS AND PRESCRIPTION. It has been intimated^(l) that the effect of the Borough Courts Act^(m) is to abolish the customary actions on *concessit solvere*, &c., mentioned above;⁽ⁿ⁾ but perhaps this may be doubted, as there are no negative words in the statute, nor do customs in such courts appear to be impliedly abrogated by it; and, therefore, as we have seen,^(o) they remain notwithstanding the statute.

*THE BOROUGH JUSTICES. [469]

THE borough justices consist of the mayor during his year of office, and for one year after the mayoralty determines;^(l) the recorder is also *ex officio* a justice for the borough;^(m) the rest of the justices are made up of such persons as the crown may commission by virtue of this enactment:⁽ⁿ⁾—"It shall be lawful for his majesty from time to time to assign to so many persons as he shall think proper, his majesty's commission to act as justices of the peace in and for each borough, and in and for each of the counties of cities and towns respectively named in the said schedule (A.), and in and for such of the boroughs in the said schedule (B.), to which his majesty may be pleased, upon the petition of the council thereof, to grant a commission of the peace. Provided, nevertheless, that every person so to be assigned shall reside within the borough for which he shall be so assigned, or within seven miles of such borough, or of some part thereof during such time as he shall act as a justice of the peace in and for such borough." Before acting, each of them must make the same declaration as the recorder,^(o) and take the same oaths *mutatis mutandis*. Their duties cannot be delegated.^(p)

A sheriff, during his year of office, is disqualified from acting as a

(k) *Martin v. Marshall*, Hob. 63; S. C. 2 Rol. R. 109; Godb. 262. As to London, *Andrew v. Webb*, 17 Vin. Abr. 266; Noy, 147; Skin. 67.

(l) 1 Wms. Saund. 68, n. (i), 6th edit. (m) 2 & 3 Vict. c. 27, s. 3.

(n) Sup. pp. 336, 337.

(o) Vid. sup. p. 322, and cases cited there, notes (a) and (b); et vid. Moseley on Inferior Courts, 427, that summons forms part of the process in these forms of action, 1 Wms. Saund. 90, n. (1), acc.; but not *plaint*, Mosel. 101. 107. Vid. definition of process, 8 Rep. 157 b.

(l) Municipal Corporations Act, s. 57. Justices were first created in Boroughs, temp. Car. 1; *R. v. Johns*, Lofft's R. 76.

(m) Sect. 103. But his deputy is not so, 3 B. & C. 762; Com. Dig. Justice of the Peace, A. 1. (n) Sect. 98. (o) Sect. 104; vid. sup. p. 447.

(p) *Jones v. Williams*, 3 B. & C. 762; 27 Hen. 8, c. 24, s. 2.

justice of the peace;(q) nor can a coroner act as a justice; but attorneys, though disabled from acting as justices for a county whilst practising as attorneys, are permitted to act in boroughs and counties of cities and towns,(r) and when sued for anything done when so acting, they may avail themselves of their privilege.(s)

The extent to which county justices are empowered to act within boroughs has been already explained(t) to some extent, and further attempts will be made to elucidate the subject, which is somewhat intricate, and involved in a variety of enactments.

It is further(u) enacted, "that every person assigned to keep the peace within any borough under the provisions of this act, or any of [*470] *them, shall, during the continuance of such assignment, execute the duties of a justice of the peace in and for the borough for which he shall have been so assigned, although he may not have such qualification by estate as is required by law in the case of other persons being justices of the peace for a county; provided that such persons be not disqualified by law to act as a justice of the peace for any other cause or upon any other account than in respect of estate; and although such person may not be a burgess of the borough in and for which he shall have been assigned to act as a justice of the peace, and that every summons for the appearance of any person, or warrant to compel such appearance, or warrant for the apprehension of any person charged with any offence, or search warrant issued by any justice acting in and for any borough in any matter within his jurisdiction, may be respectively served and executed within any county in which the said borough shall be situated, or within any distance not exceeding seven miles from such borough, and within such limits as aforesaid, shall have the same force and effect as if the same had been originally issued, or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same shall be served or executed, any law, statute, charter or usage to the contrary, notwithstanding; and every such summons and warrant shall and may be lawfully served or executed within such limits as aforesaid, by the constable or special constable to whom the same shall be directed: provided, nevertheless, that no such person, by virtue of such assignment, shall act as a justice of the peace at any court of goal delivery, or general or quarter sessions, or in making or levying any county rate, or rate in the nature of a county rate." The justices, in acting as such, are not discharging corporate functions, nor are they corporate officers.(x) They may fine for a contempt in court, and commit for the nonpayment of the fine.(y)

(q) 1 Mar. Sess. 2, c. 8, s. 2.

(r) 5 Geo. 2, c. 18, s. 2; vid. 6 & 7 Vict. c. 73, s. 34.

(s) *Duffy v. Oakes*, 3 Taunt. 166; vid. 5 M. & Selw. 324.

(t) Vid. sup. p. 453, QUARTER SESSIONS.

(u) Municipal Corporations Act, s. 101; vid. 11 & 12 Vict. cc. 42, 43, 44 (for facilitating the performance of the duties of justices, &c.) as to backing of warrants, and various other points relative to the jurisdiction of borough justices. All judicial acts by borough justices must, on the face of them, purport to be done within the locality of their jurisdiction; Reg. v. Totness, 11 Q. B. 80; ministerial (*Cro. Car.* 211. 213) or personal (11 Q. B. 66) acts need not.

(x) *Jones v. Williams*, 3 B. & C. 762.

(y) *R. v. Elliott*, Stra. 786.

The justices are exempted and disqualified from serving on any jury summoned within the borough, and exempt from serving on any jury summoned to serve in the county in which the borough is situate.^(z) For the procuring of proper evidence, they are distinctly empowered to summon witnesses thus:—"It shall be lawful^(a) for any justice of the peace acting in and for any borough to issue his summons, requiring any person to appear before any such justices of the peace, for the purpose of giving evidence touching any offence against this act; and if *any person so summoned shall neglect or refuse to appear at [*471] any time or place appointed by such summons, and no reasonable excuse for his absence shall be proved before the justices of the peace then and there present, or if any person appearing, in obedience to such summons, shall refuse to be examined on oath touching any such offence, by the justices then and there present, every person so offending shall, on conviction thereof before the said justices, or any other justices of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the convicting justices shall seem meet; and no person, although liable to the rate, contributing to the borough fund of any borough, shall be deemed an incompetent witness in proof of any offence against this act, by reason of any penalty or forfeiture for such offence being applicable to the use of such borough fund; and no justice of the peace shall be disabled from acting in the execution of this act by reason of his being liable to the rate contributing to the borough fund of any borough."

As to the power of justices of boroughs issuing warrants for the apprehension of persons charged with treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, the late enactments to facilitate the performance of the duties of justices out of sessions must be looked to.^(b)

"And^(c) be it enacted, that the justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act, may adjudge that such person shall pay the same, either immediately, or within such period as the said justices shall think fit, and in case such sum of money shall not be paid at the time so appointed, the same shall be levied by distress and sale^(d) of the goods and chattels of the offender, with

^(z) Municipal Corporations Act, s. 122.

^(a) Sect. 128; et vid. 11 & 12 Vict. c. 42, s. 16, for the proper forms of summons and warrant, and as to taking of evidence, vid. id. s. 17—20. In all cases where an information shall be laid before one or more of the justices that any person has committed any offence or act within the jurisdiction for which he is liable by law, upon summary conviction, to be imprisoned, or fined, or otherwise punished, and also in all cases in which a complaint shall have been made to such justice or justices, upon which he or they have authority to make any order for the payment of money, or otherwise, the justice or justices are empowered to summon the person to appear, &c., 11 & 12 Vict. c. 43; and also witnesses to give evidence, id. s. 7; forms of convictions, id. s. 17; Ex parte Kinning, 4 C. B. 507; vid. 2 Vern. 396; Costs, id. s. 18; Reg. v. Barton, 18 L. J. (N. S.) Mag. Cas. 56.

^(b) 11 & 12 Vict. c. 42. Justice of a borough may act as such while residing out of the borough in the county or borough next adjoining thereto, if he be also a justice of such county or borough, 11 & 12 Vict. c. 42, s. 5.

^(c) Municipal Corporations Act, s. 129.

^(d) The mention of sale was unnecessary, for distress in a statute always implies a sale; 19 Vin. Abr. 530; Arris v. Bradshaw, 1 Keb. 733.

the reasonable charges of such distress; and for want of sufficient distress, such offender shall be imprisoned, with or without hard labour, in the common gaol or house of correction, as to the convicting justices shall seem meet, for any term not exceeding one calendar month, where the sum to be paid shall not exceed 5*l.*, and for any term not exceeding two calendar months in any other case: the imprisonment to cease in each of the cases aforesaid upon payment of the sum due."

The warrant in such case must be in writing; and the detention of the party without such written warrant cannot be justified for any longer time than is necessary for making it out; ^(e) but no warrant of commitment shall be held void by reason of any defect therein, provided that it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same. ^(f)

[*472] *A conviction, we may observe, is in no respect like a commitment, for the former is only the entering on parchment the proceedings of the court which have already taken place; it is like recording a judgment in a superior court. ^(g) The form of it in cases under the Municipal Corporations Act is thus settled. ^(h) The justices of the peace, before whom any one shall be summarily convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or in any other words to the like effect, as the case may require, that is to say:—

— } "Be it remembered, that on the — day of —, in the
to wit. } year of our Lord —, in the borough of —, in the county
of —, A. O. is convicted before us, J. P. and J. J. P., two of his
majesty's justices of the peace for the said county [*or borough, or otherwise, as the case may be,*] for that the said A. O. did [*here specify the offence, and the time and place when and where the same was committed, as the case may be,*] and we do adjudge that the said A. O. shall, for the said offence forfeit the sum of —, and shall pay the same immediately [*or shall pay the same on or before the — day of —,*] to —, the treasurer for the said borough, to be by him applied according to the directions of the statute in that case made and provided.

Given under our hands the day and year first above mentioned."

"And ⁽ⁱ⁾ be it enacted, that any person who shall think himself aggrieved by any summary conviction in pursuance of this act, may appeal to the next court of general or quarter sessions of the peace, to be holden not less than twelve days after such conviction, for the county or for the borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days

^(e) *Hutchinson v. Lowndes*, 4 B. & Ad. 118.

^(f) Sect. 132.

^(g) *Per Parke, J.*, 4 B. & Ad. 121, 122.

^(h) Sect. 130; et vid. as to warrants, orders, and convictions generally, 11 & 12 Vict. c. 43, and there see the proper forms. As to conviction by mayor under statutes of Forcible Entry, *Reg. v. Layton*, Salk. 353. 106; S. C. 11 Mod. 46; 8 Hen. 6, c. 9, s. 6.

⁽ⁱ⁾ Sect. 131. As to appeal against summary convictions where the offence is not against the Municipal Corporations Act, vid. 11 & 12 Vict. c. 43, s. 27; and as to costs of appeal, &c., 12 & 13 Vict. c. 45, s. 5.

after such conviction, and seven clear days, at the least, before such sessions, and shall also either remain in custody until the sessions, or enter into a recognisance with a sufficient surety before a justice of the peace within such three days, or at any time during his custody, on giving to the complainant three days' notice in writing of his intention so to do, and of the name, description, and place of abode of his proposed surety conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognisance entered into, the justice before whom the same shall be entered into shall liberate such person if in custody, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without *costs, to either party, as to the court shall seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment. And (k) no conviction, order, warrant or other matter made, or purporting to be made, by virtue of this act shall be quashed for want of form, or be removed by certiorari or otherwise."

An order of county justices for a contract with the council of a borough for the maintenance of borough prisoners in the goal, &c., is an order made under 5 Geo. 4, c. 85, s. 1, and not under the Municipal Corporations Act, and therefore may be removed. (l) So an order of removal of a pauper may be brought up by certiorari granted in the first instance, and without a rule to show cause, upon the judge's fiat. (m)

The justices are empowered to appoint a clerk thus:—"And (n) be it enacted, that it shall be lawful for the justices of every borough, to which a separate commission of the peace shall be granted as aforesaid, at their first or any other meeting, and they are hereby respectively required, to appoint a fit person to be the clerk to the justices of such borough, to be removable at their pleasure, and so as often as there shall be a vacancy in the said office of clerk to the justices, by death, resignation, removal or otherwise: provided that it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any alderman or councillor of such borough, or clerk of the peace of such borough, or the partner of such clerk of the peace, or any clerk or person in the employ of such clerk of the peace: provided also, that it shall not be lawful for the said clerk to the justices, by himself or his partner, to be

(k) Sect. 132. This does not extend to cases where the crown is interested, 4 Burr. 2458; 1 East, 303, note (d); nor to any but summary proceedings, R. v. Battons, 1 East, 298.

(l) Reg. v. Justices of Lancashire, 11 A. & E. 144. As to the form of the certiorari, 12 & 13 Vict. c. 45, s. 7.

(m) Reg. v. Inhabitants of Newton Ferrers, 9 Q. B. 32. The order was quashed for not sufficiently showing that it was made within the jurisdiction of the borough justices making it. The omission or mistake must now be specified in the rule for issuing the certiorari; 12 & 13 Vict. c. 45, s. 7.

(n) Sect. 102. As to his fees, vid. inf. p. 474.

directly or indirectly interested or employed in the prosecution of any offender committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any court of goal delivery, or general or quarter sessions; and any person being an alderman or councillor, or clerk of the peace of any borough, or the partner or clerk, or in the employ of such clerk of the peace, who shall act as clerk to the justices of such borough, or shall otherwise offend in the premises, shall for every such offence forfeit and pay the sum of 100*l.*, one moiety thereof to the treasurer of such borough, to be paid over to the credit and account of the borough fund of such borough, and the other moiety thereof, with [*474] full costs of suit, to any person who "will sue for the same in any of his majesty's courts of record at Westminster."

The word *office* is not used in this section in its strict legal sense; a party could not have brought an assize for it; and the Court of Queen's Bench cannot inquire into the title of any person holding or dismissed from it; because the justices have absolute power of appointment and removal; (o) and of course a criminal information will not lie for his dismissal. (p)

A communication from an inhabitant inculcating the conduct of this officer, and addressed and sent to the Home Secretary, if in itself libellous, is not privileged as being an application to a competent tribunal for redress, where the Secretary of State has no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application. (q)

The fees of this functionary for business done in respect of persons apprehended by the police and brought before the justices, or in respect of informations and other proceedings taken by and at the instance of the police, must be paid out of the borough fund (if they cannot be obtained from the individuals who ought to pay them) as expenses necessarily incurred in carrying into effect the provisions of the Municipal Corporations Act, and a mandamus will go to enforce payment; a suggestion that a retrospective rate might be necessary being disregarded by the court, (r) who left the defendant to allege that fact in his return. The table of fees to be so taken must be made by the council, and confirmed and allowed by the Home Secretary; (s) or until it is made, the fees taken by the clerk to the justices for the county within or adjoining to which the borough is situated, may be taken. (t)

As to petty sessions, it is enacted as follows:—

"Every sitting and acting of justices of the peace in and for any city, borough or town corporate, having a separate commission of the peace, or any part thereof, within England and Wales, at any police court or

(o) *R. v. Mayor, &c., of Bridgewater*, 6 A. & E. 343.

(p) *Ex parte Sandys*, 4 B. & Ad. 863.

(q) *Blagg v. Sturt*, 10 Q. B. 905.

(r) *Reg. v. Mayor, &c., of Gloucester*, 5 Q. B. 862.

(s) Sect. 124. But see now 11 & 12 Vict. c. 43, s. 30, that the table must be signed by the mayor, &c.

(t) 12 & 13 Vict. c. 18, s. 1. The council may, if they think fit, from time to time direct that proper places be hired or otherwise provided for holding such petty sessions, the expenses to be paid out of the borough fund; s. 2. As to fees to clerk of the petty sessions, *vid.* 11 & 12 Vict. c. 43, s. 30.

other place appointed in that behalf, shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of acts of parliament having relation to any such petty sessions or to any business to be transacted thereat,^(m) and a copy of the accounts of moneys paid and received by the clerk to the justices and the gaoler *respectively, [^{*475}] is to be rendered to the justices in petty sessions held on or next after the first of every month.⁽ⁿ⁾

These justices, at their quarterly gaol sessions, have the right of appointing the surgeon to the borough gaol.^(o)

An information in the nature of quo warranto is the proper mode of trying the right of a justice to his office;^(p) and it seems that in the case of justices of boroughs an indictment might be sustained for acting without qualification, &c.^(q)

They can only resign (if at all) to the crown, who commissioned them; a resignation of their place or office to the corporation would be bad; for every resignation must be made to a superior;^(r) and for a voluntary absence from their duties, whereby the judicial or other business of the corporation was impeded, or the preservation of the peace endangered, they may be proceeded against by criminal information.^(s)

All powers and authorities which by the Poor Relief Act of the 43rd of Elizabeth may be exercised, out of the general or quarter sessions, by two or more justices of any county, may be exercised within any city or borough by any two or more justices of the peace having jurisdiction within such city or borough respectively, as fully in all respects as by the justices of the county in or for any parish of such county.^(t)

An order for removal of a pauper by borough justices must show distinctly that it was made within their jurisdiction, or it will be quashed on certiorari.^(u)

They are entitled to have actions against them for anything done in pursuance of the Municipal Corporations Act laid and tried in the county where the facts were committed, to be commenced within six calendar months after the fact committed, and to notice in writing of such actions and the causes thereof, given one calendar month at least before the commencement of them, and to plead the general issue and give the special matter in evidence; but for an omission or neglect to do something required by the act they are not so entitled.^(x) The Court of Queen's Bench may now rule them to do the act which they have omitted.^(y)

With respect to the extent of the jurisdiction of the borough justices, it is to be borne in mind, that^(z) all matters cognizable by

(m) See preceding note.

(n) 11 & 12 Vict. c. 43, s. 31.

(o) *Hammond v. Peacock*, 1 Exch. 41; vid. 9 Geo. 1, c. 7, s. 3.

(p) *R. v. Mashiter*, 6 A. & E. 153. (q) *Castle's case*, Cro. Jac. 643.

(r) *Vin. Abr. Resignation*, B. pl. 1. (s) *R. v. Fox*, Stra. 21.

(t) 12 & 13 Vict. c. 64, s. 1; vid. 11 & 12 Vict. c. 42; 4 T. R. 778.

(u) *Reg. v. Newton Ferrers*, 9 Q. B. 32.

(x) Sect. 133; *King v. Burrell*, 12 A. & E. 460; et vid. 11 & 12 Vict. c. 44.

(y) 11 & 12 Vict. c. 44, s. 5; *Ex parte Loader*, Q. B. 1849; vid. 3 Keb. 572.

(z) 7 Will. 4 & 1 Vict. c. 78, s. 30. All prosecutions for offences against the

[*476] *virtue of any local act of parliament or otherwise, by any justice of the peace, or by the general or quarter sessions of the peace having jurisdiction within any place which since the passing of the Municipal Corporations Act, or of an act entitled "An Act to make temporary Provision for the Boundaries of certain Boroughs,"^(a) has ceased, or which under any future act may cease, to be within and to be part of any borough or the liberties thereof, shall be cognizable by the justices of the peace, or the general or quarter sessions, of the county, riding or division, liberty or jurisdiction within which such place is situate, in the same manner and subject to the same provisions as the same were within the jurisdiction of the justices of the peace for that borough or place, or of the general or quarter sessions of the same.

Many nice and important questions have arisen as to whether orders, convictions, &c., sufficiently showed jurisdiction, but we cannot do more here than make a general reference to the cases, some of which will be found noticed at more length on convenient opportunities.^(b)

Another matter of importance with reference to the question of jurisdiction is this: "that^(c) all offences committed within any borough, or the precincts thereof, against the provisions of any local act of parliament, shall be cognizable by the justices of such borough, and such justices shall possess all the powers and jurisdiction with respect to such offences which were heretofore possessed by the justices of any county, riding, division, liberty or jurisdiction, by virtue of any such local act: provided always, that in every case in which imprisonment might be awarded for any such offence, or to enforce payment of any penalty imposed by any such act, such imprisonment may be awarded to take place in any gaol to which the justices of that borough have power to commit offenders." It has been held that non-payment of a lighting and paving rate laid under the provisions of a local act of parliament, was an offence against this section, and cognizable by the justices of the borough; *Palmer v. Sutcliffe*, 3 New Sess. Cas. 634. Also, "that^(d) in all boroughs and places where the general or quarter sessions of the peace, have under and by virtue of the Municipal Corporations Act ceased or been discon-

Municipal Corporations Act, and thereby made punishable on summary conviction, must be commenced within three months; Municipal Corporations Act, s. 127.

(a) 6 & 7 Will. 4, c. 103.

(b) *Reg. v. Stockton*, 7 Q. B. 520; *Reg. v. Milner*, 3 D. & L. 128; *Reg. v. Casterton*, 6 Q. B. 507; *Reg. v. Newton*, 9 Q. B. 32.

(c) 7 Will. 4 & 1 Vict. c. 78, s. 31.

(d) 7 Will. 4 & 1 Vict. c. 78, s. 50. The jurisdiction of justices of the Cinque Ports is preserved to them by the Municipal Corporations Act, ss. 135, 136. As to their granting licenses to victuallers, 6 & 7 Will. 4, c. 105, s. 11. The courts at Westminster do not take judicial notice to what towns the privileges of the Cinque Ports extend; 2 Inst. 557. It is doubtful whether anything enacted in the Municipal Corporations Act interferes with the customs of the Cinque Ports. That a writ of error on a judgment given in a court of record there does not lie in B. R., but shall be examined before the lord warden at the Court of Shepway. *Anon.*, *Dyer*, 376, A.; 2 Inst. 557; 4 Inst. 224. As to the extent of the jurisdiction, 4 Inst. 224. However, it is said error lies from the Court of Shepway to B. R.; 3 Bla. Com. 79, qu. tam. Debt for an escape against a gaoler of the Cinque Ports, Yearb. 30 Hen. 6, fol. 6, pl. 5; et vid. *Comyns's Rep.* 153. 574; *Bull. Ni. Pri.* 83; 1 *Ld. Raym.* 229, as to liability of officers of borough courts for escapes.

tinued to be holden, all such business, matters and things, which, under or by virtue of any general or local act of parliament, or any usage or custom, ought or were usually heard, decided or transacted at such general or quarter sessions by the justices of the peace, with *the assistance of any juries there assembled, shall and may hereafter [*477] be heard, decided and transacted by the general or quarter sessions of the peace for the counties, ridings or divisions, liberties or jurisdictions, in which such boroughs are situate, and by the justices of the peace and juries there assembled respectively."

With respect to exemption from the jurisdiction of county justices, it is now lawful (e) "for any justice or justices of the peace acting for any county at large, or for any riding or division of such county to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to, any such county, riding or division respectively, and that all and every such act and acts, matters and things to be so done by such justice or justices within such city, town, or precinct as justice or justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: provided, always, that nothing in this act contained shall extend to give power to the justices of the peace for any county, riding or division, not being also justices for such city, town or other precinct, or not having authority as justices of the peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct in any manner whatsoever."

A fundamental rule, grounded equally in law and in convenience, with respect to the mode by which a precinct could be exempted from the jurisdiction of county justices, was, that it must be done by express words; (f) and words merely giving a jurisdiction to borough justices did not annul that of the county justices where it had previously existed; (g) and it had always been held, that by apt words the crown can grant to any city or borough to have justices of their own, and exclude the county justices from intermeddling; (h) and the acts of the county justices in such cases were not merely a breach of the franchise, but were wholly void. (i) On the other hand, if the justices of an exempt jurisdiction refused to act in any case where it was their duty to act, a mandamus would have formerly issued to compel them; (k) but the proper mode of

(e) 11 & 12 Vict. c. 42, s. 6; vid. 9 Geo. 1, c. 7, s. 3; vid. 5 B. & Ald. 665; 4 T. R. 778; 10 A. & E. 711; 9 Dowl. & R. 172, as to these precincts.

(f) Per Lord Kenyon, C. J., in *Blankley v. Winstanley*, 3 T. R. 279. The principle seems to be that the king cannot grant his prerogative implicitly; it must be by express words; Yearb. 2 Hen. 7, fol. 13; *Melvin v. Reeve*, Litt. R. 116.

(g) *Bates v. Winstanley*, 4 M. & Selw. 429; *R. v. Sainsbury*, 4 T. R. 451. 456.

(h) *Talbot v. Hubble*, Stra. 1154; 2 Inst. 71; vid. Yearb. 20 Hen. 7, fol. 6, 7.

(i) *Talbot v. Hubble*, Stra. 1154; Vin. Abr. Justices of Peace, D., pl. 1.

(k) *Caly v. Hardy*, 6 Mod. 164; vid. *Sayer*, 160; 1 Wils. 21; and the motion was of course, 1 Wils. 125.

proceeding is now by a rule of the Court of Queen's Bench ordering them to do what they have omitted to do.^(l)

[*478] *There is one class of cases in which the legislature has lately given a concurrent jurisdiction to the county justices with those of the borough, viz. where offences against the Smuggling Prevention Act, or any act relating to the customs, are committed in any city, borough, &c.^(m) Where the justices ought to do an act which they refuse to do, the Court of Queen's Bench may now *rule* them to do it.⁽ⁿ⁾

[*479]

*JURORS.

As regards the persons who are to be jurors in corporate towns, &c., it is enacted,^(o) "that every person, being a burgess of any borough wherein there shall be a separate court of (quarter) sessions of the peace, or a court of record for the trial of civil actions (unless he shall be exempt or disqualified, otherwise than in respect of property, from serving on juries, by virtue of an act passed in the sixth year of the reign of King George the Fourth,^(p) intituled 'An Act for consolidating and amending the Laws relative to Jurors and Juries'), shall be qualified and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace, and in any court of record for the trial of civil actions triable within the borough of which such person shall be a burgess, and the clerk of the peace of every such borough shall give public notice of the time and place of holding every such quarter sessions of the peace ten days at the least before the holding thereof, and shall, seven days at the least before the holding thereof, cause to be summoned a sufficient number of persons, being qualified and liable as aforesaid, to serve as grand jurors at such sessions, and the clerk of the peace and registrar of the court of record respectively shall also cause to be summoned not less than thirty-six nor more than sixty persons, so qualified and liable as aforesaid, to serve as jurors at every such sessions; and at the holding of every such court of record for the trial of causes, in case there shall be any cause then to be

(l) 11 & 12 Vict. c. 44, s. 5; ex. gra. to sign a poor rate; vid. 3 Keb. 572. A poor rate not being so allowed, &c., by two justices is wholly void; Fox v. Davies, 6 C. B. 11.

(m) 8 & 9 Vict. c. 87, s. 96.

(n) 11 & 12 Vict. c. 44, s. 5; Ex parte Loader, Q. B. 1849. 18 L. J. (N. S.) Q. B. 94; vid. 10 A. & E. 179. 248. 374.

(o) Municipal Corporations Act, s. 121. Semb. in an action by the corporation it is good cause of challenge to the array that the sheriff who returned the jury panel is a member of the corporation; Mayor, &c., of Carmarthen v. Evans, 10 M. & W. 274; vid. Andrews' R. 85. 104.

(p) 6 Geo. 4, c. 50. As to jurors, where there is a district united to a borough under the District Courts and Prisons Act, 5 & 6 Vict. c. 53, vid. ss. 37, 38 of that act; and as to the jurors' book in such case, vid. s. 39. They are exempt from attending county sessions by s. 40. The crown might grant to a corporation that its members shall be exempt from serving on juries out of their borough, Yearb. 21 Ed. 4, fol. 55, pl. 28; but now no person is to be exempt from serving on juries in any of the king's courts whatever, by reason of any writ, grant, charter, prescription or otherwise, Municipal Corporations Act, s. 123.

tried, and such summons shall be made by showing to the person to be summoned, or, in case he shall be absent from the usual place of his abode, by leaving with some person therein inhabiting, notice, under the hand of such clerk of the peace or registrar respectively, containing the substance of such summons, and such clerk of the peace shall make out a list of the names of such persons so summoned as grand jurors, and the clerk of the peace and registrar respectively shall also make out a panel of such persons so summoned other than grand jurors, and such lists and panels shall respectively contain therein the christian names and surnames, places *of abode and descriptions of the several [*480] persons therein named; and if any person, having been duly summoned to attend on any jury, shall not attend pursuant to such summons, or, being thrice called, shall not answer to his name, or after his appearance wilfully withdraw himself from the presence of the court, the court shall impose such fine upon every person so making default (unless some reasonable excuse shall be proved to the satisfaction of the court) as the court shall think meet; and if any person on whom such fine shall be imposed shall refuse to pay the same to the person who shall be authorised by the court to receive the same, it shall be lawful for the court then, or at its next sitting, by order of the court, signed by the clerk of the peace or registrar respectively, to cause to be levied by distress and sale of the goods of the person on whom such fine shall have been imposed, every such fine, and the reasonable charges of such distress and sale; and every fine so received shall be paid to the treasurer of the borough, to be by him carried to the account of the borough fund.”(q)

Councillors, during the continuance of their offices, the borough justices, the treasurer, and the town clerk for the time being, are exempt and disqualified from serving on any jury within the borough, and exempt from serving on any jury of the county in which the borough is situate; and all burgesses of a borough, where there is a separate court of quarter sessions, are exempt from serving on any jury summoned for the trial of issues joined in any court of general or quarter sessions in the county wherein the borough is situate.(r)

In counties of cities, &c., the courts may order actions, &c., pending in them to be tried by juries of the adjoining counties.(s)

With respect to questions of qualification of jurors, it appears, that in counties of cities and counties of towns, the stat. 33 Hen. 8, c. 13, is still applicable, notwithstanding the abolition, by the Municipal Corporations Act, of all capital and criminal jurisdictions in boroughs, and therefore that personal property to the amount of 40*l.* qualifies for a juror on the trial of felonies,(t) a freehold qualification not being requisite (u) Although the sheriff, in counties of cities and towns, is not now of necessity a member of the corporation, yet where he is so, it seems still to be a

(q) 7 Will. 4 & 1 Vict. c. 78, s. 36, provides that persons may be summoned a second time in one year, if all the persons liable to serve shall have been summoned once during that year.

(r) Sect. 122.

(s) 38 Geo. 3, c. 52, s. 1; vid. sup. pp. 349—352.

(t) Finch, Law, 405.

(u) R. v. Mayor, &c., of Worcester, Skin. 91. 106; T. Raym. 484; R. v. Lord Russel, 2 Show. 310.

good ground of challenge to the array that the sheriff who returned the panel of the jury is such member in an action brought by the corporation; (x) but the preferable course, it *was said, for the defendant [*481] in such case, is to move to change the venue. (x) In other cases, however, which do not appear from the report to have been brought to the notice of the court in the case alluded to, it has been stated that "the books are full that challenges are allowed where the issue concerns a city or corporation, and they are to make the panel, or where any of their body be to go on the jury, or any of kin unto them, though the body corporate be not directly party to the suit." (y) It had before been repeatedly laid down, that where a corporation are parties to a suit, and immediately interested in the very issue in question, no freeman can be a juror; (z) and so if a juror be of kindred to any member of the corporation; (a) and the above (b) is the first case, apparently, in which the course of proceeding by way of motion or application to change the venue has been intimated to be that which the courts would prefer to see adopted instead of the old challenge, but the decision does not apply to challenges of jurors for relationship, &c., which can of course only be taken when the juror comes to be sworn. (c) As to the principle there is no doubt; on the contrary, "there is no principle in the law more settled than this, that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a juror, or to the officer by whom the jury is returned." (d) The minuteness of the interest does not mitigate the objection; but the defendant, by not taking the objection, will be considered to acquiesce, and in that case the trial will be good. (e) But where the question is one which only affects the members of the corporation, and the parties on either side are equally interested in the result, it is not material that the jurors, or sheriff who impanels them, are corporators. (f)

When it is desired to have a special jury in a cause arising in a county of a city or town (except London), the rule must command the sheriff to produce the list of persons qualified to serve on juries within the same county of city, &c.; and the jury are to be taken and struck as theretofore was used. (g)

(x) *Mayor, &c., of Carmarthen v. Evans*, 10 M. & W. 277. If the panel were quashed for unindifference in the sheriff, the proper course is to award a venire facias to the coroner; *R. v. Dolby*, 2 B. & C. 104; *Co. Litt.* 157 b. Form of challenge to array on grounds of unindifference in sheriff, *Cro. Circ. Comp.* 105; practice, *Eire v. Bannister*. *Hutt.* 24; *vid.* 2 *Dowl. N. S.* 296; suggestion to try issue by men of the county and not of the city, *C. C. A.* 239. 241; that one of the coroners may return venire facias, *C. C. A.* 241; *vid.* 3 *Burr.* 1848.

(y) *Day v. Savadge*, *Hob.* 87; *Chit. Arch. Pract.* 425, 8th edit.; 3 *Bla. Com.* 363; *R. v. Pilkington, Skin.* 118; *Yearb.* 28 *Hen.* 6, fol. 10. As to challenging the polls, 3 *Burr.* 1849.

(z) *Co. Litt.* 157 a; 3 *Keb.* 12, 295; 3 *Burr.* 1855.

(a) *Co. Litt.* 157 a; 1 *Saund.* 344; 28 *Hen.* 6, fol. 10.

(b) *Mayor, &c., of Carmarthen v. Evans*, 10 M. & W. 277.

(c) *Vid.* *Yearb.* 21 *Edw.* 4, fol. 11, pl. 3, fol. 20, pl. 29, fol. 63, pl. 33.

(d) *Hesketh v. Braddock*, 3 *Burr.* 1856; *vid.* 12 *Mod.* 687.

(e) *Bodwick v. Fennell*, 1 *Wils.* 234, explained 3 *Burr.* 1858.

(f) *City of London v. Vanacker, Carth.* 480, explained 3 *Burr.* 1857; *Mayor, &c., of London v. Markwith*, 9 *Vin. Abr.* 486.

(g) 6 *Geo.* 4, c. 50, s. 36; *Lush, Pract.* 477; *vid.* 3 *Exch.* 660.

*GAOLS.

[*482]

WITH respect to the subject of gaols, it has been already noticed, that in boroughs, having, at the passing of the Municipal Corporations Act, a separate court of quarter sessions and a gaol of their own, the powers of contracting for the conveyance, support, and maintenance, in the county gaols, of borough prisoners, which were vested in the justices of the borough, by 5 Geo. 4, c. 85, ss. 1, 2, are now vested in the councils of such boroughs, who are to make all contracts and orders under that act; *(g)* and, as has been already shown, the council of one borough may contract with another; and, on the other hand, the county justices may contract with a borough for the maintenance of the prisoners of each in the gaol of the other respectively. But newly-chartered boroughs, though having a grant of separate quarter sessions, could not have contracted under this enactment, because they never had a gaol of their own. *(h)* But now it is enacted, *(i)* that in every borough to which a separate court of sessions of the peace hath been or shall hereafter be granted there shall be one common gaol, and at least one house of correction, excepting those boroughs in which the mayor, aldermen, and burgesses, by their council, shall have contracted with the justices of the peace having authority or jurisdiction in or over any gaol or house of correction of the county, riding, or division, wherein such boroughs is situated, or whereunto it is adjacent, or with the mayor, aldermen, and burgesses of some other borough, in which there is a gaol or house of correction, or with the committee of a district prison, *(k)* for the support and maintenance, in such last mentioned gaol or house of correction or district prison respectively, of any prisoners committed thereunto from such borough, and during the continuance of any such contract, but no longer, the first-mentioned mayor, aldermen, and burgesses shall not be bound to maintain any other gaol or house of correction for their borough. *(l)* And it shall be lawful for the mayor, aldermen, and burgesses of any such borough, by their council, to enter into such contracts *as aforesaid, although at the time of entering into such contract there may be no gaol or house of [*483] correction belonging to such borough; and all enactments with respect to such contracts shall apply as well to those contracts where, at the time of entering into the same, there was or is a gaol or house of correction

(g) Sect. 114; vid. sup. pp. 454¹—456; et vid. 5 & 6 Vict. c. 98, s. 14.

(h) Reg. v. Justices of Lancashire, 11 A. & E. 144. As to the mode in which these expenses of maintenance are to be calculated and charged on boroughs, vid. Reg. v. Johnson, 10 A. & E. 740, and p. 455, supra.

(i) 5 & 6 Vict. c. 98, s. 14; vid. 12 & 13 Vict. c. 82. A new gaol can only be erected by authority of parliament; 2 Inst. 705; Com. Dig. Imprisonment, A.

(k) Vid. 5 & 6 Vict. c. 53, inf. p. 483. By 7 & 8 Vict. c. 50, s. 1, these agreements may be made by councils of boroughs, which have not grants of quarter sessions, contingent on such grants being eventually made: vid. 11 A. & E. 144.

(l) No borough, having commenced, &c., the construction of a sufficient gaol and house of correction, shall be liable to contribute to the costs, &c. incurred by the county in which it is wholly or in part situate, about any new gaol or house of correction for the county; 12 & 13 Vict. c. 82, s. 1.

belonging to the borough, as to those contracts where there was or is no gaol or house of correction belonging to the borough at the time of entering into the same. By another enactment,^(m) the mayor, aldermen, and burgesses of any borough which is within the provisions of the Municipal Corporations Act, or of any charter granted in pursuance of that act, or of any act passed for the amendment thereof, are empowered to agree by their council, jointly or severally, with the justices of the peace of any one or more counties, or with the mayor, aldermen, and burgesses of any one or more such boroughs, by their council respectively, for the contribution and payment of any sum of money by either or any of the parties to any such agreement, towards altering, enlarging, building, rebuilding, repairing, or improving any prison to be used as a district prison, and towards the expenses of the maintenance, safe custody, and punishment of the offenders committed thereunto, including their committal, prosecution, and conveyance to and from prison, and towards the expenses of providing and maintaining a court house and necessary buildings, and defraying the other charges of the court at which they shall be tried; and any justice of the peace acting within his jurisdiction for any borough, which is one of the parties to the agreement, is empowered to commit to such prison all persons who shall by law be liable to be committed to prison for any act or omission done or omitted, or charged to be done or omitted, within any borough specified in the agreement; and every person committed to any such prison may be tried as if such prison were a gaol belonging to the borough from which such person was committed, and all the provisions of 5 Geo. 4, c. 85, and 6 & 7 Will. 4, c. 105, shall extend as nearly as may be to such agreements, and to the trial and punishment of such offenders, and to all acts necessary for such trial, or consequent thereon, subject to the provisions of 5 & 6 Vict. c. 53. And⁽ⁿ⁾ in the [*484] case of every prison built, rebuilt, or enlarged, in *pursuance of any such agreement, such prison and place, in which the court of gaol sessions shall be holden, shall, for all purposes relative to the jurisdiction of such gaol sessions, and of the justices of the peace empowered to act in the government of the said prison, be deemed to be within the

(m) 5 & 6 Vict. c. 53, An Act to encourage the Establishment of District Courts and Prisons, sect. 1. By sect. 2, all enactments, requiring such agreements to be made at a quarterly meeting of the council, are repealed. By sect. 3, moneys to be paid under such agreements are to be raised as other moneys for like purposes. By sect. 5, the council, at a special meeting to be called for that purpose, may appoint not less than three, nor more than five, justices of the borough, to be a committee for treating with any committee appointed by any other of the parties aforesaid for the purposes aforesaid; and from time to time, at a quarterly meeting, to fill up any vacancy in the committee, which, by sect. 34, is to go out of office every 9th of November, and by other parts of the act, the council, at the quarterly meeting on that day, shall appoint fit persons to perform the duty of such committee, any member of the old committee being capable of reappointment, if then duly qualified. This committee is to unite with the other committees of the parties to the agreement, and to form one joint committee, which is to hold gaol sessions from time to time, and to have power to purchase lands, make contracts, appoint the prison officers, and at least one visiting justice for the borough, at least once every quarter of a year, and also to appoint a treasurer, make reports to the Secretary of State, &c.

(n) Sect. 18.

county and borough to which the ordinary powers of such justices respectively extend; and (o) the council are empowered to borrow money on estimate for building or rebuilding, repairing or enlarging the prison, court house, and other necessary buildings to be used with the prison, and for the purchase of land, so that the principal and interest be repaid in thirty years, for securing repayment of which the council may (p) grant bonds under the common seal, *or*, instead, may mortgage, with consent of three or more Lords of the Treasury, any part of the real property of the corporation, the rents of which are or may be by any law in force applicable towards erecting or maintaining a gaol or house of correction, and to repay the money borrowed, and the interest accruing, out of the borough fund, or borough rate, but without prejudice to any prior claim upon the borough fund; *or* instead *or* in aid thereof, the council may make gaol rates, and secure the repayment of the loan with interest by mortgage of the borough rates or gaol rates, so that all the principal, with the interest, shall be repaid within thirty years, *or*, in case the money shall have been advanced by the commissioners of exchequer bills, within twenty years. Then (q) the gaol rate is to be made, levied, and raised in like manner as the borough rate; and for the purpose of providing a prison, the council may (r) purchase and hold so much land as the Secretary of State shall deem necessary.

Then follow several important regulations respecting contracts for the maintenance, &c., of borough prisoners in county gaols, (s) and especially that where there is no special contract between the borough and county, the actual expenses of persons committed to the county gaol from the borough, whether by county or borough justices, must be paid by the borough, (t) and how the expense of prosecutions is to be defrayed, (u) and also of conveyance and maintenance, (x) such borough being exempted from the payment of any county rate in respect of such conveyance, &c. (y)

*It will be seen from what has been already stated, (z) that the legislature contemplates every borough having a gaol, and at [*485]

(o) 5 & 6 Vict. c. 98, s. 3; and by sect. 4, the exchequer bills loan commissioners may grant loans. After commencing to construct such gaol and house of correction, the borough is exempt from contributing to costs of any new county gaol or house of correction; 12 & 13 Vict. c. 82, s. 1.

(p) Sect. 5. But they cannot apply the surplus of the borough fund, after defraying the ordinary charges under sect. 92, to the repair of the gaol, or the maintenance of prisoners; Att.-Gen. v. Mayor, &c., of Exeter, 3 Russ. 395.

(q) Sect. 6.

(r) Sect. 13. The borough gaol and house of correction may be within or without the limits of the borough, and the land taken for this purpose, and that of building town house, council house, and police office, is not to exceed five acres in the whole; 7 Will. 4 & 1 Vict. c. 78, s. 40.

(s) Sect. 18; vid. sup. p. 482; and 12 and 13 Vict. c. 82, s. 1.

(t) Reg. v. Mayor, &c., of Birmingham, 10 Q. B. 116; vid. 12 & 13 Vict. c. 82, s. 1.

(u) Sect. 19.

(z) Sect. 20.

(y) Sect. 22; vid. as to the power of the County Court, under 9 & 10 Vict. c. 95. to use the borough prison as a house of correction in certain cases, sect. 49; vid. 12 & 13 Vict. c. 101, s. 2.

(z) Vid. sup. p. 482; 12 & 13 Vict. c. 82, s. 1.

least one house of correction; and it has been further enacted, that^(a) in every borough gaol, and house of correction, a clergyman of the Church of England shall be appointed to be chaplain thereof by the same authority by which *the keeper*^(b) is appointed; but no such chaplain shall officiate in any prison until he shall have obtained a license from the bishop of the diocese, or for any longer time than while such license shall continue in force; and notice of every such appointment shall within one month after it shall take place, be transmitted to the bishop by the town clerk. Therefore, where the corporation had by charter the power of appointing the keeper of the borough gaol, the council may now appoint the chaplain.^(c)

With respect to the regulation of the borough gaol, &c., it is enacted,^(d) that all the powers, which before the 9th of September, 1835, were possessed by the justices having the government or ordering of any gaol or house of correction, and all things by any act of parliament to be done at any general or quarter sessions of the peace in relation to the regulation of any such gaol or house of correction, shall, subject to any such alteration as aforesaid (i. e., as introduced by statute 5 & 6 Will. 4, c. 38,) be exercised or done by the justices of the borough to which such gaol or house of correction shall belong; and for that purpose the justices shall hold a quarterly session at the usual times of holding quarterly sessions of the peace: provided, that no order made by the justices, in pursuance of these powers, which shall require the expenditure or payment of any money, shall be of force until confirmed by the council. These, powers of regulation include in general, it seems, the power of appointing gaolers; for such appointment it a matter relating to the business of a court of criminal jurisdiction, and therefore, as we have seen, taken away from corporations by the Municipal Corporations Act;^(e) but this power only belongs to the justices, where there is no power in the corporation, by charter or otherwise, of appointing the *keeper of the gaol* of their franchise, which in some boroughs is vested in the corporation by charter; for there the corporation by the council continue to appoint the keeper of the gaol, who may if the usage authorize *him, or the charter permit it, appoint a person as the [*486] actual gaoler, who, however, is under the supervision and control of the justices.^(f)

The borough justices are to appoint the surgeon of the borough gaol.^(g)

(a) 2 & 3 Vict. c. 56, s. 15.

(b) This officer is not necessarily the actual gaoler; 5 Q. B. 161. As to the appointment of governor of prison, vid. 2 & 3 Vict. c. 56, s. 24.

(c) Reg. v. Bishop of Bath and Wells, 5 Q. B. 147; vid. 2 & 3 Vict. c. 56.

(d) 7 Will. 4 & 1 Vict. c. 78, s. 38. For these powers, vid. 4 Geo. 4, c. 64, and 5 Geo. 4, c. 85. The powers that justices of counties have respecting building, repairing, &c., gaols of counties is transferred to the council with respect to the borough gaol and houses of correction by sect. 37. A corporation may be indicted for neglecting to repair the gaol; vid. Reg. v. Mayor, &c., of Gloucester, Cro. Circ. Companion, 355. But the recorder must first have certified the expediency of such repairs, sect. 37; vid. 11 A. & E. 156; 1 Exch. 41, 56; 1 A. & E. 863.

(e) Reg. v. Lancaster, 16 Law J. (N. S.) Mag. Cas. 139.

(f) Vid. 5 Q. B. 162.

(g) Hammond v. Peacock, 1 Exch. 41.

A county gaol, though within the borough, is under the exclusive jurisdiction of the county justices.^(h)

*THE BOROUGH FUND AND BOROUGH [*487] RATES.

THE rents and profits⁽ⁱ⁾ of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A) and (B), or to any member or officer thereof, in his corporate capacity, and every fine or penalty^(k) for every offence against this act, (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called "The Borough Fund," and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before 9th September, 1835, and unredeemed, or of so much thereof as the council from time to time shall be required, as shall deem it expedient to redeem, and the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate, in or upon the real or personal estate of any body corporate, by virtue of any proceedings either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate, when there is a recorder or police magistrate, and of the respective

(h) 7 Will. 4 & 1 Vict. c. 78, s. 41; vid. Municipal Corporations Act, sect. 8; and 9 & 10 Vict. c. 95, s. 49.

(i) Municipal Corporations Act, s. 92. Stocks, funds, or public securities, standing in the books of the Bank of England, or any other public company, in the name of the corporation, and all dividends and interest due thereon, and all bonuses and accretions, are to be paid to the borough fund; 7 Will. 4 & 1 Vict. c. 78, ss. 45, 48. The council have no power under this section to expend the principal of any moneys, dividends, &c., belonging to the corporation, *Ex parte Hythe*, 4 Y. & Coll. 55; for the borough fund consists only of annual and casual proceeds or income. Money arising from the sale of real property is not to be brought into it, but invested, and the dividends only in each year go into the borough fund; 4 Q. B. 906; 2 My. & C. 619; 9 A. & E. 443.

(k) There can be no doubt that fines or penalties levied under bye-laws formerly passed, and still operative (not being inconsistent with the provisions of this act), by virtue of powers granted by charter, (as in *R. v. Headley*, 7 B. & C. 499,) must likewise be paid into and form part of the borough fund; and such would be the case with respect to the proceeds of any tax which might be laid upon the inhabitants by virtue of the powers commonly given in charters (1 Municipal Corporations Commissioners Report, p. 22) of taxing for municipal purposes; which powers, except where they are superseded as inconsistent with the Municipal Corporations Act, still exist, it is conceived, and may be acted upon, if money be required for municipal purposes, other than those of carrying into execution the Municipal Corporations Act.

salaries of the town clerk and treasurer, and every other officer whom the council shall appoint; and also towards the payment of the expenses incurred from time to time in preparing and printing burgess lists, [*488] *ward lists, and notices, and other matters attending such elections as are herein mentioned, and in boroughs which shall have a separate court of sessions of the peace, as already explained,^(l) towards the expense of maintaining the borough gaol, house of correction, and corporate buildings,^(m) and towards the payment of the constables, and of all other expenses not hereinafter provided for, which shall be necessarily incurred in carrying into effect the provisions of this act.⁽ⁿ⁾ Now, as the corporate property is thus made liable to all expenses necessarily incurred in carrying into effect the provisions of the Municipal Corporations Act, including such expenses as necessarily arose out of the duties imposed on parties by the act, but subject in the first instance to the latter particular class of payments, two cases arise; first, where there is a surplus in the borough fund, after all the ordinary payments of salaries and other fixed burdens upon the fund have been defrayed and discharged; and, secondly, where the amount of the borough fund, as described above, is not adequate to the claims upon it.

In the first place it is provided, that in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough.^(o) Explanatory of these words is a very important decision,^(p) that the council may devote this surplus to the defence of proceeding on information in the nature of a quo warranto, having for their object to destroy the corporation, though they may be nominally directed against individuals. But it must clearly appear to the court that the money has been applied for *public purposes*; therefore the surplus cannot be so applied to defend a quo warranto information against an individual whose own interests only were concerned, and whose case embodied no public interest; otherwise the borough fund must be applied to defending all proceedings of the kind, whether against friends or enemies.^(q) Hence, in no case can the surplus be properly applied to defending a criminal information against a person for misdemeanors in his office of alder-

(l) Vid. sup. p. 455, s. 114.

(m) The council may order the expenses necessarily connected with the repair of the corporation pew in the parish church to be defrayed from the borough fund; Reg. v. Mayor, &c., of Warwick; 15 L. J. (N. S.) Q. B. 306. But they cannot order payment of the interest on a compensation bond, under s. 67, to be made out of that fund; id. ibid.; S. C. 8 Q. B. 926.

(n) Fees payable to clerk of the borough justices, in cases where there is no specific provision as to the mode in which they are to be paid, as well as in cases where there are no means of obtaining payment from the parties liable for them in the first instance, are within these words; Reg. v. Mayor, &c., of Gloucester, 5 Q. B. 862.

(o) S. 92; by contracts under the common seal, 6 M. & W. 815; expenses of act for improving navigation of the river not such, 16 Sim. 225.

(p) Att.-Gen. v. Mayor, &c., of Norwich, 2 My. & C. 425; vid. R. v. Inhabitants of Essex, 4 T. R. 591, et vid. 4 Q. B. 904.

(q) Reg. v. Paramore, 10 A. & E. 287.

man; for it can never be for the interests of the borough that a person who has committed a delinquency should not be punished.^(r) Nor will one party in a corporation be permitted to fight the other by means of *legal proceedings defrayed with the corporation money. Therefore where a person claiming to have been duly elected councillor obtained a rule nisi for a mandamus to the corporation to receive his vote, and permit him to act as councillor, and the council resolved that cause should be shown against the rule, it was held that the costs of such opposition, as well as the costs of counsel's opinion taken by the mayor under a general authority from the council, on which he had acted in refusing the excluded councillor's vote, could not be charged on the borough fund, though it was sworn that the proceedings were taken bona fide.^(s) It does not distinctly appear that the council may apply this surplus to pay a fine set upon the corporation on a conviction upon an indictment, or how the fine is to be raised in case there is no surplus of the borough fund.

The *public purposes* are those of the borough, not the general benefit of the public at large. Thus the expenses relating to a petition to the lord chancellor, for leave to attend before the master, to present a list of persons as trustees for the estates held by the corporation for charitable uses, though ordered by the council, are not payable out of the borough fund.^(t) Accordingly it would seem to be strictly legal, within the above words, for the council to apply such surplus to buying of rents charged on the corporate lands under 10 Geo. 4, c. 50, s. 39. Also the expense of prosecuting a person for an assault or interruption of one of the officers of the corporation in the exercise of his duty, may properly be paid out of the borough fund, but it is the duty of the council in the first instance to consider whether the prosecution is a proper one to be instituted at the expense of the corporation; and it is only, it must be remembered, when there is a surplus in the borough fund that the council have a right to enter upon such expenses.^(u) The effect of these words is to give the Court of Chancery jurisdiction over the property of corporations in boroughs, who, since the Municipal Corporations Act, are considered to hold their property as trust property for charitable uses, and the trusts are applicable as well to the personal as to the real estate.^(v) But *semble*, a corporation cannot exempt their lands from execution, by alleging that they are held only for the purposes of the borough.^(y) As has been stated, the borough fund consists only of in-

(r) Per Littledale, J., 10 A. & E. 288.

(s) Reg. v. Mayor, &c., of Leeds, 4 Q. B. 796. It seems that the councillors constituting the majority, who were for incurring such expenses, would be personally liable; vid. sup. p. 360; S. C. and Reg. v. Mayor, &c., of Cambridge, 4 Q. B. 801; Reg. v. Dunn, 13 Law J. (N. S.) Q. B. 238.

(t) Reg. v. Mayor, &c., of Warwick, 15 Law J. (N. S.) Q. B. 306; vid. Att.-Gen. v. Mayor, &c., of Norwich, 16 Sim. 225.

(u) Reg. v. Mayor, &c., of Lichfield, 4 Q. B. 907, 909.

(v) Ex parte Ilythe, 4 Y. & Coll. 55; Att.-Gen. v. Corporation of Liverpool, 1 My. & C. 199; Att.-Gen. v. Corporation of Poole, 8 Beav. 75; Parr v. Att.-Gen., 8 Cl. & F. 409; vid. Att.-Gen. v. Aspinall, 2 My. & C. 623; vid. 9 A. & E. 443; 11 A. & E. 502; 12 A. & E. 13, acc.; 16 Sim. 225.

(y) Doe d. Parr v. Roe, 1 Q. B. 700.

come arising out of annual proceeds as well as casualties, such as fines, penalties, &c. Money, the produce of sales of real property, under the [*490] provisions of acts of parliament, does not *form part of it, such sums being to be invested, and the annual dividends only go into the borough fund, and we therefore see that it may fall short of the claims upon it; and thus we come to the second question:

If the borough fund shall not be sufficient for the purposes aforesaid, the council are authorized(y) and required from time to time to estimate as correctly as may be what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Corporations Act; and in order to raise the amount so estimated, the council is authorized and required from time to time to authorize a borough rate in the nature of a county rate to be made(z) within their borough. For which purpose the council are invested with all the powers, so far as is applicable, given to justices at general or quarter sessions by 55 Geo. 3, c. 51, with respect to the county rate; all warrants required by that act to be issued under the hands and seals of two or more justices being in the like case to be signed by the mayor, and sealed with the common seal, and an appeal being given against such rate, not to the council, but the recorder sitting in quarter sessions;(a) and all such sums levied in pursuance of such borough rate shall be paid over to the account of the borough fund, and, subject to the previous provisions, shall be applied to all purposes to which, before the passing of this act, a borough rate or county rate was by law applicable in such borough or county.(b)

The council being thus authorized when necessary to have an estimate made, and a borough rate levied, to meet the deficiency of the borough fund to defray necessary expenses, it is no excuse for the non-payment of a debt justly chargeable on the borough fund, that it will not suffice to defray the amount without a borough rate.(c) But in

(y) As to the mode of making it, vid. 53 Geo. 3, c. 51, ss. 1, 12, and 7 Will. 4 & 1 Vict. c. 81, ss. 1, 3; *Cobb v. Allan*, 10 Q. B. 689. Mandamus to make a distress in order to raise a rate, 1 Wils. 133.

(z) Municipal Corporations Act, s. 92. As to liability of added districts to municipal taxation, vid. *Mayor, &c., of Coventry v. Lythall*, 10 M. & W. 780. As to the mode of levying the rate; *Cobb v. Allan*, 10 Q. B. 683, 689. For purposes other than those of carrying into effect the Municipal Corporations Act, *semble*, corporations having, as is often the case, (1 Municipal Corporations Commissioners Rep. 22,) the power of taxing the inhabitants given by charter, may still exercise such power.

(a) Sect. 92. The appeal must be to the next quarter sessions after the rate made; and if there be no recorder, then to the next quarter sessions for the county within which the borough is situate, or whereunto it is adjacent, s. 92. As to notice of appeal in the first case, vid. 7 A. & E. 756; 12 & 13 Vict. c. 45. The mode of trying the validity of a borough rate by an individual aggrieved, is by an action of trespass against the mayor for issuing the distress warrant to levy the rate, vid. 10 M. & W. 773; or against any two borough justices who sign the distress warrant, 10 Q. B. 683, 688, according as the distress is for a borough rate or a district rate.

(b) Sect. 92. Form of order by council of a borough for the levy of a borough rate, 10 Q. B. 684.

(c) *Holdsworth v. Mayor, &c., of Dartmouth*, 11 A. & E. 504. The power of rating is not wholly new. In some instances the old charters gave the power of taxing the inhabitants for municipal purposes; 1 Mun. Corp. Com. Rep. 22; *Madox*,

*general a borough rate will be bad if it is retrospective; for it is unjust to make the present inhabitants of the borough pay [*491] expenses incurred several years ago; (*d*) for so it might happen that succeeding inhabitants would have to pay for services, &c., of which their predecessors had enjoyed the whole benefit. But on a motion for a mandamus to pay money due on account of the borough fund, it is not an objection that a retrospective rate might be necessary; the rule notwithstanding will be made absolute; it being open to the defendants to allege that fact, and discuss its effect on the return to the writ. (*e*)

Whether a borough rate is in general bad for excess, in not being levied for the precise proportion or poundage mentioned in the previous estimate, remains as yet an unsettled question. (*f*) Where the rate is to be levied from an entire parish, being part of the corporate jurisdiction, the quota payable by the parish may be satisfied either out of the poor rate, or by means of a special rate laid for that purpose, and therefore the order of the council for the raising of a rate in such case ought to specify which alternative is to be adopted. (*g*) With respect to parts of parishes there is no alternative; the amount required can be collected only by a special rate, and an order on a person specially appointed to make and collect borough rates to collect a given amount, orders him to do so by the one method expressed in his appointment. (*h*) The great inconvenience of retrospective rates had long been felt and acted upon by the courts of law, especially with respect to county rates; and therefore when the councils of boroughs were empowered to levy borough rates in the nature of county rates, the decisions on county rates under 55 Geo. 3, c. 81, necessarily becoming applicable to the borough rates, (*i*) were fully recognized with respect to them; but the principle is not merely applicable to borough rates; for when a corporation were empowered by statute to levy water rates, and raise money on the credit of the water rates, for the purpose of improving the supply of water, it was held that rates levied under the act were not to be applied by resolution or by-law of the corporation to the discharge of debts, or expenditure incurred

Firm. Burg. c. 11, s. 5. A custom to tax and rate was held good; *Smetheden v. Ashton*, Rol. Abr. Distress, G. pl. 1; and perhaps the levy of such a rate by the customary means might be good, notwithstanding that the Municipal Corporations Act appoints distress as the means; *Green v. St. Katherine's Dock Company*, 19 Law J. (N. S.) Q. B. 53. Therefore the assumption made by some of the judges in *Rutter v. Chapman*, 8 M. & W. 63, 74, that the crown could not have conferred the right of taxing, is unfounded.

(*d*) Vid. per Coleridge, J., 4 Q. B. 906; *Woods v. Reed*, 2 M. & W. 777; vid. *Douglas v. Chalk*, 3 M. & Gra. 494; *Att.-Gen. v. Mayor, &c., of Lichfield*, 17 Law J. (N. S.) Chanc. 477.

(*e*) *Reg. v. Mayor, &c., of Gloucester*, 5 Q. B. 862.

(*f*) *Cobb v. Allan*, 10 Q. B. 683, where the estimate was for 1s. in the pound, and the rate actually attempted to be levied and demanded was 1s. 2d. in the pound. Vid. now as to district rates, 8 & 9 Vict. c. 110, s. 4; inf. p. 493.

(*g*) 7 Will. 4 & 1 Vict. c. 81, s. 1; *Cobb v. Allan*, 10 Q. B. 683, 690; 8 & 9 Vict. c. 110; vid. inf. p. 494.

(*h*) 10 Q. B. 690. And if the rate ordered be 6d. in the pound, and overseers make and assess a rate of 7d., that is bad, and no person need pay it; *Reg. v. Mayor, &c., of New Windsor*, 7 Q. B. 908; vid. now 8 & 9 Vict. c. 81, s. 4, *contra*.

(*i*) *R. v. Bond*, 6 A. & E. 905.

DECEMBER, 1853.—32

for improvements of the watercourses made before the passing of the act.^(k)

[*492] *Another resource of a corporation is in the sale of its church patronage, which is now made legal, and regulated by various statutes:—In every case^(l) in which any body corporate, or any particular class, number, or description of members, or the governing body of any body corporate, now is or are in their corporate capacity, and not as charitable trustees, according to the meaning and provisions of this act, seized or possessed of any manors, lands, tenements, or hereditaments, whereunto any advowson, or right of nomination or presentation to any benefice or ecclesiastical preferment is appendant or appurtenant, or of any advowson in gross, or hath or have any right or title to nominate or present to any benefice or ecclesiastical preferment, every such advowson and every such right of presentation *shall* be sold at such times as the Ecclesiastical Commissioners for England^(m) may direct, so that the best price may be obtained for the same. These the council are empowered, with the consent of the commissioners, to convey under the common seal, the proceeds to be paid to the treasurer of the borough (whose receipt is to be a sufficient discharge,) to be by him invested in government securities for the use of the body corporate, the annual interest payable thereon to be carried to the account of the borough fund;⁽ⁿ⁾ or, under the direction of the council, the proceeds may be applied in whole or in part towards the liquidation of any debt contracted before 9th September, 1835, by the corporation.⁽ⁿ⁾ Provided^(o) that in any case of a vacancy arising before any such sale shall have taken place and been completed, such vacancy shall be supplied by the presentation or nomination of the bishop or ordinary of the diocese. Where the rectory and vicarage of a parish, with the tithes and all rights and patronage thereunto belonging, were vested in the corporation, who appointed a lecturer and curate, but without having made any endowment or giving any fixed stipend to either, it was held that the office of curate having become vacant before the completion of a sale of the advowson, &c., the right of presentation was in the bishop.^(p) Doubts have arisen whether the above enactments authorized rights of nomination to be sold, it is expressly made lawful^(q) for corporations to sell them. But^(r) notwithstanding such sale every such corporation, and the property belonging thereto, shall continue liable to the same obligations, if any, of providing for and maintaining, or contributing to the maintenance, of any such priest, curate, preacher, or minister, to which such corporation and property would have been liable if no such sale had taken place, and such liability

(k) *Dublin Corporation v. Att.-Gen. of Ireland*, 9 Bli. N. S. 395; *vid.* 7 B. & C. 315; 2 H. Lds. 108.

(l) *Municipal Corporations Act*, s. 139.

(m) 6 & 7 Will. 4, c. 77, s. 26.

(n) 6 & 7 Will. 4, c. 104, s. 3.

(o) *Municipal Corporations Act*, s. 139.

(p) *Hine v. Reynolds*, 2 Scott, N. R. 394; S. C. 2 M. & Gra. 71.

(q) 1 & 2 Vict. c. 31, s. 1.

(r) Sect. 2. Any corporation seized of lands, &c., subject to an obligation to nominate and provide any priest, &c., may augment and endow such priesthood, &c., either with lands, or by charging an annual stipend thereon, with the consent of the Lords of the Treasury; sect. 3.

is to be enforced by the same means as if the right of nomination had remained vested in such corporation.

*The effect of the statute seems to be practically to repeal so much of the statutes of dissolution of monasteries as gave license [*493] to all bodies corporate to enjoy the churches, tithes, &c., belonging to the dissolved bodies by letters-patent,(s) but only so far as relates to the municipal corporations named in the schedules of the Municipal Corporations Act. It does not appear to interfere with the statutes prohibiting the union of two churches in corporate towns, &c., unless with the assent of the corporation under the common seal.(t)

With respect to the management of municipal corporation property generally, it has been observed, the Court of Chancery has now jurisdiction over the property of corporations, and the principle extends to give that court jurisdiction to see to the application of a sum of money which has been raised as a rate by the council, and which equity treats as a trust fund; but, in the case in which that was held, it was left a question whether the court had also jurisdiction over the means by which the fund is proposed to be raised; and though the court fully recognized the principle, that in municipal corporations the expenses of each year ought to be defrayed out of the income of the year, yet it was laid down that the rule would not be so strictly applied in equity as, under all circumstances, to prevent the payment of a prior debt out of the moneys raised by a subsequent rate;(u) and an injunction was refused which was intended to restrain the corporation from raising money to pay their debts by means of a rate. In fact, funds supplied from the gift of the crown, or the gift of the legislature, or from private gift for any legal, public, or general purposes, are charitable funds to be administered by the courts of equity;(x) and, therefore, it would seem, (though the contrary has been held) that funds which a corporation are given by parliament the means and power of raising, and applying in paving, lighting, &c., for the public benefit of the borough, are such funds, and to be administered, if need be, accordingly. So a duty on coal imported into a town, to be applied to protect the inhabitants from encroachments by the sea, the grant of such duty being by parliament, was held to be a fund under the jurisdiction of equity.(y)

The powers given by the Municipal Corporations Act, and by other acts, for the raising, &c., of municipal rates, having been found insufficient, it was enacted,(z) "that in every case in which any parish or place liable to support its own poor, or any extra-parochial place, shall lie partly within and partly without any borough, and the council of the borough

(s) 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13; Jon. 2. Grant of advowson must have contained license to hold in mortmain; 2 Vin. Abr. 128; Hob. 304.

(t) 37 Hen. 8, c. 21; and 17 Car. 2, c. 3; 4 & 5 W. & M. c. 12. Effect of such union; *Fellstown v. Beale*, Carth. 238; 1 Com. Dig. 310; Finch, Law, 91.

(u) Att.-Gen. v. Mayor, &c., of Lichfield, 17 Law J. (N. S.) Ch. 472; vid. 2 H. L. 108.

(x) Att.-Gen. v. Heelis, 2 Sim. & S. 76; vid. 1 Bli. N. S. 335, per Ld. Eldon, C.

(y) Att.-Gen. v. Brown, 1 Swanst. 265; vid. 1 Bli. N. S. 335.

(z) 8 & 9 Vict. c. 110, s. 1.

[*494] hath appointed, or hereafter shall appoint, one or more persons *to act as overseer or overseers^(a) within any part of such parish or place, or those parts of such parishes or places, which is or are within the same borough, for making, levying, and collecting borough rates or watch rates made or thereafter to be made therein, the person or persons so appointed shall be empowered to levy and raise, by an equal rate or assessment upon all the property within each of the parts or parishes or places respectively for which he or they shall be so appointed, which, if such part were a parish maintaining its own poor would be rateable to the relief of the poor, such sums of money as shall be required, in order to raise the several sums assessed upon such parts or parishes or places respectively, or to reimburse^(b) such person or persons any such sums of money as he or they shall have paid for any borough rate or watch rate made, or hereafter to be made, by the council of the borough wherein such part of a parish or place, or parts of parishes or places respectively, shall be situated, such rate or assessment, or respective rates or assessments, to be paid by the occupier or occupiers for the time being of such rateable property as aforesaid, and that the person or persons so appointed, or to be appointed, to act as such overseer or overseers for the purposes aforesaid, shall have and exercise, in and for the purpose of making, levying, and collecting every such rate or assessment as aforesaid, all the powers which, by the laws now or hereafter to be in force, overseers of the poor have or may have for making, assessing, collecting, and recovering rates for the relief of the poor within their several parishes: and every such rate or assessment made, or to be made, by any person or persons appointed, or to be appointed, to act as overseer or overseers of the part of any parish or place within any such borough, shall, for the purposes of this act, be called a district rate." No such district rate,^(c) nor any separate rate made by overseers of the poor for raising a watch rate, shall be demanded, collected, or payable, until the same shall have been allowed by two or more justices of the peace usually acting in and for such borough, and shall also have been published in like manner as the rates for relief of the poor are by law required to be allowed and published. In every case^(d) in which a part only of any parish or place liable to maintain its own poor, and situated within any borough, shall be liable to watch rate, the overseers of the poor of such parish or place shall not pay the amount of any watch rate charged by the council upon such parish or place out of the money collected from any rate or rates for the relief of the poor, but shall make a separate rate or assessment upon the part or parts only of such parish or place liable to watch rates for raising and paying the same watch rate, which rate [*495] shall be made in like manner, and under *like regulations, and with like means and remedies for the recovery thereof, as are herein

(a) One or two overseers may be appointed to act for two or more places or parts of parishes; s. 8; 2 T. R. 396; Stra. 1604, 1671.

(b) This is the only case in which a retrospective rate, in the nature of borough rate, is admissible; vid. sup. p. 491, 7 B. & C. 315.

(c) 8 & 9 Vict. c. 110, s. 2. What not a sufficient publication under 7 Wil. 4 & 1 Vict. c. 45, s. 2, vid. Reg. v. Whipp, 4 Q. B. 141; Reg. v. Marriott, 12 A. & E. 779.

(d) Sect. 6.

contained in relation to district rates. Every such district rate,^(e) made for the purpose of raising money to pay or reimburse any borough rate or watch rate, charged by the council upon such part of a parish or place, and every such separate rate, to be made by overseers of the poor for raising a watch rate, may be at such amount or rate in the pound as may be necessary for raising the sum, or respective sums, so charged by such council, so that no such district rate, or rate for raising a watch rate, exceed twopence^(e) in the pound beyond the rate in the pound at which the council shall have computed the general borough rate or watch rate so laid or charged by them. Collectors of such districts shall be liable to account to the commissioners under the same penalties, remedies, and proceedings, as other officers appointed by the council are liable, and in case of a surplus arising from such rate, it is to be paid to the borough treasurer, to go in part of the next rate of the like denomination to be made or laid on such place by the council, and overseers are to account for money raised under the separate rates for raising watch rates, in like manner as for money collected under rates for relief of the poor, and any surplus to be paid as before, and go in part of the next watch rate.^(f)

A late enactment empowers the corporation, by the council, of every borough, if they think fit, as soon as the population thereof, as shown by the last census, exceeds 10,000, to purchase and to accept gifts, grants, or devises of real property, for the purpose of establishing, &c., museums of art and science; and the costs and charges of such lands and buildings, and the keeping the same in good repair, and the payment of any principal money borrowed, shall be chargeable upon and paid for out of the borough fund, and for that purpose the council may levy with and as part of the borough rate, or by a separate rate to be levied in like manner as the borough rate, such sums of money as shall be from time to time needed, so that the whole amount of the borough rate be not increased in any one year, for the purposes of this act, by more than one halfpenny in the pound, or, if a separate rate be levied, so that such rate do not in any one year amount to more than one halfpenny in the pound of the annual value of the property in the borough rateable to the borough rate.^(g)

It has already^(h) been stated that the council may adopt the Baths and Washhouses Act, and raise a rate for the maintenance and support of the establishment.

*The subject of rates may be fitly pursued by stating the result of the decisions and of legislative enactment on the subject of the [*496] rateability of corporations generally with respect to poor-rates. It has

(e) Sect. 4. Vid. 7 Q. B. 908, decided before the passing of the act.

(f) 8 & 9 Vict. c. 110, s. 4. Persons may be excused on account of poverty; s. 5. Amount rated leviable by distress upon persons refusing to pay under warrant of two borough justices, and, in default of distress, they may commit to the common gaol of, or used for, the borough, there to remain without bail or mainprize until payment of the amount and arrearages; sect. 7.

(g) 8 & 9 Vict. c. 43, s. 1. The corporation may borrow money for the purchase of lands, or for the cost of the buildings, with the approval of the Treasury, on the security of the rates; s. 2. Rates of payment for admission not to exceed one penny for each person admitted; sect. 4.

(h) Vid. sup. p. 385; 9 & 10 Vict. c. 74.

been laid down that a corporation of any description which is seised in fee of lands or other real property for their own benefit, is within the 43 Eliz. c. 2, inhabitants or occupiers of such lands, &c., and therefore liable to be rated to the poor in their corporate capacity in respect of them;⁽ⁱ⁾ and the objection that the remedy given by the statute of imprisonment on failure of distress, was impossible in case of a corporation, and that the statute imposing for the first time the liability, and pointing out a specific remedy, no other was available, was treated as of no weight, though it might be that there would be some difficulty in enforcing a remedy.

The mode of enforcing the remedy is by an indictment for disobedience to the order of two justices calling upon the corporation to pay the rate;^(k) and the indictment being removed by certiorari into the Court of Queen's Bench, distress infinite, if necessary, will issue to compel appearance.^(l) So where a local act gave the power to commissioners of rating to the poor upon "persons who held, occupied or possessed land in the parish," a corporation of proprietors of water works were held within the meaning of the enactment, although by a clause giving a power of appeal to the quarter sessions to an aggrieved party, such party was bound to enter into a recognizance, which it was contended a corporation could not do;^(m) but it was held that even assuming that a corporation could not enter into a recognizance, which some of the court held not to be clear, yet that at any rate they might find sureties to enter into a recognizance, and therefore this objection was overruled; and it was further held by one of the judges, that the statute requiring that, before any action was brought to recover the rates, there should be a personal demand of the same, or a demand in writing left at the place of abode of the persons charged; a demand in writing publicly served by the collector of rates on the chairman at a general assembly of the corporation duly convened, was a sufficient demand: and another of the judges held that a similar demand in writing, under the hand of the collector, pasted on a board, which was fixed on the premises of the corporation, and also on their pipes, both the premises and the pipes being charged under the rate, was a sufficient compliance with the latter part of the above requirement.⁽ⁿ⁾ So where a municipal corporation were seised in a fee of certain *lands, of which they retained the exclusive right of possession, in their corporate capacity and annually made regulations

(i) Cowp. 79; vid. 1 A. & E. 465; Reg. v. Cambridge Gas Light Company, 8 A. & E. 73; and now municipal corporations are rateable though the lands, &c., be held for public purposes; 4 & 5 Vict. c. 48.

(k) Reg. v. Birmingham and Gloucester Railway Company, 3 Q. B. 233.

(l) Hawk. P. C. Book 2, c. 27, s. 14; 6 Vin. Abr. 310; 3 Q. B. 233.

(m) Moor. R. 68; sup. p. 284, n. (e).

(n) Cortis v. Kent Waterworks Company, 7 B. & C. 314. An incorporated waterworks company may be rated for their pipes though another person is rated for the herbage growing on the land under which the pipes are laid; R. v. Chelsea Waterworks Company, 5 B. & Ad. 156. But though a corporation may have by statute the legal estate and interest in real property, ex. gra. a navigation, and though they may have a right to occupy, and an occupation, yet if the occupation be not such as to exclude other parties, the corporation is not "occupier of lands" within 43 Eliz. c. 2, and therefore is not rateable; R. v. Aire, &c., Company, 9 B. & C. 820.

respecting the mode of enjoyment of the subordinate right of common upon the lands which belonged to the burgesses of the corporation, and the sums to be paid by them for the agistment of their cattle thereon, which money, after deducting the expenses of the management of the lands, &c., was distributed among the burgesses who did not turn on cattle, it was held that the corporation were liable to be rated to the poor as the beneficial occupiers of the pastures ;(o) and it was said that the circumstances clearly showed the right of occupation to be in the corporation, although the right of turning on was in different members of it.(p) So where land was held by the corporation in trust for the freemen of the borough, or for a portion of them, the corporation was held to be liable to be rated to the poor,(q) though it was explained that where there was a mere naked trust uncoupled with any beneficial interest in the rents or profits, either in the trustees or any other particular person, the profits, &c., being diverted by the provisions of the act of parliament or otherwise from the control and management of the corporation or trustees, and applied to specific purposes, there the corporation would not be rateable.(r)

These principles had been applied to all corporations holding land, and among them to municipal corporations, up to the time of the passing of the Municipal Corporations Act (9th September, 1835).

The decisions upon the 92nd section of that act, however, having, as above noticed, settled that all the property of municipal corporations, whether personal or real, was held in trust since that act for the benefit of the borough, &c., in each case, the real property of municipal corporations was no longer held to be rateable to the poor, the statute being construed to have operated to relieve them from the rateability on the above ground.(s) Therefore, it became necessary to pass an act which, after reciting the expediency of such corporations being nevertheless rated to the poor in respect of such property, enacted,(t) that **the municipal corporations named in the schedules to the Municipal Cor-* [*498]
porations Act should be rateable and rated in respect of lands, tenements and hereditaments, being the property and in the occupation of such corporations, as if such lands, &c., were not corporate property; provided always, that where such property in any parish which is situate wholly

(o) *R. v. Mayor, &c., of Sudbury*, 1 B. & C. 389. That case came on upon a special case reserved by the court of quarter sessions on an appeal by the corporation: vid. 13 East, 155; 6 A. & E. 419. Where the interest of the members was that of commoners merely, it was held that the corporation was not rateable, the right to the soil not being vested in the corporation; *Reg. v. The Chamberlains, &c., of Alnwick*, 9 A. & E. 444. N. B. This corporation is not named in the schedules to the Municipal Corporations Act; et vid. *R. v. Churchill*, 4 B. & C. 750, where a right of the common was vested in the corporation for the benefit of its members, and the corporation was held not rateable. Vid. 1 A. & E. 465.

(p) *Per Best, J.*, 1 B. & C. 397. The corporation will be rateable as beneficial occupier, if, though not in fact profitable, the property may by possibility become a source of profit; *Reg. v. Blackfriars Bridge Company*, 9 A. & E. 828.

(q) *R. v. Mayor, &c., of York*, 6 A. & E. 419.

(r) Vid. *R. v. Commissioners of Load Sluice, &c.*, 4 T. R. 730, as explained 6 A. & E. 434, 435; et vid. 6 A. & E. 645; 7 B. & C. 61. 70, note (c).

(s) *Reg. v. Mayor, &c., of Liverpool*, 9 A. & E. 435; *Reg. v. Inhabitants of Exminster*, 12 A. & E. 2.

(t) 4 & 5 Vict. c. 48, s. 1.

within the boundaries and limits of a city or borough named in the said schedules, and in which city or borough the poor are relieved by one entire poor-rate, or in which city or borough the poor within the limits or boundaries thereof as existing for municipal purposes on the 9th September, 1835, were then relieved by one entire poor-rate, the exemption of such property from rateability shall continue as if this act had not passed.^(u) And^(x) any of the said municipal corporations being in the occupation of such lands, &c., are to be deemed and taken to be the beneficial occupiers thereof for all the purposes of rating, as if such occupation was for their own private advantage, and not for any public purposes or purpose, and are to be liable to be rated as such occupiers by their corporate style and title. Thus a corporation would be rateable for the tolls of their market.^(y)

A custom in a borough, which was included within the boundaries of a single parish, but not co-extensive with it, for the mayor and aldermen to appoint overseers of that part of the parish which lay within the limits of the borough, who had always made separate rates for that part of the parish which coincided with the area of the municipal jurisdiction, was held to be invalid, as contrary to the meaning of the statute 43 Eliz. c. 2, although the custom was alleged to have existed ever since the passing of the statute,^(z) and though a contrary decision in a former case^(a) was pressed on the attention of the court.

Formerly, in all cases it rested with the corporation, when it was once shown that they were in possession of rateable property, to make out that they held it as trustees for the public; for whenever that was not shown, it was concluded that their occupation was beneficial, and they were rated accordingly. When a corporation are beneficially interested in land, houses, &c., from the use of which they derive tolls, the rating is to take place in the district or parish where the tolls became due; it is immaterial where they are received.^(b) But the tolls of a navigation in general are considered to become due where the voyage is ended.^(c) Now, however, all municipal corporations to whom the Municipal Corporations Act extends are rateable for property in their possession, whether held for public purposes or not.^(d)

[*499] *We have already stated that pauper lunatics confined within lunatic asylums belonging to boroughs, &c., or found wandering within any borough, are in effect made chargeable to the borough fund, where it cannot be ascertained in what parish they are settled;^(e) but, on the other hand, where boroughs shall possess or provide, or shall have commenced, and shall be bonâ fide proceeding with, the construction of

^(u) 4 & 5 Vict. c. 48, s. 1, sup. p. 346.

^(x) Sect. 2.

^(y) Vid. 16 Vin. Abr. 426, pl. 9.

^(z) R. v. Gordon, 1 B. & Ald. 524; vid. 43 Eliz. c. 2, s. 9.

^(a) R. v. Folly, 1 Bott, 78.

^(b) R. v. Mayor, &c., of London, 4 T. R. 26; R. v. Salter's Load Navigation, 4 T. R. 730; vid. 4 B. & C. 74; 8 A. & E. 73; 4 Q. B. 18; 10 Q. B. 208; 9 Q. B. 179; 1 Q. B. 558; vid. sup. p. 285.

^(c) R. v. Page, 4 T. R. 543; Reg. v. Hull Dock Company, 7 Q. B. 2.

^(d) 4 & 5 Vict. c. 48; vid. 3 Keb. 540.

^(e) Vid. Sup. p. 450; R. v. St. Nicholas, Leicester, 3 A. & E. 79; 12 & 13 Vict. c. 82, s. 3.

a sufficient asylum, to the satisfaction of one of her Majesty's principal Secretaries of State, for the reception or care of the pauper lunatics of the borough, they no longer shall be liable to pay or contribute to the erection, fitting up, or maintenance of any new county asylum, or to the payment of any costs of maintenance in such new asylum of any pauper lunatics chargeable to the county.(f)

Before proceeding to some points, respecting liability of municipal bodies to certain miscellaneous rates, which seem fitly to follow here, it may be well to state a late important decision respecting the management of the borough fund.

It has been stated to be incident to trading corporations to apply to parliament for an act to alter their constitution;(g) a charitable corporation, however, which, without previous leave from the Court of Chancery, obtains an act altering its constitution, *although confessedly for the better*, will not be allowed to defray the expenses out of the funds;(h) and so a municipal corporation, although holding its property in trust for the improvement of the borough,(i) will not be allowed, out of the corporate property, the expenses of soliciting an act of parliament for improving the navigation of a river flowing through the town.(k)

*R A T E S.

[*500

WITH respect to the rateability of corporations to the repair of bridges, it has been laid down(g) that every corporation residing in any county, riding, city or town corporate quæ propriis manibus et sumptibus, possident et habent, are said to be inhabitants therein within purview of the Statute of Bridges.(h) If a bridge be within a franchise, those of the franchise are to repair it;(i) but the statute as to bridges in towns and cities corporate applies only to bridges then existing; it created no new liabilities,(k) and it has been construed to show only that corporate towns *may* be liable: thus a corporation may be liable by prescription to the

(f) 12 & 13 Vict. c. 82. s. 3.

(g) Sup. pp. 159. 290. When equity restrains a corporation from petitioning against a bill pending in parliament, *Stockton, &c., Railway Company v. Leeds and Thirsk Railway Company*, 2 Phill. 666.

(h) Att.-Gen. v. Earl of Mansfield, 2 Russ. 501.

(i) Sup. p. 488.

(k) Att.-Gen. v. Mayor, &c., of Norwich, 16 Sim. 225.

(g) 2 Inst. 703; Cowp. 80. What is a bridge, 2 Q. B. 745. None can be compelled to make new bridges where none were before, but by act of parliament; 2 Inst. 701; 4 B. & C. 670; vid. 5 Burr. 2598; 2 B. & Ad. 147. But a corporation may be indicted for not building a bridge when they are bound to do so; per Bayley, J., in *R. v. Kerridon*, 3 M. & Selw. 532; and they may levy a rate for repairs of a new bridge, 1 Keb. 57. (h) 22 Hen. 8, c. 5.

(i) 2 Inst. 701; *R. v. Mayor of Tenterden*, 8 Mod. 114. In pleading, "*Hull Bridge*" will be intended a bridge within the corporate jurisdiction, after verdict; *Barnard v. Barnard*, 2 Keb. 635. 646. 650.

(k) *R. v. West Riding of Yorkshire*, 2 East. 342. 348. 351; *Reg. v. Inhabitants of New Sarum*, 7 Q. B. 954; vid. *Stra.* 178; 5 Taunt. 290. Rates may be laid and raised on inhabitants for repair of new bridges; *Town of Orford's case*, 1 Keb. 57.

repair of a bridge within its limits,^(l) and is compellable by indictment to perform such duty;^(m) but no indictment can be sustained which charges any city or town corporate, *not a county*, with a liability to repair *simply*; though that is sufficient in case of a county, because upon a county the common law casts a *primâ facie* liability to repair.⁽ⁿ⁾ The words of the statute, therefore, "if the bridge be within any city or town corporate," then the repairs are to be made by the inhabitants of every such city or town corporate," must be understood with the qualification that there is an immemorial usage fixing such liability upon them;^(o) and therefore a borough will be exempt from the charge where it can be shown that the repairs have always been done by the county. Hence a borough which has been enlarged under 2 & 3 Will. 4, c. 64, s. 35, and 5 & 6 Will. 4, [*501] c. 76, s. 7, by the addition of a parish in the same county containing a bridge, which until that time the county had repaired, is not liable exclusively, but only as before, viz. as part of the county, to the repair of such bridge;^(p) or they may be liable *ratione tenuræ*.^(q) If, however, the corporate place to which the district containing the bridge had been added by a statute or charter, having the sole object in view of enlarging the municipal limits, and not passed *alio intuitu*, had been a county of itself, then the new municipal district would have been liable, as such county, to the repairs.^(r)

A corporation liable to repair a bridge will not only be indictable for non-repair, but will also be liable to an action at the suit of any party who may be injured in consequence of its being out of repair;^(s) for it is clear and undoubted law, that wherever an indictment lies for non-repair, an action lies at the suit of the individual who is injured thereby.^(t)

(l) Yearb. 21 Edw. 4, fol. 38, pl. 3; Callis, Sewers, 116; Hawk. P. C. Bk. 1, c. 76, s. 8, c. 77, s. 2; Magna Charta, c. 15; 2 Inst. 29; 5 Burr. 2598; Salk. 359. If the character of the bridge is altered, as by substituting a carriage bridge for a footbridge, the prescription is gone; 5 Burr. 2597.

(m) R. v. Mayor, &c., of Liverpool, 3 East, 86; vid. 4 B. & Ad. 628; Reg. v. Birmingham and Gloucester Railway Company, 3 Q. B. 232; R. v. Mayor, &c., of Stratford-upon-Avon, 14 East, 348; 1 H. Bla. 356; Godb. 346, 347; on criminal information, R. v. Norwich, Stra. 177. 180.

(n) Reg. v. Inhabitants of New Sarum, 7 Q. B. 954; vid. 1 Vent. 256; 2 Inst. 701; 5 Burr. 2597; Yearb. 10 Edw. 3, fol. 28; R. v. Mayor, &c., of Warwick, 2 Show. 201; R. v. Bucks, 12 East, 192.

(o) Reg. v. New Sarum, 7 Q. B. 955. On being convicted on the indictment, the corporation will be fined; and, if necessary, a *distringas ad infinitum* will issue until the court is certified that the repairs are done; Reg. v. Cluworth, Salk. 358; 4 B. & A. 469.

(p) 7 Q. B. 941. 956; 2 B. & C. 166; vid. 8 Mod. 114.

(q) 2 Inst. 700; 4 Mod. 48; 6 M. & W. 254; 2 Wms. Saund. 158, note (9); 1 B. & A. 358; 3 Q. B. 162; 2 Show. 201. This implies immemoriality; R. v. Hayman, M. & Malk. 401.

(r) Reg. v. Justices of St. Peter's York, 2 Ld. Raym. 1249; R. v. Norwich, Stra. 177; vid. 7 Q. B. 945; 2 Inst. 702. So a corporation are liable to church rates in respect of their corporate lands and tenements; Thusfield v. Jones, T. Jones, 187; S. C. Skin. 27; and may be cited in the spiritual court in their politic capacity; Skin. 27. A corporation may also be liable *ratione tenuræ* or otherwise to sewers' rates; Yearb. 12 Hen. 4, fol. 7; vid. Mayor, &c., of Lyme v. Henley, 2 Cl. & F. 331. 338, 339; or by custom, 21 Edw. 4, fol. 38, pl. 3; Callis, Sewers, 116; 3 East, 86; 12 & 13 Vict. c. 50, s. 7.

(s) Per Lord Kenyon, C. J. 2 T. R. 672; Mayor, &c., of Lyme v. Henley, 2 Cl. & F. 354.

(t) Per all the judges, 2 C. & F. 354. So Yearb. 11 Hen. 4, fol. 83; Rol. Abridg. Actions sur Case, fol. 104, l. 2; Vaugh. 340.

A custom to tax and rate the inhabitants of the borough for the repair of a bridge within the borough is good; and the corporation may distrain for the rated amount, but cannot have an action of debt;(u) and in pleading in such case, the custom to distrain need not be alleged, for there is no other remedy.(x)

The conclusion from what has been said is, that municipal corporations are contributory to repair county bridges as inhabitants of the county, unless they have a bridge within the borough, for then they must repair that, and cannot in general be doubly charged.(y)

A corporation may be liable to repair highways within their limits by immemorial usage and custom,(z) though they cannot be made so by virtue of a modern agreement with the owners of houses alongside such highway; for the parish, who are *prima facie* bound to repair, cannot be discharged by any agreement;(a) or a corporation may be liable *ratione tenuræ*; and the indictment will therefore be bad which does not state how they are liable,(b) the defect being want of certainty and a substantial imperfection, not mere matter of form.(c) [*502] The indictment must also state affirmatively that the road is within the corporate and municipal boundaries.(d)

A corporation may be liable to cleanse a watercourse by usage and immemorial custom, and may be indicted for neglecting to do so.(e)

*PROTECTION.

[*503]

WE may here add, that all persons acting in execution of the Municipal Corporations Act are protected in the following manner:(f) all actions and prosecutions to be commenced against any person for anything done in pursuance of this act *shall be laid and tried* in the county

(u) *Smethesden v. Ashton*, Rol. Abr. Distress, G. pl. 1. The distress must be made by warrant under the common seal; *S. C. Bromfield v. Tiede*, 3 Keb. 163.

(x) *Brumfield v. Tea*, Freem. 103.

(y) Borough of Shaftesbury's case, 1 Keb. 687. In case of dissolution of the corporation, the liability devolves upon the inhabitants, 2 Keb. 43.

(z) Precedent, Dickens. Qu. Sess. 411; 14 East, 348.

(a) *R. v. Mayor, &c., of Liverpool*, 3 East, 86; *R. v. Inhabitants of Shoreditch*, March, R. 26; 5 & 6 Will. 4, c. 50, ss. 23. 58. 62. 93; 3 Salk. 253, pl. 1.

(b) *R. v. Mayor, &c., of Warwick*, 2 Show. 201; *vid.* 2 T. R. 513. As to pleading, 1 B. & A. 348. The corporators might be witnesses both at common law, 2 Show. 47; 15 East, 474; 1 B. & A. 66; and by statutes 5 & 6 Will. 4, c. 50, s. 100; 3 Geo. 4, c. 126, s. 137; 3 & 4 Vict. c. 26, for the prosecution, or 6 & 7 Vict. c. 85, for the defence, as they would not be "individually named on the record;" *vid.* 5 Q. B. 187. Costs of prosecution, Dickens. Qu. Sess. 406, 6th edit.

(c) *R. v. Pendyrren*, 2 T. R. 513; form of indictment, 1 H. Bla. 356; Dickens. Qu. Sess. 401; 6th edit. 402; 2 B. & C. 190.

(d) *R. v. Upton*, 6 Car. & P. 133; *R. v. Auckland*, 1 A. & E. 744; Yearb. 9 Hen. 6, fol. 62; 34 Hen. 6, fol. 43. As to pleading, *R. v. St. Giles*, 5 M. & Selw. 260; *R. v. West Riding of Yorkshire*, 4 B. & A. 623; *vid.* 5 A. & E. 765; 7 C. & P. 208; Dickens. Qu. Sess. 402, 6th edit.; Stra. 181.

(e) Dickens. Qu. Sess. 418, 6th edit.; 6 M. & Selw. 365, note.

(f) Municipal Corporations Act, s. 133.

where the fact was committed,(g) and shall be commenced(h) within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof,(i) shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant, and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined; or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases.

[*504]

*FREEMEN.

THE case of freemen remaining in boroughs, under the old system, is thus provided for by the Municipal Corporations Act. "And(k) whereas in divers cities, towns, and boroughs, the common lands and public stock of such cities, towns, and boroughs, and the rents and profits thereof, have been held and applied for the particular benefit of the citizens, freemen, and burgesses of the said cities, towns, and boroughs respectively, or of certain of them, or of the widows or kindred of them, or certain of them, and have not been applied to public purposes; be it therefore enacted, that every person who now is or hereafter may be an inhabitant of any borough, and also every person who has been admitted, or who might hereafter have been admitted,(l) a free-

(g) How to lay the venue in indictment, Reg. v. Mitchell, 2 Q. B. 636; for the trial to be good under 7 Geo. 4, c. 64, s. 12, the offence must be laid and tried in the same county, S. C.; or perhaps, under s. 12 of that act, in the county, within 500 yards of the boundary of which it was committed, S. C.; per Lord Denman, C. J., 2 Q. B. 643.

(h) It will suffice, if the information and proceedings before magistrates are taken within that time; R. v. Stokes, 2 M. & Selw. 72.

(i) This notice is only necessary where the action is for a thing *done* in pursuance of the act, not for an omission; King v. Burrell, 12 A. & E. 460.

As to meaning of "in pursuance of an act," vid. 11 Rep. 63; 10 B. & C. 284; 9 M. & W. 743, 745; 10 M. & W. 523; 15 M. & W. 250; 1 Exch. 843; 2 Dow. 519; Cowp. 26; 1 C. B. 18; 5 Scott, N. R. 498; 7 Q. B. 324; 8 Q. B. 286; 9 B. & C. 806; 2 Dowl. N. S. 567; 4 Dowl. & L. 481.

(k) Municipal Corporations Act, s. 2.

(l) It had been disputed in respect of some of the old corporations, whether admitting to the freedom foreigners (i. e. non-residents) or persons otherwise disqualified, were a breach of the charters for which the corporate franchises were forfeited or not; R. v. Mayor, &c., of Hereford, 2 Show. 678 (3d edit.); R. v. Mayor, &c., of Hertford, Salk. 374; R. v. Breton, 4 Burr. 2260. The mode of trying the question is by information in the nature of *quo warranto*; R. v. Breton, 4 Burr. 2260. The offence of admitting contrary to the provisions of this act would

man or burgess of any borough, if this act had not been passed, or who now is, or hereafter may be, the wife or widow, or son or daughter, of any freemen or burgess, or who may have espoused, or may hereafter espouse, the daughter or widow of any freemen or burgess, or who has been or may hereafter be bound an apprentice,^(m) shall have and enjoy, and be entitled to acquire and enjoy, the same share and benefit of the lands, tenements, and hereditaments, and of the rents and profits thereof, and of the common lands and public stock of any borough or body corporate, and of any lands, tenements, and hereditaments, and any sum or sums of money, chattels, securities, for money, or other personal estate, of which any person or any body corporate may be seised or possessed, in whole or in part, for any charitable uses or trusts, as fully and effectually, and for such time and in such manner, as he or she by any statute, charter, *bye-law, or custom in force at the time of passing this act might or could have had, acquired, or enjoyed, in case this act had not [*505] been passed: provided always, that the total amount to be divided amongst the persons whose rights are herein reserved in this behalf, shall not exceed the surplus which shall remain after payment of the interest of all lawful debts chargeable upon the real or personal estate out of which the sums so to be divided have arisen, together with the salaries of municipal officers, and all other lawful expenses which, on the 5th day of June, were defrayed out of or chargeable upon the same: provided also, that nothing hereinbefore contained shall be construed to apply to any claim, right, or title of any burgess or freeman, or of any person, to any discharge or exemption from any tolls or dues levied wholly or in part by or to the use or benefit of any borough or body corporate; and that after the passing of this act no person shall have or be entitled to claim thenceforward any discharge or exemption from any tolls or dues lawfully levied, in whole or in part, by or to the use of any body corporate, except as hereinafter is excepted: provided nevertheless, that every person who, on the 5th day of June in this present year, was an inhabitant, or was entitled to be a freeman or burgess of any borough, or who, on the said 5th day of June, was the wife or widow, son or daughter of any freeman or burgess of any borough, or who on the said 5th day of June was bound

probably render the corporation liable to an indictment as for a misdemeanor, as well as to the above proceeding, and they might be liable to both proceedings consecutively.

(m) To entitle to freedom by servitude, there must be not only a continuance of the binding, but a continuance of the service under the indentures (or deed, 31 Geo. 2, c. 11), to a member of the class or body appointed by the charter, and that for the appointed period of years; *R. v. Inman*, 4 B. & Ald. 57; *R. v. Rowe*, 4 Burr. 2287; 2 T. R. 2; *Fitz. & F.* 658. An information in the nature of quo warranto is the proper mode of trying the question of freeman or not; *R. v. Rowe*, 4 Burr. 2287; *vid. Reg. v. Pepper*, 7 A. & E. 745; *In re Milner*, 5 Q. B. 589; *R. v. Whitwell*, 5 T. R. 85; and this seems to be the only mode of removing a freeman's name from the roll. A freeman cannot be disfranchised at the pleasure of the corporation. *Warren's case*, Cro. Jac. 540; for he has a freehold in the franchise. S. C. *vid.* 11 Rep. 98 b; on the other hand, a person cannot be made a freeman against his will, *Dr. Askew's case*, 4 Burr. 2200; *vid. Brownl.* 100; 1 Rol. R. 226. A mandamus will be granted to admit to the freedom of a borough; *Roger's case*, 18 Car. 1, cited 1 Keb. 881; *Townsend's case*, 1 Keb. 470. 659; *R. v. Selbye*, 2 Show. 154; *Green v. Mayor of Durham*, 1 Burr. 127; 12 Geo. 3, c. 21.

an apprentice, shall be entitled to have or acquire, and enjoy the same discharge or exemption from any tolls or dues lawfully levied, in whole or in part, by or to the use of any borough or body corporate, as fully, and for such time and in such sort, as he or she, by any statute, charter, bye-law, or custom in force on the said 5th day of June, might or would have had, acquired, and enjoyed the same, if this act had not been passed, and no further or otherwise: provided also, that where, by any statute, charter, bye-law, or custom in force within any borough at the time of passing this act, any person whose rights in this behalf are herein reserved would have been liable, in case this act had not been passed, to pay any fine, fee, or sum of money to any body corporate, or to any member, officer, or servant of any body corporate, in consideration of his freedom, or of his or her title to such rights as are herein reserved, no such person shall be entitled to have or claim any share or benefit in respect of the rights herein reserved as aforesaid, until he or she shall have paid the full amount of such fine, fee, or sum of money, to the treasurer of such borough, appointed under the provisions of this act, on account of the borough fund hereinafter mentioned: provided also, that nothing in this act contained shall be construed to entitle any person to any share or benefit of the rights herein reserved, who shall not have first fulfilled every condition which, if this act had not passed, would have been a condition precedent to his or her being entitled to the benefit of such rights, so far as the same is capable of being fulfilled according to the provisions of this act, or to strengthen, confirm or affect any claim, [*506] *right, or title of any burgess or freeman of any borough or body corporate, or of any person, to the benefit of any such rights as are hereinbefore reserved, but the same in every case may be brought in question, impeached, and set aside, in like manner as if this act had not been passed." To this enactment is added the very important proviso, that, from and after 9th September, 1835, no person shall be elected, made, or admitted a burgess or freeman of any borough by gift or purchase.⁽ⁿ⁾ The effect of the whole is, that freemen can only be constituted through the medium of birth, servitude, or marriage, and that to be capable of enjoying the municipal benefits of their freedom, they must remain resident in the borough. The effect of the former part of section 2 is to make it obligatory on corporations to continue to individuals who, before the 9th September, 1835, were entitled to municipal benefits of any kind, the full enjoyment of those benefits, and to prevent corporations from defeating the claims of the corporators or freemen, who might be entitled to these advantages, by a voluntary preference of other claimants on the corporate funds or resources; and in some cases an action may be maintained against the corporation on this section by a freeman, for the purpose of enforcing his claims,^(o) or perhaps such action might be maintained independently of the statute,^(p) but this is doubtful.^(p)

(n) Sect. 3.

(o) *Hopkins v. Mayor, &c., of Swansea*, 4 M. & W. 621; *vid. s. 92*. A freeman has a freehold in his franchise; *Warren's case*, Cro. Jac. 540; *Bracton*, c. 24; *Bagg's case*, 11 Rep. 98 b.

(p) *Vid. per Parke, B.*, 4 M. & W. 643; *et vid. S. C. in error*, 8 M. & W. 901.

We now come to the reservation to freemen of the right of voting for members of parliament. "And(*q*) whereas the right of voting in the election of members to serve in parliament was, by an act passed in the second year of the reign of his present majesty, intituled 'An Act to amend the Representation of the People of England and Wales,' preserved(*r*) to all persons who then were or thereafter might become freemen or burgesses of any city or borough, subject to the conditions and provisions in that act contained; be it therefore enacted, that every person who, if this act had not been passed, would have enjoyed, as a burgess or freeman, or might hereafter have acquired, in respect of birth or servitude, as a burgess or freeman, the right of voting in the election of a member or members to serve in parliament for any city or borough, shall be entitled to enjoy or acquire such right of voting as fully as if this act had not been passed: and the town clerk of every city or borough returning a member or members to parliament shall, at all times hereafter, do and perform all things appertaining to the due registration of the freemen or burgesses of such city or borough according to the provisions of the said act." Those provisions are: "That(*s*) any freeman duly registered *is entitled to vote, provided he shall have [**507*] resided for six calendar months next previous to the last day of July in each year within the city or borough, or within *seven statute miles*(*t*) from the place where the poll for such city or borough shall have been taken previous to the passing of the 2 Will. 4, c. 45 (the Reform Act), that is, previous to 7th June, 1832, and provided that where he shall be a freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such respective place so sharing as aforesaid, or within *seven statute miles*(*t*) of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in schedule (E.) of that act. But no one elected, made, or admitted a freeman since the 1st day of March, 1831, or hereafter to be so, except in respect of birth or servitude, shall be entitled to vote, or to be registered."^(u) As to the freemen's roll, it is enacted,^(x) "that the town clerk of every borough

As to freeman's evidence in such case, vid. 4 A. & E. 550; and 6 & 7 Vict. c. 85, s. 1.

(*q*) Sect. 4.

(*r*) 2 Will. 4, c. 45, s. 32; vid. 7 A. & E. 745; and 5 Q. B. 589.

(*s*) 2 Will. 4, c. 45, s. 32. But see now 6 & 7 Vict. c. 18, s. 79, inf. p. 508. What is not a residence for six months previous to the last day of July, Whithorn v. Thomas, 7 M. & Gra. 1. A freeman is not disqualified from being on the register by the fact of having been excused from paying a poor-rate, on the ground of poverty, that not being a receipt of parochial alms, within 2 Will. 4, c. 45, s. 36; Mashiter v. Dunn, 7 C. B. 30; S. C. 2 Lutw. Reg. Cas. 112.

(*t*) How to be measured, 6 & 7 Vict. c. 18, s. 76.

(*u*) 2 Will. 4, c. 45, s. 32. A custom to take the oath of admission on the New Testament is good, and will bind all persons not within the exemptions made in favour of Jews, Moravians, Separatists and Quakers, by the late acts; vid. sup. pp. 207, 408; R. v. Bosworth, Stra. 1112. The duty of the returning officer to read the stat. 3 Geo. 3, c. 15, at the time of the election, where the right of election is wholly or in part in freemen, still remains as settled by s. 7 of that act.

(*x*) Municipal Corporations Act, s. 5. No stamp duty payable on enrolment as a freeman; 1 & 2 Vict. c. 35. This section repeals 12 Geo. 3, c. 21, s. 2, which had become amended by 32 Geo. 3, c. 58, s. 4.

shall, on or before the first day of December next, make out a list, to be called 'The Freemen's Roll,' of all persons who at the time of passing of this act shall have been admitted as burgesses or freemen of such borough; and that whenever any person shall hereafter become entitled to be admitted a burgess or freeman for the purposes aforesaid of such borough in respect of birth, servitude, or *marriage*,^(y) and shall claim to be admitted accordingly, the mayor of such borough shall examine into such claim, and upon such claim being established, every such person shall thereupon be admitted and inrolled by the town clerk of such borough upon the freemen's roll; and the town clerk shall keep a true copy of such roll, to be perused by any person, without payment of any fee, at all reasonable times, and shall deliver a copy thereof to any person requiring the same, on payment of a reasonable price for such copy."

Besides this, the town clerk is every year, on or before the last day of July, to prepare an alphabetical list of all the freemen who may be entitled to vote for members, together with their respective *places of abode*, &c., and shall publish the same on or before the first day of [*508] ^{*}August in each year, and keep a copy thereof, and deliver copies on payment of a price fixed.^(z) He is also to publish a list of persons objected to on the freemen's list on or before 1st September in such year, and keep a copy, and deliver copies, &c., on any and every day, except Sunday, of the first fourteen days of September, at a price fixed.^(a) Then follows the very important limitation on the right of voting, viz., that no person shall be entitled to vote unless, ever since the 31st July in the year in which his name was inserted in the register then in force, he shall have resided, and at the time of voting shall continue to reside, within the city, or borough, or place sharing in the election for the city or borough, or within the distance^(b) thereof required by the Reform Act to entitle such person to be registered in any year.^(c)

Antedating the admission of a freeman made liable, in any one wilfully and fraudulently doing it, or causing it to be done, to the penalty of 500*l.*, payable to any one who should inform and sue within one

(y) Freemen by marriage not entitled to vote for members of parliament; 2 Will. 4, c. 45, s. 32. Right of voting in certain boroughs in virtue of other titles than as being a burgess or freeman how retained; 6 & 7 Vict. c. 18, s. 78. Vid. *Jeffrey v. Kitchener*, 7 M. & Gra. 99, that a qualification to vote for a borough as an inhabitant householder was not retained, under 2 Will. 4, c. 45, s. 33, unless the inhabitancy as a householder had subsisted continuously since the passing of that act. What is a house; *Daniel v. Coulsting*, 7 M. & Gra. 66. 122; vid. 5 C. B. 79; 2 Leon. 184.

(z) 6 & 7 Vict. c. 18, s. 14. How to be published, s. 23; 7 M. & Gra. 135. As to meaning of "place of abode," 7 M. & Gra. 16—20; 2 C. B. 226; 4 C. B. 100; 5 C. B. 14. 79.

(a) 6 & 7 Vict. c. 18, s. 18. As to freemen of London, s. 20. Notice of objection, *Wansy v. Perkins*, 7 M. & Gra. 130. As to posting notice of objection in boroughs, s. 100; *Cuming v. Toms*, 7 M. & Gra. 29. What not a duplicate notice, 5 C. B. 45.

(b) Vid. sup. p. 507. In an action by a stranger, the court will not grant a rule to inspect the books, in order to prove defendant a freeman; *Bradshaw v. Phillips*, cited 1 W. Bla. 39.

(c) 6 & 7 Vict. c. 18, s. 79. The residence must be continuous; 7 M. & Gra. 105. 108; vid. 7 & 8 Will. 3, c. 25, and 10 Ann. c. 23; 3 Geo. 3, c. 15.

year;(d) but such offence seems nearly impracticable since the above regulations, and the penalty for voting contrary to the statute last referred to appears to be abrogated by the above regulations.

A useful provision respecting admission to freedom remains to be noticed, inasmuch as it does not appear to be inconsistent with or contrary to anything contained in the Municipal Corporations Act, and therefore is still the law; that when any person shall be entitled to be admitted a freeman of any city, town corporate, borough, Cinque Port, or place, and shall apply for that purpose to the mayor, or other officer therein having authority to admit freemen, &c., and shall give notice, specifying the nature of his claim, to such mayor, &c., and that if he shall not so admit such person a freeman, &c., within one month from the time of such notice, the Court of Queen's Bench will be applied to for a mandamus to compel such admission; and if such mayor, &c., shall, after such notice, refuse to admit such person, and a mandamus shall afterwards issue to compel such admission, and in obedience thereto such person is admitted, then he shall, unless the court see cause to the contrary, receive from the said mayor, &c., all the costs of the rule for enforcing the same, which, if not obeyed, shall be enforced in like manner as other rules of the court.(e)

*The application must now be made, and the notice addressed, [*509] to the mayor and assessors; and the mandamus ought also to be directed to the same persons.

The above provision is the more suitable to be taken advantage of by a person claiming his freedom, because it has been decided that a corporation making a return to a mandamus to admit to the freedom, and having on the trial succeeded in a portion of the case, the prosecutor succeeding on the remaining issues, were not liable for costs of the issues on which the prosecutor had got the verdict, either under the stat. 4 Ann. c. 16, s. 5, inasmuch as they had not pleaded, (the return not being a pleading within the meaning of that statute, nor a pleading within Reg. Gen. Hil. T., 4 Will. 4, reg. 7, so as to be liable under that rule,) or under 9 Ann. c. 30, s. 5, as the plaintiff had not succeeded on the whole, and that there was no practice of the Court to warrant the imposition of such costs on them.(f) Now, though it is true the issue on which the defendants succeeded was of such a nature

(d) 3 Geo. 3, c. 15, ss. 3. 6; vid. 1 Taunt. 128. The act does not extend to London or Norwich, s. 8.

(e) 12 Geo. 3, c. 21, s. 1. As to applying for costs, 1 Will. 4, c. 21, s. 6; Reg. v. Fall, 1 Q. B. 636; Reg. v. Kelk, 1 Q. B. 660.

(f) Emery v. Mayor, &c., of Malmesbury, 3 Q. B. 577. The statute had not been acted upon by Emery. Malmesbury does not appear to be within the Municipal Corporations Act, not being named in the schedules; vid. Gale v. Chubb, 4 C. B. 41. Mandamus to admit to freedom of a trading company incorporated; R. v. Turkey Company, 2 Burr. 999; R. v. Gunmakers' Company, 2 Kelynge, 280. If a return be made to such mandamus, and the plaintiff traverse the return, but do not proceed to trial in due time, the defendants may have judgment as in case of nonsuit; R. v. Mayor, &c., of Stafford, 4 T. R. 689. Mandamus to restore a freeman; Protector v. Mayor, &c., of Kingston, Styl. 480; vid. R. v. Dean of Exeter, 2 Show. 217.

as to entitle them to the general costs in the case just referred to, the applicant or plaintiff would not have been within the statute, for the mandamus was not obeyed, yet still the decision may be serviceable to show the points that a plaintiff ought to take into consideration before applying for a mandamus, and also to prove that had the notice under 12 Geo. 3, c. 21, s. 1, been given, and the mandamus issued under it, and the plaintiff been admitted accordingly, he would have been entitled to his costs independently of the statutes cited in the case, and also of the rules and practice of the court, with this difference, that at present the costs would be payable by the mayor and assessors, who are now "the officers therein having authority to admit," according to the terms of the statute, whereas in the case just mentioned, the corporation not being within the Municipal Corporations Act, where the proper authority to admit, and were therefore properly made defendants to the mandamus, and would have been liable to the costs had the plaintiff succeeded on the whole and been admitted accordingly under a preceptory mandamus; and it is submitted that the freemen would be entitled to the whole costs in such case.

Where the freeman of a borough are entitled, during their residence in the borough, to common of pasture on a neighbouring moor for their own cattle, if they have any, that is merely a personal privilege, and not an estate or interest in the land, conferring a settlement under the poor laws, unless it can be shown that the pauper had ever exercised [*510] *the right.(g) So where a freeman, as such, has a privilege of taking a portion of the profits of certain lands at the will of the corporation he does not thereby gain a settlement,(h) for he has not even a right to enter upon the lands, which are vested in the corporation; and though in the first mentioned case, according to some authorities, he might avow that every freeman in inhabiting a house hath by custom a right of common,(i) &c.; yet, in a plea in bar of an avowry, he must prescribe in the corporation, because the same distinction holds, it has been said, as between a declaration and a plea; viz., that in the former you may reply possession generally, in the latter you must set forth a strictly legal right.(k) Other authorities, however, have established the present rule, that an avowry must show a good title in omnibus,(l) which would not support the above avowry, because in general a cus-

(g) *R. v. Warkworth*, 1 M. & Selw. 473.

(h) *R. v. Belford*, 10 B. & C. 54.

(i) *Hinks v. Clarke*, 2 Show. 78; 5 C. 2 Lev. 252. The freemen, so called, in this case were twelve capital burgesses, and the case proceeded on the distinction that the custom was not laid in the inhabitants, which would have been bad, but in the continuing body, called the freemen; vid. case of Stallingers of Sunderland, cited 2 Q. B. 593; et vid. 6 A. & E. 551; 10 B. & C. 230; from which cases taken together it seems that there were originally two corporate bodies, one consisting of freemen, or two capital burgesses, the other of stallingers.

(k) *Hardy v. Hollyday*, cited 4 T. R. 718; *Grimstead v. Marlowe*, 4 T. R. 717. It will be observed, that in *Hinks v. Clarke*, the freemen being a limited body, one objection against prescribing in inhabitants, viz., that such a prescription would become nugatory as the town increased, is inapplicable.

(l) *Goodman v. Ayling*, Yelv. 148; per *Holt, C. J.*, *Carth.* 74; *Butt's case*, 7 Rep. 25 a; vid. 2 B. & P. 360; 12 A. & E. 353; 2 Wms. Saund. 284, note (3); 1 Wms. Saund. 341, note (3); per *Lee, J.*, *Rogers v. Birkmire*, Cas. T. Hardw. 245.

tom to take a profit in alieno solo is bad, but an easement or matter of discharge to the freemen may in general be pleaded by way of custom; but if it be in the city of London, where the custom, if not already certified, is to be tried by the mouth of the recorder, they ought to prescribe so as to try by a jury.^(m)

*CHARITABLE TRUSTS.

[*511]

MANY municipal corporations were seized of real property in trust for charitable purposes, the administration of which the legislature have thought proper to regulate in the following enactments:—

“And⁽ⁿ⁾ whereas divers bodies corporate now stand seized or possessed of sundry hereditaments and personal estate, in trust, in whole or in part, for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund; be it enacted, that in every borough in which the body corporate or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seized or possessed for any estate or interest whatsoever of any hereditaments or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part in trust or for the benefit of any charitable uses or trusts whatsoever, *all the estate, right, interest and title,*^(o) and all the powers of such body corporate, or of such member or members of such body corporate in respect of the said uses and trusts, *shall continue in the persons who at the time of the passing of this act are such trustees as aforesaid,*^(o) notwithstanding that they may have ceased to hold any office by virtue of which, before the passing of this act, they were such trustees, *until the first day of August,*^(p) one thousand eight hundred

^(m) Day v. Savadge, Hob. 85; vid. 1 Ventr. 390; 2 H. Bla. 393; Willes, 203; Cro. Eliz. 363.

⁽ⁿ⁾ Municipal Corporations Act, s. 71. This section applies to all cases where property has been granted to a corporation, subject to a payment for charitable purposes, prescribed by the grantor; R. v. Sankey 5 A. & E. 423.

^(o) i. e. the estate and interest in respect of the uses and trusts only, and not the legal estate, continues, &c.; Doe v. Norton, 11 M. & W. 913; Christ's Hospital v. Grainger, cor. Sir L. Shadwell, V. C. E., 12 Jur. 276. Semb. this enactment does not apply to the case where the land is vested, not in the municipal corporation, as such, but in a different corporation with a different name and seal, though constituted of the same members as the former; 11 M. & W. 913. So Attorney-General v. Principal, &c., of Brazenose Coll. Oxford, 2 C. & F. 313.

^(p) On this day the administration of the charity estates given by this clause ceased and passed away from the individuals here designated; Bignold v. Springfield, 7 Cla. & F. 71; vid. 11 M. & W. 930; 2 Cla. & F. 295. It is to be observed, that it was not necessary in Bignold v. Springfield to determine in whom the legal estate vested after the 1st of August, 1836; per Parke, B., 11 M. & W. 924; and it has been decided that the legal estate remains in the corporation in each case, notwithstanding the above enactment, of s. 71, Doe v. Norton, 11 M. & W. 928,

and thirty-six, or until parliament shall otherwise order, and shall immediately *thereupon utterly cease and determine : provided always, [*512] that if any vacancy shall be occasioned among the charitable trustees for any borough before the said first day of August, it shall be lawful for the Lord High Chancellor, or Lords Commissioners of the Great Seal for the time being, upon petition, in a summary way, to appoint another trustee to supply such vacancy ; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee : provided also, that if parliament shall not otherwise direct, on or before the said first day of August, one thousand eight hundred and thirty-six, the Lord High Chancellor, or Lords Commissioners of the Great Seal, shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

It must be borne in mind that according to the Court of Exchequer, the object of this enactment was not to affect the ownership of charity estates, but only to keep the administration of them distinct from that of the borough fund ; that the estate and interest in the trusts only, and not in the legal estate, was to continue in the *individuals* constituting the corporation on the 9th Sept. 1835, until 1st August, 1836 ; all that was meant being merely to transfer the right and duty of administering the funds. The effect of any other construction that could have been adopted would probably be to revest the legal property in the heirs of the original donors of the lands, &c. But as thus construed, the effect of the clause is to leave the legal estate just where it was on the 9th Sept. 1835 ; which, however, is disputed.

With respect to the choice of trustees, it has been decided that members of the newly named corporation are not ineligible, although the old corporation have formerly set up a claim to the property as against the charity,(q) and notwithstanding that the new corporation is but a continuation of the former, the two being completely identified, except in name, and mode of supporting the succession.(r) The courts of equity

which disposes of a doubt that has been expressed, 1 Platt, Leases, 366, as to who, since this enactment, are the parties to grant a lease of charity lands vested in corporations. But Lord Cottenham, C., has expressed an opinion that the trustees have all the power which the corporation before had, and that there is no ground for dividing the trust by vesting the legal property in one party, and the discretionary powers in another ; Attorney-General v. Mayor, &c., of Ludlow, 2 Phill. 687.

(q) *Re Ludlow Charities*, 3 My. & C. 262. Petitions for filling up vacancies require the Attorney-General's fiat, as being presented under Sir S. Romilly's Act, 52 G. 3, c. 101, as well as the Municipal Corporations Act, but need not be served on him ; *In re Warwick Charities*, 1 Phill. 559.

(r) 11 M. & W. 928 ; 9 Sim. 30 ; 1 Beav. 420. The mention in the statute of the mode of proceeding to be adopted, viz., by petition, is consistent with the established practice ; for a petition is the proper mode of applying to the court, when the only question is in what manner a trust shall be executed, and how trustees are to be appointed ; when, however, there is a question as to the nature of the trust, and who are the parties to manage it (i. e. which of two or more given persons or bodies) that is not the subject of a petition, but an information ; *Mayor, &c., of Ludlow v. Greenhouse*, 1 Bli. N. S. 48 ; *vid. In re Upton Warren*, 1 My. & K. 410.

refuse to fill up vacancies in the body of trustees, unless they are satisfied that the number is practically insufficient, and that inconveniences arise from not having more.^(s) Orders of the Lord Chancellor made under this section, and the stat. 52 Geo. 3, c. 101, jointly, are subject to appeal to the House of Lords, by the express terms of the second *section of the latter act, but it is a question whether orders made under the Municipal Corporations Act, sect. 71, alone are [513] subject to such appeal; and the question is stated to be one of considerable difficulty.^(t)

These provisions, however, still left difficulties as to the disposition of the personal property, stock, &c., of these charities, which the legislature removed by enacting as follows: "And^(u) be it enacted, that any stocks, funds, securities, and moneys, standing as aforesaid in the name of any such body corporate, which shall belong to the charitable trustees of the borough solely upon some charitable trust or trusts, may be transferred by and paid to such person or persons as shall be appointed under the hands and seals of the greater part of the trustees, which appointment shall be attested under the hand and seal of their clerk, provided that such instrument as last aforesaid shall be also sealed with the corporate seal of the borough; and the mayor of the borough is hereby required, upon request, to cause the seal of the borough to be affixed to such instrument of nomination." "And^(x) be it enacted, that the dividends and interest of any stocks, funds, securities, and moneys, standing as aforesaid in the name of any such body corporate, which shall belong partly to the said body corporate, but subject to some charitable trust or trusts, may be paid to such person or persons as shall be authorized to have the same paid to him or them by an instrument in writing under the corporate seal of the borough, and appointed under the hands and seals of the greater part of the trustees, which appointment shall be attested under the hand and seal of the said clerk." "And^(y) be it enacted, that in every case the receipt of the person or persons authorized to give a receipt to the said company or society by any instrument under the corporate seal of the said borough, and also signed and sealed by the clerk to the charitable trustees, shall be an effectual discharge to the said company or society; and all moneys so paid shall be applied to the uses and in the manner provided by the said act, that is to say, so much of the said moneys as may be held on charitable trusts shall be paid over to the charitable trustees of the said borough, and so much as the said body corporate shall be entitled to beneficially shall be paid over to the treasurer of the borough, and applied, as directed by the said act, as part of the borough fund; but no such public company or society as aforesaid shall be bound to see to the due application thereof, or to the validity of the appointment of the clerk to the charitable trustees, or to the execution of any such instru-

(s) *Re Worcester Charities*, 2 Phill. 284.

(t) *Bignold v. Springfield*, 7 Cl. & F. 71; *vid. per* *Ld. Cottenham, C., Id.*, 103; *et vid. observations of Sir E. Sugden, C., Ir., In re Suir Island, &c., School*, 3 Jon. & Lat. 174.

(u) 7 Will. 4 & 1 Vict. c. 78, s. 46.

(x) Sect. 47.

(y) Sect. 48; *vid. sup.* p. 187, note (i).

ment by any of the said trustees, or to inquire whether or not the said stocks, funds, securities, or moneys, are charged with, or held upon, any charitable trust; and every person authorized to receive any moneys [*514] *under this act shall account to the council and to the charitable trustees respectively for all moneys so received by him, and the council and trustees respectively shall have the same remedies against any such person refusing or wilfully neglecting so to account as are provided by the said act for regulating corporations, in the case of a treasurer or other officer appointed by the council refusing or wilfully neglecting to account as provided by the said act, during the continuance of his office, or within three months after the expiration of his office." There appears to be nothing in these enactments to shield a corporation from the obligation to account for by-gone misconduct in the management of trust funds. From what period a corporation may be obliged in equity to account has never been decided(z). An account has been decreed to be taken for 200 years back(a).

[*515]

*THE UNIVERSITIES.

THE next in importance to the municipal are the educational corporations of this country.

At common law, when the Universities were spoken of, the Universities of Oxford and Cambridge were uniformly intended, and their degrees were alone recognized in the courts as conferring civil or ecclesiastical rights and privileges; but by a late statute the degrees of the Universities of Durham, London, and Dublin are taken notice of, as conferring certain privileges therein specified.(b) The term *Universitas* was adopted in the Middle Ages to denote certain great schools, but not as schools; the term denoted these places as corporations;(c) and the Universities of Oxford and Cambridge are defined to be, not corporations of colleges, but of matriculated members.(d) Agreeably to this definition, it will be seen hereafter that a person becomes a corporator of

(z) Att.-Gen. v. Brewers' Company, 1 Meriv. 495; vid. Att.-Gen. v. Mayor, &c., of Stafford, 1 Russ. 547.

(a) Att.-Gen. v. Mayor, &c., of Exeter, Jac. 443—450; vid. 2 Russ. 367; 3 Russ. 398; 13 Ves. 537; 17 Ves. 500; 2 My. & K. 35; 1 Bli. N. S. 355; 9 Beav. 67.

(b) Vid. The Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 7.

Where the Universities are mentioned in statutes, those of Oxford and Cambridge only are intended, unless otherwise expressed; Jones v. Smart, 1 T. R. 49; Com. Dig. tit. University, A.

(c) Smith's Diction. Grk. & Rom. Antiqs. in voce; Calvin. Lexic. Juridic. in voce.

(d) Att.-Gen. v. Downing, Wilm. Notes, 14. The Chancellor of Oxford, it is said, will be intended to be commorant in the University; Chase's case, Yearb. 8 Hen. 6, fol. 37, pl. 9; 1 Vin. Abr. 21, pl. 23.

The Chancellor of Oxford seems to be a corporation sole, vid. Chase's case, Yearb. 8, Hen. 6, fol. 18, pl. 7; and has power to erect corporations, Stat. Oxon. Lib. xvii. s. 1; 1 Bla. Com. 474; 8 M. & W. 90. He is a justice of peace by prescription as well as by charter, Com. Dig. University, C.; Yearb. 9 Hen. 6, fol. 44, pl. 24; Dodwell v. University of Oxford, 2 Vent. 33.

the University, or corporation of the chancellor, masters and scholars, by matriculation; but he only becomes a corporator of the college to which he belongs by being elected a scholar, or fellow, of the foundation, or master of the college: and though he may resign or be deprived of either of the last franchises, he does not thereby necessarily lose the rights of a corporator of the University.

The Universities, although composed, as to the greater part, of clerical corporators or members, are nevertheless lay corporations; ^(e) and the crown cannot now take away from them, any more than from other lay corporations, any right that has subsisted in them under old charters or prescriptive usage; nor grant them new charters, or impose upon them fresh statutes, without their voluntary acceptance. ^(e)

*The two Universities were respectively incorporated by charters from the crown at very early periods; ^(f) and by statute 13 [*516] Eliz. c. 29, they were anew incorporated, and the ancient privileges, liberties, and franchises of either of the two Universities theretofore granted, ratified, and confirmed by the crown, and all manner of quietances and privileges, letes and lawdays, and other things whatsoever, expressed, given or granted, in former grants or letters-patent, to either of the said Universities, were ratified, established, and confirmed, and they were empowered to sue and be sued, and to do all other things by the name and style of the chancellor, masters, and scholars of either University respectively, and by no other name or names. "By this blessed act of parliament," says Sir E. Coke, ^(g) "all the courts, franchises, liberties, privileges, immunities, &c., mentioned in any letters-patent, &c., to either of the said Universities (which were too long here to be recited,) that they might prosper in their study with quietness, are established, made good and effectual in law, against any quo warranto, seire facias, or other suits, or any quarrel, concealment, or other opposition whatsoever."

Another act of Parliament, 32 Hen. 8, c. 10, enables both Universities to imprison for incontinency, and on its provisions is chiefly founded the power in that respect which is at present exercised by the proctors and proproctors. ^(h)

^(e) R. v. Vice Chancellor of Cambridge, 3 Burr. 1656; S. C. 1 W. Bla. 550; compare Rex v. Westwood, 7 Bing. 1. This also appears from the course of practice from very early times, which shows that they were treated by the courts as civil corporations. Thus, 5 Edw. 2, a mandamus went to the Chancellor of the University of Cambridge to allow Robert Baketon to take his degree, cited T. Raym. 109. So Temp. Edw. 3, a mandamus went to restore a man who was banished, cited per Ld. Mansfield, C. J., 4 Burr. 2189; so 50 Edw. 3, a mandamus to the University of Oxford to remove a Lollard from a scholarship in the University, Lichlade's case, cited T. Raym. 110; et vid. per cur. Moseley v. Warburton, Salk. 321; vid. a vast list of records respecting the Universities, Prynne, Animadv. on 4th Inst. p. 159.

^(f) They return themselves to a mandamus as corporations by prescription; 1 Stra. 557.

^(g) 4 Inst. 227; vid. per Coke, C. J., in Archbishop of York v. Sedgwick, Godb. 201, pl. 287; Jenk. Cent. 117, pl. 33. The act is a private act; 1 W. Bla. 454.

^(h) Per Coke, C. J., R. v. Chancell, &c., of University of Cambridge, 3 Bulst. 110; 5 Vin. Abr. 590, pl. 23; vid. 10 Q. B. 292.

One of the two charters of Queen Elizabeth gave large powers over public women as to removal, coercion, regulation, &c., with the clause "statuto sive actu

They have the power of banishing members, who become guilty of crimes or enormous moral delinquencies, breaches of discipline, or offences against the University statutes.⁽ⁱ⁾

A rule of corporation law is, that all corporations may be visited, that is to say, all corporations, whether sole or aggregate, are liable to have their acts inquired into, discussed, modified, controlled, or set aside, accordingly as such acts violate the law in a less or in a greater degree.^(k)

We have seen how the Court of Queen's Bench, and the courts of equity, exercise control over the acts of civil corporations, of municipal, commercial, and other descriptions, and how those courts oblige them to act when they have refused or omitted to do so; but we are now to inquire *how the Universities are kept within the limits prescribed [*517] to them by the law.

Now, generally, the founder and his heirs, and, in default of heirs, the crown, is the visitor of all corporations which have been established with an endowment for any purpose which the law calls eleemosynary, which includes schemes for promoting education, by holding out to all future generations certain advantages, facilities, and privileges, upon repairing to these institutions, towards which the proceeds of the endowment are appropriated more or less exclusively. In general, the first gift of such endowment is the foundation of the institution, and he who gives the lands is the founder. But here the king had his prerogative, for if the king and a private person jointly contributed to the *first* endowment, the crown was alone reckoned to have been the founder.^(l) Now it is the rule that, in all cases, except where the founder himself otherwise has provided, the visitatorial power attaches to, and is inseparable from, the foundership, that is to say, the founder and his heirs are always visitors of his foundation, their province and duty being to see that the institution conforms to the rules and regulations that the founder has laid down, called in this case statutes, and to maintain order generally, but not to take cognizance of offences which are such by act of parliament, or the common law, independently of the statutes of the institution.^(m)

In former times there seem to have been considerable doubts as to the

parliamenti jam edito, seu in posterum edendo, in aliquo non obstante;" vid. 1 Dyer, Privil. Un. Camb. 125.

For Oxford there is an express provision, 6 Geo. 4, c. 97, s. 3, sanctioning the apprehension in the streets of streetwalkers and prostitutes within the precincts of the University; various charters of Edw. 3, and subsequent kings, had given them large powers in this respect; vid. Prynne's *Animadversions* on 4th Inst.

(i) *R. v. Chancellor, &c. of Cambridge*, 6 T. R. 89; vid. instance Aldrich's case, cited 1 Q. B. 964, 965.

The power which they possess of conferring degrees does not imply the power of degrading from them without reasonable cause or summons; *R. v. Chancellor, &c., of Cambridge*, Stra. 557. A contempt of the court of the Chancellor, held before the Vice-Chancellor, is not a reasonable cause; Stra. 566, per Eyre, J.

(k) 1 Bla. Com. 480.

(l) 1 Bla. Com. 481; 2 Inst. 68; Com. Dig. Visitor, A. 1. If the king augmented an endowment, originally granted by a subject, though the augmentation bore ever so great a proportion to the original endowment, still the subject remained the founder; 2 Inst. 68.

(m) *R. v. St. John's College, Cambridge*, 4 Mod. 233; S. C. Skin. 368.

question how the Universities were visitable ;(*n*) but the practice seems to be now settled that a mandamus lies to the universities as to other *corporations of a civil kind ; (i. e., that they are visited by the Queen's Bench ;) or at least, to the University of Cambridge ;(*o*) [*518] and it has been denied that the crown is founder of that University.(*p*) So a mandamus will issue to the keepers of the common seal of the University of Cambridge to compel the affixing it to an instrument of appointment of an University officer pursuant to a grace of the senate ;(*q*) such matters, although apparently objects of visitatorial jurisdiction, being held to belong to the jurisdiction of the Queen's Bench.

It may well be doubted whether, at the present day, the crown would be advised to exercise the powers which former sovereigns, especially the Stuarts, were in the habit of enforcing over the Universities without question ; the only ground for such interference being apparently its great convenience, if not utility : thus, Charles 2, by warrant, dated October 30, 1679, dispenses in one respect with the statutes of the foundation of Lady Margaret's preacher in the University of Cambridge, and even orders the University to alter the form of oath imposed upon the preachers accordingly ; he also, by another warrant, dated April 8, 1681, dispenses with the statutes so as to excuse bachelors of physic

(*n*) Edw. 3, in the 8th, 14th, 50th, and 51st years of his reign, visited Oxford by commissions ; Prynn's *Animadversions* on the 4th Inst. pp. 346. 355. 358. 360, 361. 363 ; vid. what seems to be a recognition by parliament of the power of the crown to regulate and determine disputes between the Universities and strangers, 50 Edw. 3, in Cotton's Tower Records, 102, 103.

The Archbishop of Canterbury was declared to be visitor of the University of Oxford by letters-patent of Richard 2, A. D. 1568, after solemn argument before the king himself in parliament, and it was decided, and the decision inrolled in parliament, and afterwards established by act of parliament, 13 Hen. 4, that the archbishop was visitor of that University ; 1 Burn's *Eccles. Law*, 478, edit. Philim. ; Rot. Parl. p. 3, Memb. 9 ; Prynn's *Animadversions* on 4th Inst. pp. 367, 368.

In 12 Car. I. Archbishop Laud asserted the right with respect to both Universities, and the cause was heard before the king in council ; and it was declared to be granted on all hands, that the king had an undoubted right to visit the Universities, but the king in council adjudged the right to belong also to the archbishop by himself or his commissary, as often as any great emergent cause should move him ; the Chancellor of either University being allowed to appear by proxy in the Visitatorial Court ; Rushw. *Collect.* 324 ; Com. Dig. Visitor, A. 1, A. 5 ; 4 T. R. 241, note (per L. Mansfield, C. J.) ; Cockman v. Mather, 1 Barnard. 14.

Oxford seems to have been visited by the crown temp. Ric. 2 and Edw. 6.

So was Cambridge in the reign of the latter, 2 T. R. 290 ; 4 T. R. 237 ; so in 5 Mary, by commission to Cardinal Pole ; so temp. Hen. 8, by Cromwel ; and 37th Hen. 8, by Dr. Parker, the Vice-Chancellor, and others, 1 Dyer, Priv. Un. Camb. 471 ; so 12 Eliz., by commissioners, when the crown gave new statutes by which the University are at present chiefly governed ; 3 Jac. 1, some further statutes were granted, vid. 3 Burr. 1650 ; Burn's *Eccles. Law*, tit. Colleges : Brief Historical Notices of the Interference of the Crown, by G. E. Corrie, Cambridge, 1839 ; Origin of Universities, by H. Malden, London, 1835 ; Ayl. Hist. Oxford ; 1 Dyer, Privil. Un. Camb. 154, pp. 10, 11, 12.

(*o*) R. v. Chancellor of University of Cambridge, 1 Stra. 557 ; S. C. Ld. Raym. 1334 ; 8 Mod. 148 ; Fortesc. 202 ; R. v. Vice-Chancellor of Cambridge, 3 Burr. 1655—1663.

(*p*) Per Lee, C. J., in R. v. Parnell, 1 W. Bla. 44 ; vid. 3 Burr. 1650. 1652.

(*q*) R. v. Vice-Chancellor of University of Cambridge, 3 Burr. 1647 ; S. C. 1 W. Bla. 547, where see form of the direction of the writ.

Such mandamus will be enforced by attachment if necessary ; S. C. 1 W. Bla. 550 ; R. v. Stephens, T. Jones, 177.

keeping one of their own acts.(*r*) But probably it would be difficult to support the position, that the crown has not the right to visit in extraordinary cases; ex. gra., in questions respecting alterations of the scheme of education.

It ought not to pass unobserved, however, that the statutes of Cambridge contain express provisions that the explication and determination of all ambiguities and doubts, which may at any time arise on the statutes, should appertain to the chancellor of the University and the major part of the heads of colleges;(s) and if it were to be considered as unquestionable that such power of interpretation implied a power of visitation, then it would follow that the visitatorial power over the University resided in the chancellor, assisted by the heads of houses. Now it has been distinctly held that a power to interpret implies a power to visit, and that such words constitute the person to whom they are applied a visitor;(t) and this position of Lord Hardwicke, C., was afterwards fully adopted by Lord Mansfield, C. S., who added, that a power to interpret, [*519] determine, and explain statutes, was as large an authority *as a visitor could have;(u) and Lord Eldon, C., also laid down that a power to interfere and determine doubts in the statutes, given in clear words, *may* itself constitute visitatorial power.(v)

But this doctrine has not been received with general acquiescence.(x)

The practice seems now to be nearly settled(y) that the *coercive* and *controlling* power over the Universities resides in the crown, to be exercised by and through the Court of Queen's Bench in ordinary cases of common law rights. The practice as to the crown *visiting* has not been very consistent; in fact the question has not arisen for a great many years.

Offences against University statutes are not cognizable as such by the courts of law, or justices of the peace; nor are they offences against the crown so as to be pardoned by an act of grace.(z)

(*r*) 1 Dyer, Privil. Un. Camb. 372, 373.

(*s*) Vid. 1 Dyer, Privil. Un. Camb. 278—342, where many instances are given in which such explications and determinations have been so made and published for the guidance of the University by the Vice-Chancellor and majority of heads, under statute 50 of Queen Elizabeth's statutes.

A person may be banished from the University of Cambridge by the Vice-Chancellor, assisted by the heads of houses in the Chancellor's Court, without also banishing him from his college, though the statutes seem to require that both shall be done; *R. v. Chancellor, &c., of Cambridge*, 6 T. R. 89.

(*t*) *Att.-Gen. v. Talbot*, 3 Atk. 662.

(*u*) *R. v. Bishop of Ely*, 1 W. Bla. 85.

The Chancellor of Oxford is empowered by statutes, (tit. xvii. s. 1, *De Officio, Potestate, et Auctoritate Cancellarii*), ordinationes etiam et statuta (poscente sic usa) cum consensu Universitatis sancire vel sancita abrogare.

The Chancellor of Cambridge has besides this power by the statute 42 of Queen Elizabeth, *De Cancellario*, viz. "Eidem Cancellario, cum consensu totius academice, licebit nova statuta ad eruditionis amplificationem, et decori atque honesti conservationem inter scholasticos habendam sancire sic ut ea his decretis nostris nihil detrahant aut officiant; vid. Queen Elizabeth's statutes, 1 Dyer, Privil. Un. Camb. 157—210; charter of 3d Eliz. id. 113—131; of 31st Eliz. id. 133—135; of Jac. 1, id. 135—137.

(*v*) *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 317.

(*x*) *Re Queen's College, Cambridge*, 5 Russ. 71, where the statutes (stat. 37) give the president and major part of the fellows power to interpret; vid. 1 Jac. 20.

(*y*) *R. v. Vice-Chancellor of Cambridge*, 3 Burr. 1647, S. C. 1 W. Bla. 547.

(*z*) *Bentley v. Bishop of Ely*, Stra. 912. 917.

The statute 13 Eliz. c. 29, as before observed, ratified and confirmed to both Universities all the franchises, liberties, privileges, immunities, &c., that had ever been granted to either of them by the crown. The principal of these is the franchise, immunity, or privilege, which these learned bodies possess of the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, ^(a) and of all injuries and trespasses against the peace (treason, mayhem, and felony alone excepted,) ^(b) where a scholar or privileged person is one of the parties; provided that these courts shall entertain no case where the right of freehold is concerned. They have the further privilege by their charters of being at liberty to try and determine all causes within their jurisdiction as just described, either according to the common law, or according to their own local customs, at their discretion, which has generally led them to carry on their process in a course much conformed to the civil ^(c) law, for which they have the express sanction of the above statute. ^(d) [*520]

These courts, called the Chancellor's Courts (or, in common language, the Vice-Chancellor's Courts, from being practically held before him and his assessor,) are courts of record. ^(e)

In the University of Oxford an appeal lies from the sentence of the Vice-Chancellor to delegates appointed by the congregation; and from thence to other delegates of the House of Convocation; if these all agree, their sentence is final, as it seems; ^(f) otherwise, there was a further ap-

(a) 3 Bla. Com. 83, 84; vid. grant of 17 Edw. 3, Prynne's Animadversions, 374; 1 Dyer, Hist. Univ. Camb. 88, charter 3 Eliz. to Cambridge. In case of Oxford, vid. charter of 1st Edw. 4, cited 1 Q. B. 955; and that of 14 Hen. 8, 1 Q. B. 955; 2 Ayliffe's Oxford, App. p. 178; Cripp's case, Litt. R. 252.

Semb. the jurisdiction does not extend to actions given for the first time by statute subsequent to the 13 Eliz. c. 29; vid. Yearb. 14 Hen. 4, fol. 20, A.; Dyer, 85, A., pl. 88; Cox v. Barnsley, Hob. 48; Yearb. 22 Edw. 4, fol. 23, B.; 1 Roll. Abr. 490.

(b) These are triable in either University by the Lord High Steward or his deputy; 4 Bla. Com. 277; Bac. Abr. University, B.; but the power has not been exercised in either University for a great length of time. The indictment is found as usual by the grand jury, the Chancellor of the University claims conuance, and the cause is taken before the High Steward, and a jury, half of freeholders of the county and half of lay members of the University.

(c) 3 Bla. Com. 84; Bac. Abr. Universities, B.; Vin. Abr. University, A., pl. 1, marg.; charter of 3 Eliz. 1 Dyer, Hist. Univ. Camb. 88.

A citation before the Chancellor's Court must not be served within the doors of Westminster Hall, that being a privileged place whilst the courts are sitting; 3 Inst. 141.

(d) Hale, Hist. Com. Law, 33; 4 Inst. 227; Merew. & Steph. Hist. Bor. 1318, 1319; Hayes v. Long, 2 Wils. 408.

(e) Charter of 3 Eliz. 1 Dyer, Hist. Univ. Camb. 88; vid. R. v. Chancellor, &c., of University of Cambridge, 1 Stra. 557; 13 Eliz. c. 29.

As to proof of residence, Perrin v. West, 3 A. & E. 405. Even if the defendant waives this, appears and enters into the merits, and judgment is given against him, it is not too late for him to remove the cause into the Queen's Bench; 3 A. & E. 405.

As to intitling affidavit, &c., id., 3 A. & E. 405.

(f) 3 Bla. Com. 85; vid. per Thorpe, J., Yearb. 40 Edw. 3, fol. 18, A., that the Court of Queen's Bench even then prohibited the Chancellor's Court of Oxford when it usurped jurisdiction.

peal to the crown in chancery, *(g)* who named delegates to hear the appeal, now the Judicial Committee of Council.

With respect to the Chancellor's Court of the University of Cambridge, its proceedings are examinable in the Court of Queen's Bench (though there is some appearance of an appeal lying immediately to the senate; *(h)*) and upon its appearing to the Court of Queen's Bench that the court below has exceeded its jurisdiction, or acted erroneously within the limits of such jurisdiction, a mandamus will issue to compel them to do justice to the injured party, *(i)* or a prohibition, according to circumstances, and so of the Chancellor's Court of Oxford; the rule is, that prohibition always may be had where the court usurps jurisdiction.

The courts in the two Universities have somewhat different powers: the jurisdiction of the Chancellor's Court at Oxford extending to personal actions throughout England, in which any of its members are *sued*; *(k)* that of the Chancellor of Cambridge only to such personal actions as arise within the town and suburbs. In the case of Oxford, however, the privileged person must be resident within the University; *(l)* and the only mode in which that court can assert its privilege, where a plaintiff, not a member, sues in one of the king's courts a resident member of the University, is by discommuning such person; i. e. by [*521] **debarring him from trading and maintaining intercourse with the members of the University.* A plaintiff in such circumstances, on being cited to appear in the Chancellor's Court for having brought such action, neglected to do so; the Chancellor's Court proceeded, of its own authority, to adjudge that he should stop all proceedings, and pay all costs, and that on default he should be arrested; but this it was held that court had no legal authority to do, although the proceeding was shown to be usual and less penal than discommuning. *(m)* A prohibition will be granted if the court attempts to act in this matter. *(m)* But the jurisdiction of the court extends to matters in equity, and where a member of the University had filed a bill in the High Court of Chancery for a discovery of the personal estate of a late member deceased, the plaintiff was ultimately banished from the University for the offence, and Lord Harcourt fully admitted the claim of the University to a court of

(g) Bac. Abr. Universities, B.; 2 Ld. Raym. 1346; 1 Q. B. 961.

(h) 1 Stra. 558, 566. Otherwise stated to be to delegates appointed by the senate; Bac. Abr. University, B.; vid. the question discussed, 1 Dyer, Privil. Un. Camb. 443, 444.

(i) R. v. Chancellor, &c., of University of Cambridge, 1 Stra. 557; vid. further as to the constitution of the Chancellor's Courts and the construction of the University statutes, R. v. Chancellor, &c., of Cambridge, 6 T. R. 92.

(k) 12 East, 19; per Lord Camden, C. J., in *Hayes v. Long*, 2 Wils. 311; vid. charter, 14 Hen. 8, 1 Q. B. 956; 957; per Holt, C. J., *Rush v. Chancellor, &c., of Oxford*, Salk. 343.

(l) 2 Wils. 311, *Speakman's case*, cited 1 Q. B. 967, note; In re Chancellor of University of Oxford, 1 Q. B. 952; vid. Yearb. 8 Hen. 6, fol. 19, citing grant of conuozance of pleas by Richard 2.

(m) In re Chancellor of University of Oxford, 1 Q. B. 952. Prohibition will even issue after sentence. S. C. vid. *Excerpta ex Statutis Oxon.* tit. 21, de *Judiciis*, printed A. D. 1674.

But there is no inclination in the superior courts to invade the real privileges of the Universities; *Byat v. Pickering*, Chanc. R. 86 (10 Car. 1.)

equity⁽ⁿ⁾ touching chattels. Except, however, by discommuning, the Court of the Chancellor of Oxford has no means of enforcing its privilege where the plaintiff is not a member of the University. So the Court of the Chancellor of Cambridge will be prohibited if it attempts to punish, as a criminal, a plaintiff for suing in the king's courts for a cause of action, or prosecuting for an offence, arising within its jurisdiction.^(o) The privilege extends to cases where a corporation is defendant.^(p) On the other hand, where a defendant is sued in these courts for a matter within their jurisdiction, and he is himself a resident member of the University, he cannot waive his privilege;^(q) but whether, when judgment has passed against a member resident at the time of the action brought, but afterwards, and before judgment, quitting the jurisdiction, he may be legally arrested out of the jurisdiction by warrant of the court, remains a question;^(r) though the custom is alleged to be so.^(r) In general, the jurisdiction does not extend to any but cases in which the court has power to do justice; therefore it does not extend to *quo warranto* or *quare impedit*;^(s) and, as has *been stated, these courts cannot entertain [*522] pleas in which the freehold comes in question.^(t) Therefore they cannot hold plea of an action of trespass *quare clausum fregit*, for the freehold may come in question in such action;^(u) nor of an action of ejectment;^(x) but they may hold a plea of covenant where damages only are to be recovered.^(y) A penalty on a statute cannot, it is said, be recovered there.^(z) But it is said, that in an information in the Exchequer for

(n) *Stratford v. Aldrich*, 22 Vin. Abr. 11, pl. 13; et vid. S. C. cited, 1 Q. B. 964, 965; *Mitf. Chanc. Plead.* 151; *Williams v. Roberts*, Finch, R. 45; *Busby v. Cross*, id. 162; *Powell v. Hine*, Finch, R. 292; *Prat v. Taylor*, Chanc. Cas. 237.

The jurisdiction in equity extends only to cases where the court can grant relief; therefore a bill for specific performance of a contract relative to a subject-matter lying beyond the precincts of the University does not lie there, *Draper v. Crowther*, 2 Ventr. 362; 1 Vern. 212; *Gilb. Hist. C. B.* 157.

(o) *Richardson's case*, 6 Bac. Abr. 584, 7th edit.; *Litt. R.* 10.

(p) *Case of Magdalen College, Oxford*, 1 Mod. 163. The word "persona" in the charters being held to include a corporation, therefore the privilege is applicable in all cases within the competence of the court where a college is sued, S. C. The court not being competent to award a *distringas*, the practice is to make the corporation give bond, and put in stipulators that they will satisfy the judgment, and on non-performance of the condition of the bond the court commits the bail, S. C.; vid. sup. p. 4, n. (s).

(q) *Wilcocks v. Bradell*, Cro. Car. 73, S. C. *Litt. R.* 40; *Hetley*, 25. Though he may if sued in a superior court; *Crosse v. Smith*, 3 Salk. 79, 80.

(r) *Perrin v. West*, 3 A. & E. 405, where see form of writ or process.

(s) 5 Vin. Abr. 572, pl. 4; *Dalison*, 12, pl. 20; 1 Rol. Abr. 489; *Co. Litt.* 134 b; 2 Inst. 30; per Hale, C. B. in *Castle v. Lichfield*, Hardr. 507; *Keilw.* 88—90; 1 Rol. Abr. 489.

Nor to an action against heir on bond of ancestor, heir having no assets within the jurisdiction; *Brown v. Carrington*, Cro. Jac. 502; vid. tam. *Clerk v. Broughton*, Cro. Jac. 503, as to pleading, and *Dowdale's case*, 6 Rep. 46.

(t) Bac. Abr. Universities, B.; per North, K., in *Stephens v. Berry*, 2 Vern. 212, pl. 209; *Yearb.* 40 Edw. 3, fol. 17, pl. 8; *Merew. & St. Hist. Bor.* 1318.

(u) *Com. Dig. University, C*; *Crisp v. Webb*, *Litt. R.* 252; per *Finchden, C. J.*, *Yearb.* 40 Edw. 3, fol. 17, pl. 8.

(x) *Halley's case*, Cro. Car. 87; *Com. Dig. University, C*; *Moor. R.* 361. Nor of *replevin*, 22 Vin. Abr. 2, pl. 3, marg.; *Chapman v. Wish*, *Gilb. Hist. C. B.* 156; 1 Rol. Abr. 489, pl. 25; 2 Inst. 140; Bac. Abr. Courts, D. 3. (y) Cro. Car. 88.

(z) *Chancellor, &c., of Cambridge v. Price*, *Skin.* 665; *Hinton v. Hern*, *Salk.* 671.

making cards contrary to the statute, &c., the privilege was allowed,^(a) and the case acknowledged to be within the competence of the Chancellor's Court to entertain. In most cases it is indispensable that clear proof be given that the defendant was a resident member or privileged resident, ex. gra. servant, &c., at the commencement of the suit: proof that he was so when the debt, &c., was contracted is not sufficient.^(b) However, it has been held enough to prove that he was so at the time of claiming the privilege, which of course must be after the action is brought.^(c)

In Oxford, the privilege of being sued in the Chancellor's Court for causes within its competence, arising within the precincts, extends to the servants and ministers of the University and of the colleges and scholars, provided such servants are matriculated and resident within the precincts; but when one of them is sued along with members of the University, it is not always necessary, at least on a claim of conuzance by the University, to prove that he is matriculated or resident;^(d) If the affidavit states him to be a common servant of the University, and there is no evidence to disprove his matriculation or residence, and the cause of action is of such a nature as to show that the party must have been within the jurisdiction when it arose, that is sufficient.^(d) But perhaps this would not suffice in case the party were himself setting up his privilege;^(e) and in [*523] such case, if it appears *to the court that the party had procured himself to be registered as a servant merely for the purpose of claiming the privilege in the action, it will not be allowed.^(f)

With respect to the privilege of servants in Cambridge, but little is to be found in the books, and that is unsatisfactory, from the brief manner in which it is stated. The effect of one case is, that a defendant in an action on a bond, purporting to be made at C., in the county of Surrey, pleads the privilege of the University, granted by Queen Elizabeth for scholars, &c., and their servants, upon contracts made within the University, and shows that the bond was made in Cambridge, and that he was a servant of the scholars, to wit, bailiff of King's College in that University; "and upon reading the record" (says the report), "it seemed that the defendant, being a bailiff of the college, is not capable of the said privilege."^(g) It seems, however, that where a servant or other privileged person claims his privilege by way of plea to an action for a tres-

(a) Poole's case, cited Hardr. 506.

(b) Perrin v. West, 3 A. & E. 405. 408; Hayes v. Long, 2 Wils. 310. So in pleading a custom of the University to distrain on members, &c., the residence is to be alleged; Chase's case, Yearb. 8 Hen. 6, fol. 19; so Yearb. 40 Edw. 3, fol. 17, pl. 8.

(c) Fryer v. Dew, Godb. 404, pl. 485.

(d) Thornton v. Ford, 15 East, 634; vid. R. v. Routledge, Dougl. 513; Woodcocke v. Brook, Cas. Temp. Hardw. 241; vid. Turner v. Bates, 10 Q. B. 292.

(e) As to the privilege of servants, vid. Statut. Oxon. tit. 18, s. 1, tit. 2, ss. 2, 6; charter 14 Hen. 8. By the statutes all such servants are to be registered.

As to privilege of proctor's men, Turner v. Bates, 10 Q. B. 292.

As to answering affidavits in support of the claim, id.

As to swearing them before Chancellor's attorney's partner, id.

(f) Per Lord Ellenborough, C. J., 15 East, 638, 639; White v. Lowgher, Cary's R. 79; vid. Hetl. 28; Litt. R. 41.

(g) City of Oxford's case, 2 Ventr. 106; 3 Salk. 383; vid. stat. 6 Geo. 4, c. 97, as to constables appointed by the Universities.

(g) Carrell v. Parke, Brownl. & G. 74; 22 Vin. Abr. 10.

pass, alleged to be committed out of the jurisdiction of the University Court, he ought to conclude with the special traverse, without this, that he was culpable in any place without the University of Cambridge. (*h*)

The jurisdiction of these courts does not extend to cases where the Chancellor or Vice-Chancellor is himself sued, though along with others of the University; for no one but the king (it is said) shall be judge in his own cause, and the king only through his judges; (*i*) nor to cases where the officers of the courts at Westminster are plaintiffs; (*k*) and therefore not to actions by attorneys of the courts at Westminster; (*l*) but the Chancellor in former times appears to have claimed conuozance of an indictment against his Commissary for striking one of the marshals of the king coming to execute his office within the University. (*m*)

These being exempt jurisdictions, the privilege may either be pleaded by the defendant, or claimed by the Chancellor or Vice-Chancellor. (*n*)

*If the defendant pleads the privilege, the following requisites must be observed; he must plead in *propria personâ*, and not by [*524] attorney; for the attorney being the officer of the court, if he puts in a plea it will be intended to be done by leave of the court, and by obtaining such leave defendant is taken to admit the jurisdiction of the court. (*o*) However, this does not hold in the case of an attorney pleading in the court below his privilege to be sued in his own court; for that is a plea of privilege, strictly so called, and not a plea to the jurisdiction, (*p*) and therefore an attorney may in such case plead by attorney of the court below.

Next, the defendant must plead, as in all other cases of pleas to the

(*h*) *Payne v. Worth*, 3 Bulstr. 282; vid. 4 Inst. 213.

(*i*) *Chase's case*, Yearb. 8 Hen. 6, fol. 18, pl. 7, per Babington, C. J., and Cotesmore, J., Martin, J.; *Brookes v. Earl of Rivers*, Hardr. 503; et vid. *Hunston v. Mayor, &c., of Boston*, Benl. 88, pl. 134.

(*k*) *Anderson's case*, 3 Leon. 149; *Butts v. Clarke*, Dyer, 287, A.

(*l*) *Case of University of Oxford*, Litt. R. 304; vid. 1 Rol. R. 489; *Wells v. Trahern*, 5 Vin. Abr. 592; *Willes*, R. 240; 1 Rol. Abr. 489, pl. 40; *Jolliffe v. Lanes-ton*, 1 Ld. Raym. 134; vid. tam. *Whoper v. Harewood*, Benl. 233, 234.

(*m*) *Prynne's Animadv.* on 4th Instit. 368.

(*n*) *Crosse v. Smith*, 3 Salk. 79, 80; 4 Inst. 224; *Chapman v. Maddison*, 2 Stra. 1089; *S. C.* Andr. 198; *Bac. Abr. Courts*, D. 3; *Pern v. Manners*, Fortesc. 157; *S. C.* 5 Vin. Abr. 589, pl. 22 (recognised *Wells v. Trahern*, *Willes*, R. 238, 239); 3 Bla. Com. 298; *Skinner v. Crouch*, Comberb. 171.

Privilege of Chancellor of Cambridge to hold pleas was claimed and allowed in *B. R.* in 1 Hen. 5, *Prynne, Animadv.* 376.

It has been said that privilege of University of Oxford is never pleaded, *Dormer v. Howard*, 9 Jurist, 737; but this seems to be incorrect. The plea there was bad for not stating enough of the charter, 14 Hen. 8, to show the exempt jurisdiction; vid. *Prat v. Taylor*, *Chanc. Cas.* 237; *Masters v. Bruett*, 2 Freem. 143; Yearb. *Chase's case*, 8 Hen. 6, fol. 18, pl. 7; *Wilkins v. Shalcroft*, Hardr. 188; from which case it appears that the *plea* is not good to a proceeding in the Exchequer for a debt due to the crown.

As to *pleas* of privilege of an University pleaded in equity, vid. *Temple v. Foster*, *Cary's R.* 65; *Cotton v. Mannering*, id. 73; et vid. 2 Vent. 362; 1 Vern. 212; vid. *Mitford*, Plead. 224, as to the requisites of such pleas. May be put in without oath, *Masters v. Bruett*, 2 Freem. 143. Other points, *Busby v. Cross*, *Finch*, R. 162; *Powell v. Hine*, id. 292.

(*o*) *Bac. Abr. Courts*, D. 3.

(*p*) *Hunter v. Neck*, 3 Sc. N. R. 448; *S. C.* 3 M. & Gra. 181; *Groom v. Wortham*, 2 Dowl. N. S. 657. A plea to the jurisdiction of the Chancellor's Court must be put in in *propria personâ*, 1 Chit. Plead. 460, 7th edit.; and he must make oath of its truth, id.

jurisdiction, within four days (the first exclusive, the last inclusive) after declaration ;(q) the plea must be accompanied by affidavit of the truth of the facts contained in it,(r) and, as we have seen, of the defendant's residence within the jurisdiction at the commencement of the action ; the body of it must show satisfactorily that the Chancellor's Court has power to do effectual justice in the particular action ;(s) and it should, it seems, in general conclude with *si curia cognoscere velit* ;(t) or if the declaration lay the cause of action to have arisen out of the jurisdiction of the Chancellor's Court, there ought also to be a special traverse, without this, that the defendant is culpable in any place extra jurisdictionem.(u) The plea also ought to be verified,(x) and signed by counsel.

The defendant cannot take advantage of the fact by demurrer,(y) nor in arrest of judgment, even though the declaration should disclose that the cause of action arose within the jurisdiction of the Chancellor's Court, for unless it were shown, on the face of the declaration, that the Court above never had jurisdiction, the objection would not be good in arrest of judgment ; and such declaration would not show that, unless it showed also that the defendant was resident within the precincts of the University at the time of the commencement of the suit.(z)

[*525] *Nearly the same principles regulate pleas of privilege of an University pleaded to the jurisdiction of courts of equity. Such pleas must allege that the court in which they are pleaded has no jurisdiction in the case, and show by what means it is deprived of jurisdiction, and also what court has jurisdiction, otherwise such pleas are bad for want of form.(a) In point of substance, it is necessary to entitle the Chancellor's Court to exclusive conuance of the suit that it should be able to give complete remedy.(b) If the suit is instituted against different persons, some of whom have privilege and some not, or if one defendant is not amenable to the Chancellor's Court, the plea fails.(c)

If conuance be claimed, the claim must be made after the defendant has made appearance ;(d) and it may be before declaration, but it

(q) 1 Chit. Plead. 460, 7th edit.

(r) 4 Anne, c. 16, s. 11.

The affidavit may be sworn by the defendant or another person ; Lumley v. Foster, Barnes, 344 ; Pract. Reg. 6.

(s) Cowp. 172 ; Davis v. Stringer, Carth. 355 ; 4 Inst. 213.

As to prohibiting the Chancellor's Court, 1 Q. B. 952.

Form of rule for writ of prohibition, 1 Q. B. 965, note.

(t) 1 Chit. Plead. 461, 7th edit. ; vid. 2 Wms. Saund. 210, note (1) ; Rast. Ent. 434, B, 434 ; Thomps. Entr. 5. 9.

(u) Payn v. Worth, 3 Bulstr. 282.

(x) Vid. form 1 Wils. 193, 194 ; Robins. Entr. 1 ; Brown, 473 ; Jones v. Jones, 1 Wentw. Prec. 45 ; 1 Wils. 206.

(y) Davis v. Stringer, Carth. 354.

(z) Jennings v. Hankyn, Carth. 11.

Semb. the courts take judicial notice of these jurisdictions, 2 T. R. 10 ; Mayor, &c., of Berwick v. Shanks, 3 Bing. 461 ; Greene v. Simpson, 1 Keb. 946. 948 ; 2 Keb. 5.

(a) Mitf. Chanc. Plead. 224.

(b) Ibid.

(c) Id. 225 ; Grigg's case, Hutt. 59 ; 4 Inst. 213 ; Cowp. 172.

(d) Browne v. Renouard, 12 East, 12 ; Bac. Abr. Courts, D. 3 ; semb. that claim of conuance cannot be allowed as to one party when disallowed for others, his co-defendants in trespass, Turner v. Bates, 10 Q. B. 292 ; vid. tam. per Lord Ellenborough, C. J., 15 East, 638, 639.

As to time of making the claim in a criminal prosecution, R. v. Agar, 5 Burr. 2820.

must^(e) be before plea.^(f) It is made in the first instance by a letter-missive and signifiatory from the Vice-Chancellor to the court in which the action is pending, making the claim with a brief statement of the facts, and an allegation of the defendant's membership and residence in the University; and that the cause of action arose within the University in the case of Cambridge;^(g) and in Cambridge, such letter-missive and signifiatory is under the seal of office of the Chancellor of the University.^(g)

The claim in court is made for Oxford by the Chancellor of the University, or during a vacancy of the office by the Vice-Chancellor;^(h) in either case the claim is made in writing under seal of the office of the Chancellor,⁽ⁱ⁾ expressed to be by him as deputy for and on behalf of the University. The reason for this is, that in all cases of conuazance, the claim must be made by the lord of the franchise (which the University is in this case,) or his deputy.^(k) For *Cambridge the claim may be made by the Vice-Chancellor, under seal of office of the Chancellor, as Vice-Chancellor, locum tenens, [*526] and deputy of the University, whether the office of Chancellor be full or not.^(l) The claim is to be made in the same manner in the Courts of Chancery.^(m)

In both Universities the claim must set out the grants by the charters, and confirmation by the stat. 13 Eliz. c. 29 (which being a private act must be exemplified,) so as to show the jurisdiction, and must state that the cause of action arose so as to give the chancellor's Court jurisdiction, or within the jurisdiction, and that the defendants was, at the time of the commencement of the suit, resident in the University.⁽ⁿ⁾

(e) 12 East, 12. The most usual course is to make it after declaration or indictment; 12 East, 19; vid. Woodcocke v. Brook, Cas. T. Hardw. 241.

(f) Wells v. Trahern, Barnes, 346; S. C. Willes, R. 233; Parker v. Edwards, 1 Show. 352; Bishop of Ely's case, 1 Siderf. 103; Bac. Abr. Courts, D. 3.

(g) Browne v. Renouard, 12 East, 12; in the case of Cambridge, the court takes notice that the claim is in fact made on the day of the date of the letter-missive and signifiatory, S. C.

If the claim is made in vacation, vid. 10 Q. B. 292, and as to affidavits.

It need not appear that the defendant was resident in Oxford when the cause of action accrued, if it appear that he was resident when the action was commenced; Castle v. Lichfield, Hardr. 509. This is said to be the first case in which the University of Oxford ever claimed conuazance; 2 Wils. 412; vid. Liber. Placit. 5; inf. n. (k). If an entire cause of action arise partly within and partly without the jurisdiction, conuazance must be allowed, it is said, 1 Rol. Abr. 494; Yearb. Falk v. Burley, 8 Hen. 6, fol. 31. B.

(h) Williams v. Brickenden, 11 East, 543; Thornton v. Ford, 15 East, 634; Leasingby v. Smith, 2 Wils. 406; vid. Castle v. Lichfield, Hardr. 510.

(i) Kendrick v. Kynaston, 1 W. Bla. 545; Turner v. Bates, 10 Q. B. 292.

(k) Broke, Abr. Conuazance, 36. 50.

Conuazance appears to have been claimed by the University of Oxford as early as A.D. 1429; Merew. & St. His. Bor. 924. In case of Cambridge it was allowed in B. R. in 1 Henry 5; Prynne, Animadv. 4th Instit. 376.

(l) Vid. precedents, 12 East, 12; Willes, R. 233; 11 East, 543; 15 East, 634; Turner v. Bates, 10 Q. B. 292.

(m) Prat v. Taylor, 1 Cas. Chan. 237; 2 Bac. Abr. Courts, D. C. vid. sup. note (d).

(n) Vid. forms, sup. p. 522; Liber. Placit. 5, conuazance for esquire bedell.

Affidavits of the facts and residence(*o*) must accompany the claim, which itself is to be entered of record.(*p*) There must also be produced in court a power or warrant of attorney, under the seal of office of the chancellor, empowering an attorney or attorneys to claim and defend the liberties of the University in the action.(*p*) The old practice was that this warrant should be filed and entered of record;(q) and perhaps this must still be done, although by one of the new rules(*r*) no entry shall be made on record of any warrant of attorney *to sue or defend*; also this warrant, it seems, must still be filed, as well when the action is in the Common Pleas as in the other courts, notwithstanding a late rule of the Common Pleas.(*s*) The rule calling upon the plaintiff to show cause why the claim should not be allowed, is drawn up on reading the said claim of conuance, the warrant, affidavits, with the letters.patent, and exemplification.(*t*)

The University of Cambridge holds by charter the office of clerk of the market, and as such has power to make orders for the regulation of the market; but they cannot imprison for the violation of their orders, nor do their powers as such clerk extend to any articles but victuals.(*u*)

The University of Oxford had the assize of bread, ale, and wine, granted it by charter of 39 Hen. 3.(*x*) Both Universities have the right of sizing and marking ale and beer measures conferred on them by statute.(*y*)

The University of Cambridge had the right of sizing and weighing [*527] bread confirmed to it by statute;(z) and by immemorial usage recognised in stat. 9 Ann. c. 23, s. 50, the franchise of licensing alehouses within the jurisdiction of the University, i. e., in the town and suburbs,(a) exercised by the Vice-Chancellor as a justice of the peace *virtute officii*. Each University has a Court Leet, and, as incident to such court, the power of appointing constables;(b) but that power now rests, it seems, on stat. 6 Geo. 4, c. 97, for the better preservation of the peace and good order in the Universities of England.

The jurisdiction over ale and beer measures is exercised in the Chancellor's Court(b) at Oxford; but at Cambridge by the Deputy High

(*o*) *Boot v. Graham*, Barnes, 49; S. C. Stra. 810; *vid. sup.* p. 524; Cas. T. Hardw. 241.

(*p*) 12 East, 15; 1 Show. 352; 1 Siderf. 103; *Pern v. Manners*, Fortesc. 157; S. C. 5 Vin. Abr. 588.

(*q*) 1 Lev. 87; *Hampton v. Phillips*, Palm. 456.

(*r*) Reg. Gen. Hil. 4 Will 4, l. Plead. s. 4. Who may be such attorney, 10 Q. B. 304, 305. (*s*) Reg. Hil. 1 Vict. art. 2.

(*t*) 12 East, 16; *Pern v. Manners*, Fortesc. 157; S. C. 5 Vin. Abr. 588; 5 Burr. 2820; *Woodcocke v. Brook*, Cas. T. Hardw. 241. As to demurring or pleading to the claim, &c., *vid.* 1 Chit. Plead. 442; 7th edit.; 2 Wils. 406, 409, 410; 10 Q. B. 312, *quære*.

(*u*) Case of the University of Cambridge, Hetl. 145; S. C. Litt. R. 296. The University of Oxford yearly appoints from among its members two clerks of the market; Stat. Oxon. tit. xvii, s. 8.

(*x*) *Vid.* 1 Mod. 164, note (*b*); 3 Salk. 383, pl. 4; 8 A. & E. 287.

(*y*) 11 & 12 Wm. & M. c. 11, s. 9; Wood, Inst. 550.

(*z*) 31 Geo. 2, c. 29, and 3 Geo. 3, c. 11; *vid.* grant in parliament of the same, 5 Ric. 2 Cotton's Tower Records, 200. 304.

(*a*) Reg. v. Archdall, 8 A. & E. 281, where see form of license.

(*b*) 13 Eliz. c. 29; per Holt, C. J. in *Rush v. Chancellor*, &c. of University of

Steward.(c) The latter University might seem to have had the assize of ale and bread in virtue of its court leet.(d)

No person shall retail wine in either University without license from the Chancellor or Vice-Chancellor of Oxford, and the Chancellor, Masters and Scholars (i. e. the University) of Cambridge, on pain of 5*l.*(e)

The charter of 14 Henry 8 makes the Vice-Chancellor and Pro-Vice-Chancellor of Oxford justices of the peace *virtute officii* for the vill of Oxford, and the counties of Oxford and Berks. In an information by the Attorney-General against the Vice-Chancellor of Oxford, for misbehaviour in his office, both as Vice-Chancellor and as a justice of peace of the University, the court refused to allow an inspection of the statutes and archives of the University, which it was alleged would show what was the duty of the Vice-Chancellor.(f) It is remarkable that the rule was moved for on a suggestion that the king, being visitor, had a right to inspect their books whenever he thought proper. The court to some extent relied upon the ground that there was no instance of an information *ex officio* against an officer of a corporation for breach of bye-laws, and a rule granted to inspect the bye-laws;(g) and that the motion tended to make defendant accuse himself.(g) This case is distinguishable, it will be observed, from that of an information in the nature of *quo warranto*, because that always is concerning a franchise, of which the corporation books are the proper and only evidence, and they concern the crown and defendant equally, and that is the reason why an inspection of them is granted in such informations.(h) It has been said that the Universities may accept in part *or reject part of the statutes given them by the crown; but this [*528] is contrary to principle, and would not now be upheld by the courts.(i)

The Universities have the power of presenting to the livings of Papists;(k) and of conferring degrees in arts and sciences; and upon refusing to admit to the latter, they are liable to be compelled by *mandamus*;(l) and so, on illegally removing or suspended from degrees, they may be compelled to restore by *mandamus*.(m)

They may now substitute declarations for the oaths formerly required to be taken by members in certain cases. This important power is given by statute 5 & 6 Will. 4, c. 62, s. 8.

Oxford, Salk. 343; per Lord Mansfield, C. J., in *R. v. Chancellor, &c., of University of Cambridge*, 3 Burr. 1659; Merew. & St. Hist. Bor. 1319. 1340; Com. Dig. Supplemt. 566. As to constables and proctor's men, *vid.* *Turner v. Bates*, 10 Q. B. 292; 6 Geo. 4, c. 97. (c) per Wilmot, J., 3 Burr. 1660.

(d) *Count of Shrewsbury's case*, 17 Vin. Abr. 263, 264; *vid.* Co. Entr. 527 b; 4 Inst. 262; Merew. & St. Hist. Bor. 1318; 6 Rep. 78; 4 Leon. 104. 216; *Berrington v. Brooks, T. Jones*, 229.

(e) Stat. 17 Geo. 2, c. 40, s. 11; Stat. Univ. Oxon. tit. xvii. s. 1; Salk. 671.

(f) *R. v. Purnell*, 1 Wils. 239; S. C. 1 W. Bla. 37, q. v.

(g) *Per Lee, C. J.*, 1 W. Bla. 44, 45.

(h) *Vid. R. v. Babb*, 3 T. R. 579.

(i) *Per Lord Mansfield, C. J.*, W. Bla. 550; *vid.* Harg. note (104) on Co. Litt. 94 a; *R. v. Westwood*, 7 Bing. 1.

(k) 10 Geo. 4 c. 7, s. 16; Bac. Abr. Universities; 22 Vin. Abr. 4.

(l) *Baketon's case*, cited T. Raym. 109; et *vid. sup.* p. 515 note (e).

(m) *R. v. Chancellor, &c. of Cambridge, Stra.* 557.

They have each the franchise of returning two members to parliament.

[*529]

*COLLEGES.

THE colleges in the two Universities are lay eleemosynary foundations,⁽ⁿ⁾ being corporations by the name, in general, of "The Master, Fellows and Scholars of — College."^(o) Sometimes the head is called president, sometimes principal, or provost, or rector, but most commonly master.

All ecclesiastical foundations have visitors,^(p) and many of the colleges in the Universities having originally partaken at least of an ecclesiastical character, retain many points of similarity to spiritual foundations; and in this respect all the colleges resemble them, that they all have visitors.^(q)

As has been observed, when the founder, in giving his statutes or rules for the future government of the institution, did not use language showing that he meant to place the visitatorial power, *i. e.* authority to inspect the actions and regulate the behaviour of the members of the corporation, elsewhere, it has always been considered as remaining in the founder and his heirs in succession, and resulting to the king in default of heirs;^(r) and it is to be exercised by him *ex pres* to the manner in which it was exercised by the founder and his heirs.^(s) It may be observed, that the better opinion seems to be, that words giving a power to interpret the statutes do not necessarily imply the gift of visitatorial power;^(t) and it is further apparent, that so complete is the power of the

(n) *Att.-Gen. v. Talbot*, 3 Atk. 662; *vid.* 2 C. B. 782, note; *Matthews v. Burdett*, Salk. 672; *R. v. New Coll., Oxford*, 2 Levinz, 14. The dean and chapter of Christ Church, Oxford, is a spiritual body; *Bunb.* 209. As to Trinity College, Cambridge, *vid.* *Hob.* 123.

(o) It is not necessary for a college, in suing or defending, to state the names, either christian or surname, of the head of the college; 2 Inst. 666; *Com. Dig.* Abatement, E., 18. College *ex vi termini* imports a corporation, 2 T. R. 353; hall does not; the halls in Oxford are not incorporated; the students of them live under the University statutes only.

(p) *R. v. Lee*, 1 Show. 252; the ordinary being such visitor as to spiritualities; 1 Bla. Com. 480; *Com. Dig.* Visitor, A. 6; *Godolph. Repertor.* 34, c. 3.

(q) 17 Vin. Abr. 245, pl. 11.

(r) *Fairchild v. Gaire, & Co.* Jac. 63; *Rennell v. Bishop of Lincoln*, 7 B. & C. 160. *aff. Dom. Proc.* 8 Bing. 490; *vid. acc.* 2 T. R. 352; *Lib. Ass.* 8 Edw. 3, pl. 29; *vid. Att.-Gen. v. Abp. of York*, 2 Russ. & M. 465; 1 Burn, *Eccles. L.*, tit. Colleges; *Simonde de Monford's case*, Yearb. 5 Edw. 4, 123 (*Longo Quinto*); *Ex parte Wrangham*, 2 Ves. jun. 609; *et vid.* 2 V. & B. 134; *Anon.* 12 Mod. 232.

(s) *R. v. Catherine Hall, Cambridge*, 4 T. R. 243. Whether the crown can grant the inheritance of a visitation may be questioned; but without doubt the crown can grant to whom it pleases to be visitor for a time; *per Holt*, C. J., 12 Mod. 233.

(t) *Sup.* p. 519. When a visitor is appointed and interprets, such construction binds the superior courts; *Att.-Gen. v. Clare Hall*, 2 T. R. 312. As to construction of *Domus* in college statutes, *vid.* 2 T. R. 340; *Ex parte Wrangham*, 2 V. & Beam. 609; of "admission to an office," *Case of Queen's College*, Jac. 36, 37. 45.

founder to dispose of this authority as he chooses, that he may even divide it, and vest one portion in one *quarter and another in another quarter; (u) but here his power stops, in the case of a private founder, for it seems that neither his heirs nor he himself can alter his statutes when once given, or give new ones, unless there be expressly reserved in the statutes themselves a power of doing so. (v) However, in respect to colleges as well as other lay eleemosynary foundations, no particular form of words is indispensable to the valid appointment of a visitor by the founder; if the intention sufficiently appears who is to be visitor, more is not required. (x) It is a principle, that as far as it is possible, the founder's will, as expressed in the statutes, is to be followed. (y) "No usage which cannot be shown to have a legal origin can ever justify a breach of the statutes of a college." (z)

Nevertheless, the crown, when founder's heir, frequently grants dispensations, pro hac vice, with the statutes of colleges, and may even grant a perpetual dispensation to empower the college to vary from the

(u) *Att.-Gen. v. Middleton*, 3 Atk. 329; *R. v. Bp. of Ely*, 1 W. Bla. 83. But though a mode of visitation is prescribed by the founder in any particular case, that does not take away the general power incidental to the office of visitor, of which hearing complaints and doing justice therein is one: *R. v. Bp. of Ely*, 1 W. Bla. 83; *Whiston v. Dean and Chapter of Rochester*, cor. Wigram, V. C., August, 1849. If the founder reserve to himself and his heirs only a part of the visitatorial power, the remainder of it vests at once in the crown; *R. v. Master, &c., of Catherine Hall, Cambridge*, 4 T. R. 233. So if he gives all the power, but exempts a particular case, the crown is visitor when that case occurs; *R. v. Bp. of Ely*, 1 W. Bla. 85, 86.

(v) 1 W. Bla. 83, 84; *Phillips v. Bury*, Skin. 513; *vid. tam. Walker's case*, Rep. Temp. Hardw. 212; *R. v. Bishop of Ely*, 2 T. R. 290; *et vid. 4 T. R. 233*. It has been doubted whether a founder can restrain that part of a visitor's authority which arises by implication of law, 2 T. R. 310; 1 Ld. Raym. 9; and at any rate there must be negative words to effect that; 4 Mod. 109; 1 Rol. Abr. Corporations, G. 2; 2 T. R. 313. Nor can a visitor (without power to do so reserved in the statutes) impose fresh laws upon the college; 1 W. Bla. 84. As to publication of college statutes, *Coop. Chanc. Cas.* 265, (1846).

(x) *R. v. Bp. of Ely*, 1 W. Bla. 83 (sit visitor held a sufficient appointment, S. C.); *vid. Att.-Gen. v. Talbot*, 3 Atk. 662.

Jac. 1, by his charter of 1604, ordered that such of the colleges in Cambridge as had not visitors of their own should be visited by the Chancellor of the University, or, in his absence, by the Vice-Chancellor; 1 Dyer, Privil. Un. Camb. 471.

A visitor will be presumed to be a general visitor, i. e. endowed with all the power that belongs to the office, unless there are express words in the statutes to abridge his authority; *R. v. Bp. of Worcester*, 4 M. & Selw. 421; *St. John's Coll. v. Todington*, 1 Burr. 200.

(y) *Vid. Heydon's case*, 2 Rep. 8; *Magdalen College case*, 11 Rep. 73; *et vid. Broom's Max.* 51, that the king, though not named, is bound by the general words of acts of parliament which tend to perform the will of a founder. It is no argument for controlling acts of a visitor done in pursuance and execution of power given by founder, that such power is unreasonable; 2 T. R. 350.

(z) *Per Lord Eldon, C.*, 1 Jac. 20, 34, in a case where an usage of election in the teeth of one of the statutes having been proved to have subsisted for a considerable time, a grant of a standing dispensation to depart from the statutes in that particular was *presumed*; S. C. So *Att.-Gen. v. Middleton*, 2 Ves. sen. 330; *et vid. 17 Ves.* 497. Offences against college statutes are not pardoned by an act of grace and pardon, though the crown be founder, *Bentley v. Bp. of Ely*, Stra. 912; nor cognisable as such by courts of law, S. C.; nor can offenders against them be committed till they give security to observe them; S. C.

statutes; ex. gra., by giving a power to elect a greater number of fellows, natives of the same county, than the statutes prescribe.(a)

[*531] *A foundership of a college, it has been said, is incident to the blood of the founder; moreover, it is inseparably incident to his heirs, and cannot be granted even to the king, though it be by deed inrolled;(b) and it was held that it could not be forfeited even for treason;(c) nor could it escheat,(d) though the patronage might devolve by either of the last two modes.(e) However, there is some obscurity about this, for elsewhere foundership and patronage are said to be the same thing.(f) A decision of a later date, however, seems to show that a right of nomination may be aliened by the founder of a lay corporation eleemosynary, or even by his heirs.(g)

A founder who has once made an endowment of an eleemosynary corporation, although voluntarily, cannot of his own authority alter the endowment.(h)

Although at common law the right of electing to the offices in a corporation is incident to the whole body,(i) yet founders of colleges, nevertheless, and notwithstanding the stat. 33 Hen. 8, c. 27, frequently—indeed almost always—seem to have placed the right of election in a portion only of the whole collegiate body; and the power to do so seems

(a) Case of Queen's Coll. Camb., 1 Jac. 35; R. v. St. Catherine's Hall, Cambridge, 4 T. R. 233, in which last case the crown is visitor, as ultimus hæres, in default of heirs of the founder, 8 Assis. pl. 29, 31. The present president of Queen's College, Cambridge, holds his office, being a layman, by virtue of a dispensation granted by Lord Brougham, C., with the statutes requiring the head to be in holy orders; vid. tam. T. Raym. 102. 104.

Where the founder's heir is lunatic, the duty and power of visitation devolves on the crown, to be exercised by the great seal during the life of the lunatic: Att.-Gen. v. Dixie, 13 Ves. 519.

When no heir appears, and there is reason to think that an heir is in existence, the Court of Chancery will direct an inquiry before the master to discover the heir; Att.-Gen. v. Gaunt, 3 Swanst. 148.

Where the person who is visitor in right of office, as a bishop, &c., becomes head of the college, then, as a visitor cannot visit himself, the visitatorial power devolves upon the crown, to be exercised by the Queen's Bench during the union of the two offices, 1 W. Bla. 86; R. v. Bp. of Chester, 2 Stra. 797; et vid. 2 Geo. 2, c. 29; from which it follows, that where the statute makes the crown visitor, the jurisdiction (without a special provision empowering the Queen's Bench will go to the great seal in general, the recital of the act throwing considerable doubt upon the above case of R. v. Bp. of Chester, 2 Stra. 797; S. C. 1 W. Bla. 86; vid. 4 T. R. 244; 2 W. Bla. 1287, per Blackstone, J.

This devolution only results to the crown where the statutes do not otherwise dispose of the visitatorial power in case of a vacancy; 2 T. R. 309.

(b) Magdalen Coll. case, 11 Rep. 77 a; Co. Litt. 99 a; Vin. Abr. Incidents, B., pl. 11; per Doddridge, J., W. Jo., 123.

(c) Englefield's case, 7 Rep. 13, A.; S. C. Moor. 322.

(d) Bro. Abr. Corodies, 5; Vin. Abr. Escheat, C., pl. 1.

(e) Yearb. 5 Edw. 4, fol. 118 (Longo Quinto); 16 Vin. Abr. 565.

(f) Abbot de Lyra's case (cited), 10 Rep. 33; per Holt, C. J., 2 T. R. 352; Att.-Gen. v. Butler, Skin. 645. 482, 500.

(g) Att.-Gen. v. Master, &c., of Brentwood School, 3 B. & Ad. 59; vid. Atkins v. Montague, 1 Cas. Chanc. 214; S. C. 1 Ves. sen. 80; Att.-Gen. v. Wycliffe, 1 Ves. 48; 3 Atk. 576.

(h) Att.-Gen. v. Dulwich, Coll. 4 Beav. 55; Att.-Gen. v. D. of Newcastle, 5 Beav. 312; S. C. 12 Cla. & F. 402.

(i) 1 Roll. Abr. 513; 12 Rep. 120; Att.-Gen. v. Davy, 2 Atk. 212.

never to have been questioned; thus the fellows, or the master and fellows, are the body in whose hands the right of election into the corporation is for the most part placed; although the corporation, in fact, consists of the master, fellows, and scholars; thus excluding the latter body from a voice in the transaction.

When a visitor is duly appointed, his power, on the one hand, is confined to enforcing obedience to the statutes of the corporation and the general maintenance of order; but he may do every act necessary for the full accomplishment of these objects, only he cannot take cognizance of offences which are such by virtue of acts of parliament or [*532] *the provisions of the common law, independently of the college statutes.^(k) Part of his ordinary duty, therefore (unless restrained by the provisions of the statutes,) is to decide upon the validity of elections, and, if necessary, to declare them void;^(l) but it does not follow as a right incident to the office of visitor in general, that when an election is void, or even when two successive elections are each void, he should appoint to the vacant place or office.^(m) Nor does it follow, that when the time has been suffered to elapse within which the college ought to have appointed to the office, the appointment devolves upon him,⁽ⁿ⁾ not even where the crown is visitor.⁽ⁿ⁾ To control the execution of the trusts with respect to estates devised to the corporation in trust, is not within the scope of the visitatorial power, either generally or when the devise has been made subsequent to the foundation of the college,^(o) and he has no power whatever to compel the specific performance by the

(k) *R. v. John's Coll., Cambridge*, 4 Mod. 233; *S. C. Skin.* 368; *Com. Dig. Visitor, D.* Where a visitor has proceeded to amove or deprive a corporator whose place is a freehold, such person may try the legality of the act in some cases, in ejectment against his successor; *R. v. Bp. of Chester*, 1 Wils. 209.

A visitor cannot compel the execution of a common law trust vested in the college, ex. gra. to present their senior fellow to a particular living; *Green v. Rutherford*, 1 Ves. 471; *R. v. Bp. of Ely*, 1 W. Bla. 85, 86. His jurisdiction is forum domesticum, of which the common law does not take notice; *Cas. T. Hardw.* 218; 2 Q. B. 36, 37; *vid. inf. n. (g)*.

(l) *Att.-Gen. v. Black*, 11 Ves. 193. As to majority in elections in colleges, *vid.* 33 Hen. 8, c. 27, set out, *sup. p.* 74. Abuses in elections of scholars, fellows, &c., 31 Eliz. c. 6. Cases bearing on the former stat. are *Dyer*, 247, A.; *Case of New Coll., Oxford*; *Case of Queen's Coll., Cambridge*, *Jac. R.* 47; 5 Russ. 65; *Re Clare Hall*, 5 Russ. 73; *Re Caius Coll.*, 5 Russ. 76; *Re Catherine Hall*, 5 Russ. 85; *vid.* 1 B. & P. 229; 2 Atk. 212; 3 T. R. 595; *Steers v. Butt, Finch, R.* 78.

(m) *Att.-Gen. v. Black*, 11 Ves. 193; *R. v. Bp. of Ely*, 2 T. R. 338. The founder ought to be careful to mould his statutes so as to give the visitor the power of carrying them into effect. The courts will not interfere for that purpose; *Att.-Gen. v. Middleton*, 2 Ves. sen. 330.

(n) *Case of Queen's Coll., Cambridge*, 1 Jac. 32. Nor where the course of election is to nominate and return to the visitor two persons, of whom the visitor is to elect one, does it follow that he has power, in case of a void return, to appoint to the vacant office, *R. v. Bp. of Ely*, 2 T. R. 338, 343; and a mandamus will issue to compel him to appoint one of two persons properly returned to him, *S. C.*; and though both persons were unqualified, it seems he must name one of them; and could not appoint a person *de novo*; even though it might be his duty to deprive such person immediately as being unqualified; *Att.-Gen. v. Clare Hall*, 3 Atk. 662; 2 T. R. 316.

(o) *Green v. Rutherford*, 1 Ves. sen. 462. The college is compellable in chancery, like a private person, to execute a trust, *S. C.*; *vid. Mitf. Chanc. Plead.* 225, 226.

college of a contract between the college, as a corporation, and a third party. The proper remedy in such case is an application to the Queen's Bench for a mandamus.(p) But where there is a visitor, the Court of Queen's Bench will not in general interfere as to matters within the scope of his authority; though where he ought to visit, and refuses, they may call upon him by mandamus to hear and form *some* judgment on, though not to go into the *whole* of the merits of, a matter which is properly within his duty and competence to decide.(q) So it is a general [*533] principle *that the Court of Chancery will not interfere with the exercise of a visitor's power over matters properly within his jurisdiction and cognizance.(r) But if the visitor abuses his authority, the Court of Chancery, in the case of a charitable foundation, will either interfere upon an information, or will issue a commission (it is said.)(s) The latter power, however, is now hardly ever exercised; and, generally, where the governors or visitors of a charitable foundation are trustees for the charity, and are found to be making a fraudulent use of their powers, the Court of Chancery interferes on information, and there are cases which seem to extend the stat. 13 Eliz. c. 4, to this point;(t) so that though the founder have left directions in his will vesting the sole government and management of the charity in the visitors, nevertheless the Court of Chancery will exercise jurisdiction and control, where such visitors are *also* trustees of the charity estates;(u) for that court is not necessarily disabled from interfering by the fact that the case is not one for a commission,(x) the jurisdiction of the court, in cases of charities, being independent of the statute of Elizabeth.(y) But the case of the interference of chancery with visitors in the way just mentioned, is said to be *only* where both the legal estate and the receipt of the rents, &c., are vested in the visitors.(z)

(p) *R. v. Windham*, Cowp. 378. So not within jurisdiction of a visitor to compel the corporation to affix the common seal to an instrument at the instance of a stranger; *S. C.*; *Reg. v. Kendall*, 1 Q. B. 377, 378; nor to compel the head to set the seal to an answer in chancery, Cowp. 377; nor to a lease, 3 Burr. 1663.

(q) *R. v. Bp. of Lincoln*, 2 T. R. 338, n.; *R. v. Bp. of Ely*, 5 T. R. 475; *Sherlock's case*, cited 1 Wils. 208; *vid.* 5 Mod. 404; 4 M. & Selw. 415. Sometimes, when it did not appear whether there was a visitor or not, the court has granted a rule to show cause why a mandamus should not go; 1 Wils. 209; *vid.* tam. 1 Wils. 266. The courts of Westminster do not take notice that a college has a visitor; the fact must be returned to a mandamus or pleaded, *Cas. Temp. Hardw.* 218; and that whether the crown or a subject be visitor, *S. C.* *vid.* 1 Stra. 566; *R. v. St. John's Coll. Oxon*, Comber. 238.

(r) *Att.-Gen. v. Smythies*, 2 My. & C. 142. Therefore, it is a good plea in equity to an information charging an undue election to a fellowship, that by the statutes all controversies on elections are to be decided by the visitor averring the extent of his authority, and that he has power to do justice in the premises; *Mitf. Chanc. Plead.* 225; 3 Atk. 662.

(s) *Hynshaw v. Mayor, &c., of Morpeth*, Duke, *Charit. Uses*, 69; confirmed, *Eden v. Foster*, 2 P. Wms. 325, as regards the principle that giving the governors the legal estate, together with receipt of the rents and profits, does not make them visitors of itself, and that in such case the Great Seal visits.

(t) *Per Lord Eldon, C.*, 15 Ves. 314; *vid.* cases cited note, *Coop. Chanc. R.* 34; 2 Ves. 551; 3 Atk. 108.

(u) *Att.-Gen. v. Lubbock*, *Coop. Chanc. R.* 15.

(x) *Att.-Gen. v. Dixie*, 13 Ves. 519. 533. 539.

(y) *Coop. Chanc. R.* 35, n.; *per* Sir E. Sugden, *Chanc. Irel.* 1 Dru. & War. 258. 307. 331.

(z) *Att.-Gen. v. Middleton*, 2 Ves. sen. 328.

It is a general rule, that when a complaint is made to the visitor in respect of a matter within his jurisdiction by a party having the right to put in motion the visitatorial functions (i. e. in general a member of the corporation, for generally visitors cannot entertain complaints by strangers), he is bound to receive and entertain the investigation of it, and to adjudicate in some way either on the subject itself, or on the evidence adduced before him,^(a) provided it be not in his judgment wholly frivolous and idle. The rule that a stranger to the corporation cannot appeal to the visitor extends to persons who (ex. gra. fellow-commoners) are not admitted members of the foundation, but merely boarders, having their names on the college books for the purposes of *study, &c.,^(b) though subject to the discipline of the body. In all cases the [*534] complaint must be made in writing;^(c) and where the crown is visitor, the complaint is to be preferred, by way of petition, to the Great Seal.

The principle is clearly settled, that the same person cannot in general be the visitor and the visited. A visitor cannot visit himself without express words in the statutes.^(d)

If the visitor proceed without any jurisdiction at all, or transgress the bounds laid down in the college statutes to restrain his power, he is liable, it is laid down, to an action at the suit of an injured party;^(e) and he will be prohibited by the courts at Westminster.^(e) If there be a doubt whether the visitatorial power resides in A. B. or the crown, the proper mode of trying the question appears to be for A. B. to proceed to visit, when the attorney-general may move for a prohibition, on which the matter may be fully gone into and tried by a jury;^(f) but where the dispute was which of two subjects was visitor in right of office, and it appeared that the predecessors of the one had exercised the jurisdiction, but the predecessors of the other were not shown to have done so, a prohibition was denied, the court saying, that though long usage will not give a right, it is strong evidence of right.^(g)

Such are the restrictions within which only a visitor can act; but, on the other hand, the decision of a founder's visitor on a matter within the scope of his jurisdiction is perfectly final and irreversable by any other

(a) Com. Dig. Visitor, C.; Litt. s. 136; Co. Litt. 96 a; R. v. Bp. of Lincoln, 2 T. R. 338, n.; vid. sup. p. 532.

(b) Ex parte Davison, Cowp. 319; R. v. Grondon, Cowp. 315. 321; 2 T. R. 333; per Holt, O. J., R. v. President, &c., of St. John's Coll. Oxon, Comberb. 238.

(c) R. v. Bp. of Chester, Stra. 797; Green v. Rutherford, 1 Ves. 471; per Buller, J., R. v. Bp. of Ely, 2 T. R. 339; Att.-Gen. v. Middleton, 2 Ves. 327. This must equally apply where a corporation aggregate is visitor, as in case of the Irish Society, of which the corporation of London is visitor; id.; Skinners' Co. v. Irish Society, 12 C. & F. 425. Costs of visitation where a corporation is visitor, Att.-Gen. v. Skinners' Co., 2 Russ. 418.

(d) Gwynne v. Poole, 2 Lutw. 1566, per Powell, J.; vid. 1 Ves. sen. 470; 21 Vin. Abr. 588, pl. 5; Master, &c., of St. John's Coll. Cambridge v. Todington, 1 Burr. 199; Eden v. Foster, 2 P. Wms. 325.

(e) Bp. of Ely v. Bentley, 2 Bro. P. C. 220; Master, &c., of St. John's Coll. Cambridge v. Todington, 1 Burr. 193. 199. The act must probably be shown to have been done maliciously and without probable cause; vid. Gwynne v. Poole, 2 Lutw. 1566.

(f) R. v. Bp. of Ely, 1 Wils. 266. 268.

(g) Martin v. Abp. of Canterbury, Burn, Eccles. Law, tit. Colleges, cited 4 T. R. 238.

judicature or body in the realm, unless it be by parliament.^(h) From the sentence of one who visits, not as representing the founder, but quā ordinary, there is an appeal to the⁽ⁱ⁾ king in chancery; but in the former case there is no appeal from the visitor's decision, unless the founder hath thought fit to make one.^(k)

[*535] *A visitor is not bound, in taking an inquiry, or conducting an investigation, or adjudicating, to pursue any particular forms^(l) either of the common law or otherwise.^(l) He may inquire, either personally or (when the founder so appoints, as is usually the case,) by commission.^(m) Nor is he liable to prohibition from the superior courts at Westminster for irregularity in his proceedings, but only for proceeding without jurisdiction;⁽ⁿ⁾ for where there is jurisdiction, the manner of exercising it affords no ground for prohibition;^(o) but where a visitor has passed a sentence in excess of his jurisdiction, the Court of Queen's Bench will prohibit the execution of the sentence, or (if, indeed, such sentence is not wholly void,) may, perhaps, enjoin the revocation of it.^(p) He may proceed to inquire and determine upon a grievance arising in the time of his predecessor,^(q) and in all cases he may proceed to examine upon oath, and also require the complaint and answer to be in writing, subject to the statutes.^(r)

Whether on a general or ex officio visitation at one of the periods for visitation prescribed by the founder, or on hearing a particular appeal from some member of the college who considers himself aggrieved by a

(h) Com. Dig. Visitor, B.; *Phillips v. Bury*, 2 T. R. 353, 354; *Allen v. Nash*, 1 W. Jones, 393. "The jurisdiction is in its nature very peculiar. It is a despotism uncontrolled and without appeal; the only one of the kind which is known to this kingdom; per Lord Camden, C., in *Shipley's case*; vid. 5 Lord Campbell's *Lives of the Chancellors*, c. 148, App.; et vid. T. Jones, 75; 1 Wils. 206; *Stra.* 798; *Cas. Temp. Hardw.* 218, 219; *Burr.* 200; *Cowp.* 322; 4 Inst. 340. The reason is, that in these societies, error of judgment, the chance of partiality or injustice, is a less evil than the duration of contention; *Master, &c., of St. John's Coll. v. Todington*, 1 *Burr.* 199.

(i) *Phillips v. Bury*, 2 T. R. 353; 8 Assis. pl. 29. 31; vid. *Coveney's case*, *Dyer*, 209, A.; 2 Ayliffe, *Hist. Oxf.* 84. 86; 11 Rep. 99, B.; Assis. 8 Edw. 3, pl. 29.

(k) *Phillips v. Bury*, 2 T. R. 353. Still a sentence of deprivation by a visitor may indirectly be reviewed in the superior courts, as was in effect done in that case in an ejectment brought upon a lease granted by the deprived person's successor; vid. 1 Wils. 209.

(l) *Bp. of Ely, v. Bentley*, 2 Bro. P. C. 220; per Buller, J., 2 T. R. 338; *Case of Queen's Coll. Cambridge*, 1 Jac. 19.

(m) *In re The Dean of York*, 2 Q. B. 1; (*Phillips v. Bury*, 2 T. R. 346). A rule for a prohibition ought to call upon the visitor as well as the commissary to show cause, &c.; 2 Q. B. 1. As to the mode of framing a commission to a commissary to visit, vid. observations of the court, S. C. 42, note B.

(n) *Bp. of Ely v. Bentley*, 2 Bro. P. C. 220. So 1 *Burr.* 193, where there is a dispute who has the right to visit, and one of the two has long usage in favour of his right, a prohibition to him to visit will be refused; *Martin v. Abp. of Canterbury*, 1 *Burn*, *Ecc. Law*, tit. Colleges; 4 T. R. 238.

(o) *Bp. of Kildare v. Abp. of Dublin*, 2 Bro. P. C. 179, explained *In re The Dean of York*, 2 Q. B. 37, 38.

(p) 2 Q. B. 40.

(q) Com. Dig. Visitor, A. 15; 4 Inst. 340. What does not amount to a visitation ex officio, 2 T. R. 348, 349.

(r) Com. Dig. Visitor, C.; vid. tam. *R. v. Gray's Inn*, *Dougl.* 342, semb. that a visitor cannot examine upon oath. It was done in *Phillips v. Bury*, 1 *Ld. Raym.* 5. He may take viva voce evidence; 2 Q. B. 15.

decision of the body from which he appeals, the visitor is to conduct the inquiry summarie, simpliciter, et de plano, sine strepitu aut figurâ iudicii, i. e. according to reason and justice,^(s) observing always, however, any forms prescribed by the statutes of the foundation. But if the visitor, having certain regular periods ascertained and prescribed in the statutes at which he is to make his *ex officio* visitations, pretends to visit (not being thereto requested by any party entitled to call upon him to interfere), at any other time or times, such visitations are wholly void, and anything done at them is of none effect, as being done *coram non iudice*; *ex. gra.*, if the visitor, being required and empowered by the statutes to visit once in five years, makes his quinquennial visitation, and then, of his own mere motion, visits again *before the five years have elapsed, [*536] such second visitation is a mere nullity.^(t)

A visitor having appointed to hold his visitation in the college hall or chapel, has a right of entry therein for such purpose; and the college, by forcibly excluding or preventing him from entering, cannot render ineffectual the visitation;^(u) for to admit that, would be to allow them to profit by their own contumacy and breach of the statutes, which they are sworn to observe according to the will and intention of their founder; for, in general, it is inseparably incident to their places that the members of the college should submit to the visitation.^(x)

The visitor, although not bound to any precise rules of procedure, ought nevertheless, unless expressly dispensed from so doing by the statutes, to proceed by process of some kind; probably by citation, and exhibiting articles, and hearing the party accused.^(y) As has been before observed, his jurisdiction does not extend to give his cognizance over disputes between the corporation and strangers, nor to disputes between any member or number of members and a stranger.^(z)

(s) 2 Ayl. Hist. Oxf. 95; 2 Q. B. 34; Com. Dig. Visitor, C. There *need* be no information or complaint by a member to enable the visitor to proceed on an *ex officio* visitation; he *may* proceed even to deprivation wherever he sees cause, 2 T. R. 358; or he may proceed upon complaint then made; 1 W. Bla. 85.

(t) Phillips v. Bury, 2 T. R. 348; et vid. per Lee, C. J., 1 W. Bla. 56; 2 Gibs. Cod. 958, n. (c), 2nd edit.; Com. Dig. Visitor, A. 15.

(u) 2 T. R. 349; vid. 3 Q. B. 37.

(x) 2 T. R. 357; Walker's case, Cas. Temp. Hardw. 218; Green v. Rutherford, 1 Ves. 472. Where, as is sometimes the case a separate visitor is appointed by the founder to visit the head of the college, and the visitor proceeds to visit, it is no excuse for the head that the acts complained of were done by him in conjunction with the rest of the corporation, and were corporate acts; Bentley v. Bp. of Ely, Fitzg. 307.

(y) 2 Stra. 912; R. v. Bp. of Ely, 2 T. R. 336; 2 Q. B. 27. 34; Cas. Temp. Hardw. 213, 214; R. v. Bp. of Ely, 2 T. R. 290; 1 Stra. 567; Doe d. Earl of Thanet v. Gartham, 8 J. B. Moore, 368; vid. R. v. Gaskin, 8 T. R. 109; Ex parte Kinning, 4 C. B. 512; 2 Vern. 396; 3 Moo. P. C. Cas. 37, n.; 15 East, 130. The court of a visitor has power to suspend or adjourn the proceedings at discretion; 2 Q. B. 39. But in pleading an expulsion or deprivation by a visitor, it is not necessary to state the above forms; vid. sup. p. 535. Nor is it necessary in pleading to aver matters by way of explanation in what his power consists, for the *term* visitor is known to the law; Cas of All Souls' College, Skin. 13; vid. tam. R. v. Bland, cited 1 Ves. sen. 466, 467. But the fact of there being a visitor must be stated on a return to a mandamus; to state it in an affidavit does not suffice; R. v. Whaley, Stra. 1139; sup. 532, n. (k), 533, n. (q).

(z) R. v. Windham, Cowp. 378; R. v. Grundon, Cowp. 319; Davison's case, cited id. 319.

The visitor, whether the great seal acting for the crown, or the person appointed by the founder to visit, appears to have the power of deciding the question of the costs of the petition or appeal; (a) and where a visitor incurs expenses, it appears that he will be entitled to charge them on the college; (b) and on one occasion of a case, where a sum allowed to the visitor by the foundation deed was so small as not to induce him to exercise the visitatorial power, Lord Hardwicke intimated that it might be augmented. (c)

Also, in practice (it has been said) the power of a visitor is perfectly uncontrolled, of removal, new appointment, variation, and alteration. (d) [*537] *However, a doubt had been previously intimated, whether in case of a freehold office a visitor has a general power to appoint. (e) That he may remove, expel, or deprive a member of the corporation, is perfectly settled. (f) But though a power of amotion is incidental to the office of a general visitor, appointed by the founder without any restrictions on his power, yet, on the other hand, a grant by a founder to a corporate body, that they should have the power to amove the wardens, &c., of a hospital, does not constitute them founder's visitor. (g) A power of suspension from office follows of course from a power of deprivation, because *cui licet quod est majus, quod minus est magis licet*, and because it is equally necessary to the execution of the office, by providing the visitor with a variable measure of punishment, which may easily be so adjusted as to meet every kind and species of delinquency below such as require the extreme penalty of deprivation or amotion from office. (h) The effect of suspension from a fellowship or other office in any of these

(a) Case of Queen's College, Cambridge, 1 Jac. 47, where the crown visited, and the costs were ordered to be paid out of the college funds, *vid.* Jac. 401, 402; 2 Swanst. 532; Wilm. Notes, 163. As to taxing costs before a visitor, *Ex parte Dunn*, 9 Ves. 547; *Spencer v. All Souls' College*, Oxon, Wilm. Notes, 163.

(b) *Att.-Gen. v. Dean, &c., of Christ's Church*, Oxon, Jac. 487.

(c) *Att.-Gen. v. Price*, 3 Atk. 108.

(d) *Per Lord Brougham, C., in Att.-Gen. v. Abp. of York*, 2 Russ. & My. 468. So *per Holt, C. J.*, 2 T. R. 349. 353; as to amotion, *vid.* 2 Q. B. 36; *per Lord Hardwicke, C. J.*, *Cas. T. Hardw.* 219; *per Gould, J.* 1 Ld. Raym. 543; *per Lord Mansfield, C. J.*, 1 Burr. 200; but Lord Mansfield strongly doubted whether visitor can repeal or alter statutes, without an express power given by the founder, 1 Burr. 201; *vid.* 1 W. Bla. 26; 2 Show. 170. Therefore in pleading any of these acts, the cause need not be stated, for it is not traversable; *Kenn's case*, 7 Rep. 42; *Rast. Entr.* 1; *Phillips v. Bury*, 2 T. R. 354. So on return to a mandamus; 2 T. R. 356; *Yearb.* 9 Edw. 4, fol. 24, pl. 31; *Appleford's case*, 1 Mod. 82.

(e) *Per Lord Eldon, C., Att.-Gen. v. Black*, 11 Ves. 193. It is no objection to a deprivation that the visitor has by the statutes the power of appointment on a vacancy; *R. v. Bp. of Chester*, 1 Wils. 206; *Lib. Ass.* 8; *Ass.* 29. 31; *vid.* 2 Ves. 327; 3 Atk. 164.

(f) *Lib. Assis.* 8 *Assis.* pl. 29. 31; *Phillips v. Bury*, 2 T. R. 346. 349; 2 Q. B. 36; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491; *Case of President of Magdalen College, Oxford*, cited 13 Rep. 70. Contumacy when good cause of deprivation; 2 T. R. 357, 358; 2 Q. B. 36. The Court of Chancery disclaims all power of interference in a case of deprivation by a visitor acting within the statutes of the foundation; *Att.-Gen. v. Master of Berkhamstead Grammar School*, 1 V. & B. 134.

(g) *Case of Kirkby Ravensworth School*, 8 East, 221; *R. v. Bp. of Worcester*, 4 M. & Selw. 420. In pleading the amotion of the head, it is not necessary for the college to state how he was amoved; *Yearb.* 5 Edw. 4, fol. 70, B.

(h) *Com. Dig. Visitor, C.*; 4 Mod. 110; *Show. Parl. Cas.* 43; *vid.* instance of suspension, and subsequent deprivation, of a head, *Skin.* 645.

bodies, is not to vacate the office, but only to prevent the individual from enjoying any benefit from the office; he may still discharge the office in any matters disconnected from the receipt of advantages from it; so that a suspended fellow, as it seems, may still vote at an election, or on any other occasion, subject to the above limitation; and if the suspended person be the head of the college, he may, during such suspension, put the college seal to a lease, or join with the rest of the corporation in maintaining an action, for the headship is not vacant so as to make it an answer to such action, that the corporation was in an imperfect state, in which it could do no other act than elect some one to the headship.⁽ⁱ⁾ The suspended person, on being declared innocent of a supposed offence for which he was suspended, and the suspension being removed, is entitled to the intermediate profits of the office.^(k)

It is to be observed, that in general, indeed always, in the absence of *special provisions in the statutes, and except where estates have been accepted by the college appropriated and belonging to particular offices, neither the head nor the fellows, nor any other member of a college, has any title to the revenues of the college, or any part of them, in his own right; his right to any specific share of the revenues does not arise until the amount of such share is ascertained upon the division of the revenues, which is made at stated periods by the college, so that the head or fellow of a college has not a sole seisin in his office, and therefore could not have maintained an assize for it.^(l) And so in trading and all other corporations, the law is that no corporator has any seisin in the real estate of the corporation, or any right in respect of it; the entire fee is in the body politic.^(m)

The effect of expulsion by the college of one of its members is, that the sentence is conclusive as long as it is not appealed from, and may be given in evidence to justify the corporation in removing the expelled person from the precincts of the college.⁽ⁿ⁾ From what has been stated to this effect, it appears that the visitor is to determine finally all questions of elections, all disputes respecting the internal management and discipline of the collegiate body; it follows that the Court of Queen's Bench in

(i) Vid. 2 T. R. 351.

(k) *Johnstone v. Sutton*, 1 T. R. 525, 526. The profits of a fellowship may be assigned in equity; *Feistell v. King's College, Cambridge*, 10 Bear. 491. Whether he may let his rooms in college, is a question for the visitor; *Att.-Gen. v. Stephens*, 1 At. 360.

(l) *Phillips v. Bury*, 2 T. R. 355; *Young v. Lynch, Saye*, 84; per *Littledale, J.*, 7 B. & C. 166. In pleading seisin in the master fellows, &c., (the corporate name), it need not be said they were seised jury collegii, for that shall be intended; *Fulmerston v. Stuard, Dyer*, 103, A.; *Com. Dig. Pleader, E. 22*.

(m) *Ex parte Lancaster Canal Company, Mont. & Bli.* 94; *S. C.* 1 Deac. & Ch. 411; *vid. Acc. per Maule, J.*, 7 M. & Gra. 210.

(n) *R. v. Grundon*, Cowp. 315, 316. Therefore an indictment or action for the expulsion in such case cannot be maintained; *S. C.* In pleading expulsion or deprivation by a visitor, it is not necessary to state a citation, or hearing the party; *Rast. Entr.* 1; *Trem. P. C.* 479, 484; 2 T. R. 322; 8 Assis. pl. 31. Expulsion is generally in practice a question for the college to determine, subject to the interposition of the visitor; on the other hand they have unlimited power over admission to the college, for there is no general right of admission to a college in either university; *Wooller's case*, per *Littledale and Holroyd, JJ.*, 4 B. & C. 855.

general cannot interfere to reinstate a person who has been removed from a college office, or from membership of the corporation. Therefore, in general, a mandamus cannot be had to restore a fellow to his fellowship ;(*o*) though in the vacancy of the visitor's office, it is said that the court has granted a mandamus ;(*p*) and there appears to be a very old instance of a mandamus having issued to restore to a fellowship ;(*q*) But it has been repeatedly decided that the visitor is the proper tribunal to appeal to in all cases, whether of amotion from, or refusal to admit to, offices, fellowships, &c., *in a college in the Universities,(*r*) or of an irregular [539] and void election to a fellowship, ex. gra., a stranger, where one of founder's kin was eligible ;(*s*) and where the proper candidate for a close fellowship has been improperly rejected by the corporation, the visitor may send him back to be examined before them again ; or if, from a misapprehension, the candidate did not present himself for examination at the proper time, still they may be called upon to examine him.(*t*) Accordingly, an information in the nature of a quo warranto, was refused to try the right to a fellowship in a college ; although the college was apparently without a visitor, as the founder's heir (the proper visitor) could not be found.(*u*) It has already been noticed, that in such a case the Court of Chancery will direct an inquiry before the Master to discover the heir,(*x*) and if he cannot be found, the visitorship results to the crown, to be exercised by the great seal. Nor could an ejectment be brought to try the right to the mastership of a college, because there would be nobody to make the demise to John Doe. Where, however, a college refuses a copy of their statutes to a claimant to be admitted a fellow, a bill of discovery will be held to lie to compel them.(*y*) To an information in

(*o*) Com. Dig. Visitor, A. 15 ; Parkinson's case, Carth. 92 ; Prohurst's case, Carth. 168 ; Walker's case, Cas. T. Hardw. 218 ; R. v. All Soul's College, Oxon, T. Jones, 175 ; Broadnox's case, 1 Wils. 209 ; R. v. New College, 2 Lev. 14 ; vid. 2 Keb. 861. 102. So where college, as visitor, had removed from a mastership in a school, mandamus to restore was refused ; Protector v. Craford, Styl. 457 ; vid. Whiston v. Dean and Chapter of Rochester, 18 Law J. (N. S.) Chanc. 478, that a bill in Chancery will also be dismissed in a like case, et vid. Stamp's case, 1 Sid. 40.

(*p*) Herne's case, cited T. Raym. 112 ; vid. tam. S. C. 1 Keb. 234 ; 4 T. R. 235. It seems that when a rule for a mandamus has been granted, the court will not supersede the writ of affidavit that there is a visitor, but will put the college to make return, on the ground that the complainant had no opportunity to right himself by action ; R. v. Whaley, Stra. 1139 ; S. C. Serjeant Hill's MS. 2 Selw. N. P. 1016, 4th edit. ; vid. 1 Ves. sen. 470. (*q*) Temp. Edw. 2, 1 Levinz, 23.

(*r*) Com. Dig. Visitor, A. 15 ; R. v. Warden of All Soul's, Oxon, T. Jones, 175 ; S. C. 2 Show. 170 ; Waddington's case, T. Raym. 31 ; vid. Burn. Eccles. L. tit. Colleges. So mandamus refused to declare a fellowship vacant, and proceed to a new election ; R. v. Master, &c., of Catherine Hall, Cambridge, 4 T. R. 233.

(*s*) Spencer v. Warden of All Souls', Oxon ; Wilm. Notes, 163, where "founder's kin" used absolutely, and without qualification in the statutes was determined to mean all his blood ad infinitum. "Shall and may" means "must," in college statutes, 3 Atk. 164. See further as to construction of college statutes, 17 Law J. (N. S.) Chanc. 298 ; S. C. 2 Phill. 521.

(*t*) Ex parte Inge, 2 Russ. & M. 590. As to interpretation of college statutes on a question of close fellowship, In re University College, Oxford, 2 Phill. 521.

(*u*) R. v. Gregory, 4 T. R. 241 ; and vid. R. v. Master, &c., of Catherine Hall, Cambridge, 4 T. R. 244 ; Mariott v. Gregory, Lofft, 21.

(*x*) Sup. p. 531, note (*a*).

(*y*) R. v. Abp. of Canterbury, Ridgw. Cas. T. Hardw. ; S. C. 2 Barnard. Chanc. 437 ; vid. sup. p. 293, n. (*b*) ; sup. p. 527.

equity for relief against an undue election to a fellowship, it is a sufficient plea that there is a visitor who has the sole determination of such matters.^(z) On the other hand, if an act of parliament makes it imperative on all fellows of colleges, &c., to take certain oaths, &c., and a fellow refuses to do so, then (the statute stating that any one so refusing shall be disqualified to retain his fellowship, or to become a fellow,) a mandamus will issue commanding the society to amove him;^(a) and the reason is, that this is a matter of public policy, depending on the construction of acts of parliament and the general law of the realm, and therefore beyond the competence of a visitor to adjudicate. The courts will incline to construe liberally acts of parliament made in favour of colleges.^(b)

The Act of Uniformity makes it incumbent on every head of a college *to subscribe the declaration mentioned therein *at his admission*; [^{*540}] that means, as soon as is in his power after his admission; and the effect of the elected person neglecting to do so, is to make the office void without any declaration or judicial sentence, and therefore the corporation ought immediately to proceed to a new election.^(c)

Where a writ of mandamus was directed to the master, fellows, and scholars of — college, naming the Master John Goaz, it was held that the return need not be under the college seal, but was sufficient after being filed, if indorsed *Responsio Johannis Goaz, &c.*; for after filing, the college are estopped to say it is not their return.^(d)

Where the crown visits as founder, or as founder's heir, (whether directly or as *ultimus hæres*,) it is through the great seal, and the mode of proceeding on the part of any one who is desirous to obtain the interposition of the visitor, is by petition to the great seal, and not by bill or information in equity.^(e) So it is where a private person endows a royal foundation, but amounts to appoint a special visitor, the king is visitor, and exercises the visitatorial functions by the same medium.^(f)

A singular case of visitation is presented in the institution called St. Katharine's Hospital, Regent's Park, London, where the visitatorial power is ambulatory, being vested primarily in the Queens of England; but the right remains in a queen dowager, and when there is no queen consort or queen dowager, reverts to the crown.^(g)

(z) *Att.-Gen. v. Talbot*, 3 Atk. 662; 1 Ves. 78.

(a) *R. v. Master, &c., of Trinity College, Cambridge*, cited Andr. 183; *vid.* 12 A. & E. 712. But the recusant must be made a party before a peremptory mandamus will go; *R. v. St. John's College, Skin.* 546. 549; 4 Mod. 233; *et vid.* stat. 1 Geo. 1, c. 13, s. 13; *et vid.* 5 & 6 Will. 4, c. 62, s. 8, giving the universities and all other bodies politic, legally entitled to impose oaths at the passing of the act, power to make bye-laws, &c., for substituting declarations in lieu of those oaths.

(b) *Pitts v. James*, Hob. 122, 123.

(c) *Cases of Queen's College, Cambridge*, Jac. 46; *vid.* 1 Burn, Eccles. L. 490, 491.

(d) *R. v. St. John's College, Cambridge*, Skin. 368, 369.

(e) *R. v. St. Catherine's Hall, Cambridge*, 4 T. R., 233; *vid.* 1 Jac. 35; Lord Mansfield's dictum in *R. v. Gregory*, 4 T. R. 241, note, to the effect that a college is not a charity, but a corporation, and therefore that the power of visitation was in the King's Bench, is fully overruled; 4 T. R. 244; *vid.* *Ex parte Wrangham*, 2 Ves. jun. 609. 617; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491. 498; *et vid.* 12 Cla. & F. 537; Co. Litt. 96 a; Fitz. N. B. 42.

Or the crown may appoint special commissioners to visit *pro hac vice*; Com. Dig. Visitor, A. 3; sup. 529, note (s).

(f) *Eden v. Foster*, 2 P. Wms. 326.

(g) *Att.-Gen. v. Butler*, Skin. 644; *Lord Brounker v. Montague*, Skin. 14; S. C. T. Jones, 169.

We shall now proceed to state some points more particularly characteristic of this class of corporate bodies.

With respect to the name of a college, minute accuracy will no longer be required to make good a grant or demise, or presentation to a church made by a college; and though some of the words in the name or appellation by which it was founded be omitted in the instrument, or equivalent words substituted, or additions given to the real name, none of these circumstances, nor all happening together, will invalidate it, provided that the essentials of the name are preserved, so that there can be no real doubt what is the college intended; for the established maxim in cases of corporations is *nihil facit error nominis dum de corpore constat.*^(h) Thus where a demise and presentation had been by the name of "The Provost of Queen's College, in the University of Oxford, and of the Fellows and Scholars of the same College," the *true name [*541] of foundation being "The Provost and Scholars of Queen's Hall, of Oxford," it was held that these differences were immaterial.^(h) The deed of foundation, the founder's statutes, royal confirmations of the charter of incorporation, the practice of the college itself, and usage, may be looked to for the determination of the true name.⁽ⁱ⁾

A college (the site of which is not extra-parochial) being seised in fee of lands to their own private use, are within the stat. 43 Eliz. c. 2, and rateable to the poor in their corporate capacity;^(k) for they are considered as inhabitants or occupiers;^(k) and an agreement by the parishioners that they should be exempt from the poor rate, though acted on for a century and a quarter, is no reason for not assessing them to the relief of the poor.^(l)

A college, like other corporations, does all important acts—and all acts that vest or divest an interest in or out of the body—by its common seal;^(m) and where the master refuses to affix the seal to an act of the majority, though the act was resolved upon contrary to the vote of the master (his concurrence not being necessary to the validity of the act,) a mandamus will go to compel him.⁽ⁿ⁾ But if it were shown in any case that to affix the college seal was clearly a matter within his discretion, the writ would not issue.^(o)

It has before been mentioned that the power of admission to a college depends absolutely upon the will of the collegiate body, the public not possessing any right of entering themselves on the books of a college;

(h) *Ayray's case*, 11 Rep. 18 b; *vid. Cro. Jac.* 248; *per Coke*, C. J., *Ayray v. Lovelas*, 1 Bulst. 91; *Croydon Hospital v. Farley*, 5 Taunt. 467.

(h) See preceding note.

(i) *Vid.* 11 Rep. 18 b, 20.

(k) *R. v. Gardner*, Cowp. 79. As to the manner in which colleges are rateable to the poor, *vid. Master, &c., of Downing College, Cambridge v. Purchas*, 3 B. & Ad. 162. As to rateability of colleges to the land tax, 3 Bos. & P. 635. As to property tax, 5 & 6 Vict. c. 35, ss. 40. 54. 60, 61, No. VI.; and 8 & 9 Vict. c. 4.

(l) *R. v. Ellis*, 2 Dowl. N. S. 631.

(m) A verdict finding a lease from a college, and entry by bailiff for condition broken, but does not find authority by deed to enter, is bad, *Com. Dig. Pleader*, s. 20; though it need not be pleaded that he had it, *Com. Dig. Pleader*, 2 B. 2.

(n) *R. v. Windham*, Cowp. 377; *vid.* 3 T. R. 594.

(o) *Vid. Ex parte Garrett*, 3 B. & Ad. 252; *et vid.* 3 A. & E. 429. 432; 4 A. & E. 297.

but this must not be understood to mean that each of these bodies may at pleasure add to the permanent body of its members. A college, which by its constitution is composed of a certain limited number of members, cannot, any more than any other corporation in such circumstances, make a permanent, or even a temporary addition to the specified number of its members; thus if by the constitution or statutes of the founder, the college is to consist of a certain body, as a master, so many fellows, and so many scholars, the college in general cannot add to such number in any of the branches; nor, strictly, can they diminish from the number, though the practice undoubtedly is not very rigid as to keeping each branch of the corporation always full of its proper number; and in fact one or more fellowships, or one or more scholarships, are very frequently allowed to remain vacant for considerable periods of time. In general, however, when the college consists of a *number of members defined and specified by the founder, no [542] addition can be made to that number, so as to put the new members exactly on the same footing with the old ones, except by a new charter, and a fresh incorporation, (which is the general rule applicable to all corporations alike;) but where the corporate number is indefinite, any corporation and colleges among the rest, may accept any addition to their members that they think proper.(p) The question then arises now, and with what limitations, can this be done? Now a college is not bound to accept an increase to its foundation,(q) nor is it bound to accept any other trust; but if it does accept such increase, it will be compelled in equity to adhere strictly to the terms of the trust; for it is a general rule, that a college or other corporation, will be compelled to perform a trust as a private person;(r) and where a college has accepted funds for the creation of new fellowships, or other additions to the original foundation, the visitatorial power over the new part of the foundation is co-extensive with that over the original foundation, except where the indenture of annexation, by which the college took the additional foundation, has expressly created a difference in respect of the visitation between the two foundations;(s) for the founder of the new fellowships might, if he

(p) Att.-Gen. v. Talbot, 3 Atk. 675; Anon., 12 Mod. 232. Definition and origin of colleges, Jenk. Cent. 229, pl. 77.

(q) R. v. Master, &c., of St. Catherine's Hall, 1 Jac. R. 381. A legacy "to educate servitors," refused by Trinity College, Cambridge; 5 Ves. 302. Nor has equity any power to force them to accept; Att.-Gen. v. Andrew, 3 Ves. jun. 633. 640. They may either accept or refuse, or suspend their determination, S. C.; but it may be a question whether, where the crown is visitor, they can accept without the consent of the crown; Jac. R. 400. What not an acceptance; Att.-Gen. v. Andrew, 3 Ves. 640. 646. Though a corporation is not bound to accept an accession to its endowments, it may accept it as a trust with qualifications; Att.-Gen. v. Drapers' Company, 6 Beav. 382. Where an arrangement has been made at the time of the acceptance, of which there is satisfactory evidence either from contemporaneous documents, or constant subsequent usage, the arrangement, even though not expedient, will not be disturbed; 2 Keen. 150.

(r) Att.-Gen. v. Caius College, Cambridge, 2 Keen. 10.

(s) Master, &c., of St. John's College, Cambridge v. Todington, 1 Burr. 195; Att.-Gen. v. Talbot, cited 1 Burr. 191; case of University College, Oxford, cited 1 Burr. 203. Where additional property is given to, and accepted by, a college, with regulations inconsistent with those by which the rest of the property of the college is governed, but no special visitor is appointed, the Court of Chancery will

had chosen, and the college had agreed to accept the gift on those terms, have granted fresh and peculiar statutes to the new foundation, which might be at variance with those of the old foundation; but of this there are said to be no instances known.(t) If such statutes, or any statutes of any other kind, were given by the new founder, and the college accepted the donation, they will be bound in the statutes in all respects, for they take the benefit cum onere(u) Where no particular [*543] statutes are given and accepted, making an alteration, the engrafted part always follows the original foundation, and is subject to the same discipline and judicature; and the founder of the additional fellowships, &c., will be presumed, in such case, to have been acquainted with the statutes of the college, and to have meant that his fellowships should be subject to the same statutes.(x)

Not only is a college, appointed by the charter to consist of a specified number, unable to add to its numbers, but even a founder cannot make an addition to his own foundation without a fresh grant from the crown. Thus where A., being empowered by the crown, founds and endows, and obtains letters-patent incorporating a certain number, and conveys the lands to them, but afterwards made statutes, by which, among other things, he added to the number of members, and appropriated to the new ones a portion of the revenues, it was held that A. had no power of creating additional members, or of declaring any trust of the property in their favour.(y)

Where the possession of an income of so much a year of private property is laid down in the college statutes as a qualification for an office in the college, it is not necessary that a candidate should produce his qualification at the election;(z) but in such case, unless the contrary appear from the statutes, real estate alone will satisfy the require-

interfere to compel the execution of the trusts; *Green v. Rutherford*, 1 Ves. sen. 461. 467. 472. As to the mode of enforcing as against the college the covenants in a deed of annexation, vid. 1 Burr. 158. 192. 202; 1 Ves. sen. 461. Probably an action on the case might be maintained by any one not a member, who was injured by the non-performance by the college of conditions on which they accepted the increase to the foundation; *Mayor, &c., of Lyme v. Henley*, 1 Scott, 29; *Brett v. Camberland*, Cro. Jac. 399. 521.

(t) 1 W. Bla. 77; vid. *St. John's College, Cambridge v. Platt, Finch*, R. 222. The Michel's Fellows, annexed to Queen's College, Oxford, have a different visitor from the old foundation; vid. Pref. to W. Bla. Rep. pp. xi. xii.; 1 W. Bla. 88.

(u) 1 Burr. 197; 1 W. Bla. 89; Jac. R. 392; *Att.-Gen. v. Andrew*, 3 Ves. 633; *Mayor, &c., of Lyme v. Henley*, 2 Cl. & F. 331; *Priestley v. Foulds*, 2 Scott, N. R. 205. 225. So where a founder instituted, and the University of Cambridge accepted, a lectureship, &c., on the terms that the person appointed lecturer should always be of a certain age, and this and other restrictions being found inconvenient, the University applied to have the regulations altered in equity, the Chancellor refused, though the founder's heir consented, and no one opposed the application; *Att.-Gen. v. Lady Margaret's and Regius Professors of Divinity, Cambridge*, 1 Vern. 55.

(x) *Ex parte Inge*, 2 Russ. & M. 590. Vid. a case where on construction of the indenture of annexation, it was held that the fellows under it were entitled to the same benefits as the other fellows; *Att.-Gen. v. Pembroke Hall, Cambridge*, 2 Sim. & Stu. 441.

(y) *Att.-Gen. v. Dulwich College*, 4 Beav. 255; vid. *Skin*. 513; *Andr*. 182.

(z) *Case of Queen's College*, Jac. R. 36.

ment, and the modern notions of equity will not be applied strictly in deciding what is such estate.(a)

Where a grant by the crown of an advowson or land is made to a particular functionary or officer of a college, ex. gra. the president or senior fellow, it seems such grant would operate to make him a corporation sole;(b) and devise of an advowson might be to the college in trust to present the senior divine, then being a fellow of the college, and it would be good, and the Court of Chancery would interfere to carry it into effect.(c)

Where there are cross presentations or nominations to a close fellowship of a college (that is, a fellowship which is held by the college on the terms that it is to be appointed to by the heir of the founder,) and rules for writs of mandamus to admit have been severally obtained by the alleged patrons, the Court of Queen's Bench will direct an issue to *try the right of nomination;(d) and in *such case*, when the right of nomination is ascertained by the trial and verdict, the [*544] rule will be made absolute for a mandamus to the college to admit the nominee of the successful party,(e) and the other party must pay him his costs of the application, of the trial, and of issuing the mandamus.(f) This case, it will be observed does not conflict with the general principle that a mandamus to admit to a fellowship will not go, the matter being of visitatorial cognizance and within the competence of the visitor to decide; for here the question is not on the merits of an election under the college statutes, but as to the right to a freehold depending upon questions of common law, which, as before observed, a visitor cannot in general entertain, and upon questions of fact extrinsic to the affairs of the college, which he cannot try, as he has no power to summon a jury. Where a bond is given to Dr. C. (the master,) fellows, and scholars, &c., solvendum, to the master, fellows, and scholars, &c., (the corporate name), in debt upon it, a plea that Dr. C. is dead, is no plea, because it appears by the record that the bond was given to the corporation.(g)

The master of a college giving an acquittance (without the college seal) for rent due to the college, does not bind the corporation; for alone he cannot divest any right of interest which resides in the whole body in their corporate capacity.(h)

(a) Ibid. 37.

(b) Dean, &c., of Christ Church case, 4 Leon. 190; vid. *Green v. Rutherford*, 1 Ves. sen. 473, and *University of Cambridge v. Crofts*, there cited.

(c) *Green v. Rutherford*, 1 Ves. sen. 462.

(d) *Reg. v. Master, &c., of Peterhouse, Cambridge*, 1 Q. B. 315. Form of issue, id. 316, note. As to evidence, id. 317, note. Vid. another case of election to a fellowship for natives of a certain town, in re *St. John's College, Cambridge*, 2 Russ. & M. 603; et vid. *Ex parte Inge*, id. 590.

(e) 1 Q. B. 315. Semb. a return to such a mandamus, stating particular facts, showing that the nominee was unfit, on the score of morals or discipline, to be a member, would be good; *R. v. St. John's College, Oxford*, 4 Mod. 368; *Holt, R.* 437.

(f) 1 Q. B. 315.

(g) *Master, &c., of Sidney College v. Davenport*, 1 Wils. 184.

(h) *Magdalen College case*, 11 Rep. 78.

By 18 Eliz. c. 6, upon leases made by colleges, a third part of the rent to be reserved in corn.⁽ⁱ⁾

Where the bailiff of a college made conuizance for rent granted unto them in fee by indenture, and on non concessit the jury found that the grantor granted the rent to them by deed, and delivered that deed to a stranger to their use, and they sealed the counter-part of the indenture, and the question was, whether a stranger, without letter of attorney from them to receive it, might receive the deed to their use, it was held by the court unanimously, that the sealing of the counterpart was sufficient to show that they accepted the grant, and that a power of attorney was not therefore necessary; and further, that if they had not sealed the counterpart, but had brought an action upon the indenture, that would have been a sufficient recognition of the grant, and would have made it perfect.^(k)

[*545] With respect to devises of property to colleges in the universities, it has, as it seems, been settled, that such devises are good, and will convey a *legal* and not merely an equitable title;^(l) and a devise to a college of a remainder is also good.^(m) The devise must, however, in all cases be for the benefit of the college, and not pass only a legal interest to the college, in trust for other charitable uses, or it will not be valid within stat. 9 Geo. 2, c. 36;⁽ⁿ⁾ and though it has been said that this principle relates only to such colleges as were in existence in the Universities at the time of the passing of that statute, *i. e.* A. D. 1736,⁽ⁿ⁾ yet subsequently the courts have held that both the old colleges and such as may have been established since the statute, are within it;^(o) also the principle applies to devises to either of the corporate bodies of the two universities, as well as to devises to colleges within them.^(p)

(i) 2 Bla. Com. 322; 6 T. R. 388, Burn's Eccles. Law, tit. Leases. This is a private act, and must be pleaded; 4 Rep. 76; 19 Vin. Abr. 499; 1 Leon. 306; Savil, 309.

(k) Cooper v. Goodrich, Cro. Eliz. 862. Qu. tam., as the taking the rent vested an interest in the corporation, whether it ought not to have been authorised by their seal; vid. Lyn v. Wynn, G. Bridgm. 150.

(l) 43 Eliz. c. 4; Dyer, 255, B.; Bennett College v. Bishop of London, 2 W. Bla. 1182; vid. Hob. 123. But on the decision in Bennett College v. Bishop of London, Sir Edw. Sugden, C. Irel., says, in The Incorporated Society in Dublin for promoting English Protestant Schools in Ireland v. Richards, 1 Dru. & War. 305, "I am not aware that this case has ever been followed. I must say it rests upon no solid foundation." Vid. tamen per Lord Loughborough, C., Att.-Gen. v. Bowyer, 3 Ves. 727; Att.-Gen. v. Mayor of Rye, 7 Taunt. 546; et vid. 2 Russ. 407; 1 Russ. 154; 2 Russ. & M. 107.

(m) Hood's case, Hob. 136; vid. Wilm. Notes, 13; Duke, Charit. U. 77, cas. 16; R. v. Newman, 1 Lev. 284; Hellam's case, Toth. 92; S. C. Duke, 80, pl. 23; Roll's case, Moor. 829; vid. 1 Vern. 161.

(n) Case of Christ College, Cambridge, 1 W. Bla. 92; vid. Dru. & War. 331, 332. But it seems that a devise to the then master and eight senior fellows of Trinity College Cambridge, and their heirs and assigns for ever, in trust for the vicar of C. and his successors for the time being, is good; Browne v. Ramsden, 8 Taunt. 559.

(o) Att.-Gen. v. Boyer, 3 Ves. jun. 728, note; Att.-Gen. v. Andrew, id. 633. A devise to Sir John College, though void at common law for misnomer, will be upheld in equity, as an appointment to a charitable use; Anon. 1 Cas. Chan. temp. Car. 2, 267.

(p) Att.-Gen. v. Downing, Wilm. Notes, 14; Duke, 171; Att.-Gen. v. Bowyer, 3 Ves. 728, note.

We have before shown, that devises to colleges must be for purposes consonant with the objects of the college, and not for ostentation or to serve the devisor's vanity. (q) A general devise to trustees for the use of a college will be carried into effect *cy pres*; (r) and it seems that a devise for the benefit of particular members of a college is also good, though not within the words of the stat. 9 Geo. 2, c. 36, s. 4. (s) As in the case of vacancies in all other corporations, a devise to a college during a vacancy of the headship is bad: and therefore the master cannot devise to a college. (t) But a devise to the fellows and demies of Magdalen College, Oxford, was held to be too loose and indefinite to be carried into effect; such a devise cannot be supported as a devise to the corporation for the benefit of part of its members. (u) An annuity charged on land may be devised to any of the devisor's name who should be fit to be a student and reside in a college (named in the will) with a power to the college to distrain for *the annuity, and a bill may be brought in chancery [*546] by a student to whom the annuity is due by the will, to recover it. (x)

By the stat. 9 Geo. 2, c. 36, intituled "An Act to restrain the Disposition of Lands whereby the same become unalienable," all colleges in the Universities were restrained from purchasing, acquiring, receiving, taking, holding, or enjoying any advowsons of ecclesiastical benefices, above the number equalling one moiety of the fellows under the then constitution of the college, but this is now repealed by stat. 45 Geo. 3, c. 101, so that the colleges are now subject to no restriction or limitation in this respect. It had been decided before the repealing statute, that a devise to a college to buy advowsons was good, although they had already the limited number of advowsons; for the devise, it was held, might be performed by means of exchanging advowsons. (y)

Some points respecting college leases have been decided, which it falls within the scope of this treatise to state.

A testator devises two college leases by a will, after the making of which he renews his leases, paying a large fine, but dies before the college seal is set to one of the two new leases; held, that as to the lease actually renewed there was a revocation of the devise; as to that which the testator had attempted only to renew, there was not. (z) The same principle we have already observed to operate with respect to the character of contracts, which have not been duly perfected by the affixing of the common seal, in cases of municipal, railway, trading, and other corporations. A lease of a somewhat similar character may here be noticed, as illustrative of the same doctrine. A college seised in fee was restrained by its consti-

(q) Vid. sup. p. 116.

(r) Att.-Gen. v. Green, 2 Bro. Ch. Cas. 492; vid. *Muggeridge v. Thackeray*, 7 Ves. 69, where Ld. Eldon, C., lays down the general principle. (s) 1 W. Bla. 92.

(t) *Corpus Christi Coll. case*, 4 Leon. 223; S. C. Dalis. 31.

(u) Att.-Gen. v. Sibthorp, 2 Russ. & M. 107.

(v) *Coleman v. Coleman and Bennett College*, Cambridge, Finch, R. 30.

(y) Att.-Gen. v. Green, 2 Bro. Ch. Cas. 492.

(z) *Abney v. Miller*, 2 Atk. 597. A lease made by a corporation to J. S. by their agent, authorised to make leases for them, but sealed with his own seal and not the common seal, is, it seems, void; *Anon.*, Moor. 70; Com. Dig. Attorney, C. 14; vid. tam. sup. p. 147, note (h).

tution from leasing otherwise than for twenty-one years, and at a rack rent. They made a lease accordingly to J. S., who entered, and during the term greatly improved the premises by building. Of this circumstance an entry was made in the College Audit Book, together with a recommendation, signed by the head and majority of the body, to grant him a new lease at the end of the term at the same rent, and shortly before the end of the term an order was made by the college for such new lease. But Lord Parker, C., held, that the recommendation and order not being under the college seal, was not binding upon the college, although it was signed by the majority of the members; and that although if the tenant subsequently to the date of the order had invested capital on the premises, in confidence and reliance upon the order, he would have been entitled in equity to compensation for the improvements, such compensation must have been made by the persons in their private capacity [*547] who signed the entry, and not by the college, inasmuch as the intent of the proceeding was to wrong the college, and violate the statutes, and accordingly the tenant's bill to compel the college to grant a new lease on the above terms was dismissed with costs; (a) thus adhering to a principle of corporation law which has been frequently insisted on in this treatise, that where a majority takes upon it to do acts which it is beyond the competence of the corporation consistently with its constitution to adopt, the persons forming such majority are individually and in their private characters responsible for such acts, and cannot shield themselves behind the corporate powers and corporate responsibility which they have exceeded and violated. (b)

Colleges, it is said, are not obliged in equity to account so strictly or so far back as natural persons with respect to trust funds placed in their hands for administration. The principal ground for this doctrine is stated to be, that "colleges are a various fluctuating body," and "that the money is used and the persons who so applied it are perhaps dead." (c) Thus, where a college had let lands under a very long lease, and reserved rent, the college to pay the taxes, and it appeared that the tenant had paid the taxes by mistake for a great number of

(a) *Taylor v. Dulwich Hospital*, 1 P. Wms. 655; S. C. 4 Vin. Abr. 495, 496; *vid. Edwards v. Grand Junction Railway Company*, 1 M. & Craig, 650; *Dance v. Girdler*, 1 N. Rep. 34. Where a lease was in existence, but was void in law, as not being under the common seal, and the tenant had paid rent to the head, it was held he might be considered as tenant from year to year to the corporation, and that the servant of the corporation might make cognizance for taking a distress under a demise from them; *Wood v. Tate*, 2 N. R. 247. If defendant in trespass pleads a lease granted by master and fellows of a college, replication that at the time of the demise alleged there were no fellows, must go on and traverse, *absque hoc* that the master and fellows demised; Com. Dig. Pleader, G. 2.

(b) *Att.-Gen. v. Mayor, &c., of Liverpool*, 1 My. & C. 171; *Att.-Gen. v. Retford*, 3 My. & C. 484. Each is liable for all the consequences; *Att.-Gen. v. Wilson*, 1 Cra. & P. 1.

(c) *Att.-Gen. v. Baliol College, Oxford*, 9 Mod. 407. It has also been alleged to rest on the consideration, that to make them account would open the door to vexation, *Att.-Gen. v. Talbot*, 1 Ves. sen. 78; still where there is no doubt of the misfeasance, misdeeds committed long ago may be visited on the present generation of corporators, *Att.-Gen. v. Caius College*, 2 Keen. 150; *Att.-Gen. v. Mayor, &c., of Norwich*, 3 M. & K. 651.

years, without deducting them from the rent, Lord Macclesfield, C., decreed that the taxes were to be deducted from the rent in future, but refused to make an allowance backward, and refused to direct an account, because the college had lived upon their whole income, and the sums were spent upon the repairs and other necessary demands of the college. (d) Again, although where a college has by charter particular powers over a school, as of removing a master for misbehaviour, &c., though they were not appointed general visitors, equity would not interfere with their acts as regards such powers; yet in respect to the revenues equity always interfered; and the college having appointed one of their fellows master, and another usher, the latter of whom never resided, and the former took both his own and the usher's salary, Lord Hardwicke, C., decreed the master to account for fifteen years back for the benefit of the charity, not of the usher. (e) But before equity *will give relief from abuses of management, it must be satisfied [*548] that there is a trust in the college in the sense that the words are understood in equity, otherwise the remedy is through the visitor. (f) However, a doctrine somewhat less lenient towards these bodies has been elsewhere laid down; perhaps, it may be added, a doctrine more consistent with the general principles of corporation law Lord Brougham, C., held it to be "of no consequence, in cases of misappropriation of funds, that the individuals now sustaining the corporate character, enjoying the immunities, and exercising the franchises of the corporation, are wholly different from those who did the wrong or who permitted the neglect, and are only connected with them through the medium of a common municipal character; this is the condition inseparably annexed to their corporate character, and the individuality of the body politic, with all its incidents, is thus maintained as perfectly in the system of jurisprudence, as the identity of the natural body is preserved entire in the system of the world." (g) The Court of Chancery cannot interfere with a trust which a testator has appointed to be in a college, upon any notion that there is more personal responsibility in individuals; (h) and it will not appoint new trustees, although there have been great errors and misapplications of the charitable funds committed by the college for two centuries, no corrupt or improper motives having been imputed to them. (h) But if there is no doubt that there has been a misfeasance, the misdeeds of the college committed long ago may be visited on the present generation of corporators; (i) and it is a misfeasance, and a serious one, for any trustees, whether corporation aggregate or sole, or individuals, who are intrusted with different funds, to mix

(d) Anon. cited 9 Mod. 410.

(e) Att.-Gen. v. Mayor, &c., of Bedford, 2 Ves. sen. 505. As to removing master of a free school attached to a cathedral, &c., Whiston v. Dean and Chapter of Rochester, 18 L. J. (N. S.) Chanc. 473.

(f) Att.-Gen. v. Magdalen College, Oxford, 10 Beav. 402.

(g) Att.-Gen. v. Mayor, &c., of Norwich, 3 M. & K. 651; et vid. Att.-Gen. v. Mayor, &c., of Leicester, 9 Beav. 546, where Lord Langdale, M. R., decreed the corporation who had abused its trust in former times, and was now found indebted to the charity 5,365*l.*, to pay costs and interest.

(h) Att.-Gen. v. Caius Coll., 2 Keen. 150.

(i) 2 Keen. 150.

them together and so divert into one channel the bounty which was intended to flow in another.^(k)

Various acts of parliament have been passed of late years materially affecting the powers of colleges over the enjoyment and disposition of the lands they hold *jure collegii*. Of these it is desirable to mention the principal, with some notice of their objects and purpose.

By an act (1 & 2 Will. 4, c. 45) to extend the provisions of the "*Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies*" (29 Car. 2, c. 8, and for other purposes, the last-mentioned act is extended^(l) to the case of augmentations made by colleges by grant or reservation out of any rectory impropriate, or tithes, or portion of tithes, belonging to such [^{*549}] college, provided that every such augmentation shall be made to the incumbent of some church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise, as the case may be; and further,^(m) to the case of augmentations made by colleges by grant or reservation out of any lands, tenements, or other hereditaments belonging to such college. But all such augmentations whatever shall be⁽ⁿ⁾ in the form of an annual rent. Also, colleges being owners in their corporate capacity of any rectory impropriate, or of any tithes or portion of tithes arising in any particular parish or place, are empowered,^(o) by a deed duly executed, to annex such rectory impropriate, or tithes or portion of tithes as aforesaid, or any lands or tithes being part or parcel thereof, with their appurtenances, unto any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise, to the intent and in order that the same may be held and enjoyed by the incumbent for the time being of such church or chapel; and by the same means a college, being owners of any lands, tenements, or other hereditaments whatsoever, and also patrons of any church or chapel, may^(p) annex such lands, &c., with the appurtenances, to such church or chapel, to the intent and in order that the same premises may be held and enjoyed by the incumbent for the time being thereof. And the provisions of stat. 39 & 40 Geo. 3, c. 41, respecting college leases, are extended^(q) to such augmentations in certain cases, for which the statutes themselves must be consulted.^(r)

By stat. 2 & 3 Will. 4, c. 80, reciting, among other things, that the masters, or other heads, and fellows and scholars, or other societies of

(k) Att.-Gen. v. Mayor, &c., of Norwich, 3 M. & K. 651. Vid. as to costs of recovering against a corporation in such case, there being no fraud imputed to the existing members of the corporation, Sol.-Gen. v. Mayor, &c. of Bath, 18 L. J. (N. S.) Chanc. 275; but there the mode in which the corporation had dealt with the school property was attended with great pecuniary advantage to the school, S. C.; vid. 1 Vern. 44, n. (2). (l) 1 & 2 Will. 4, c. 45, s. 3; et vid. s. 29.

(m) Sect. 4. (n) Sect. 5. (o) Sect. 11. (p) Sect. 12. (q) Sect. 14. (r) As to college leases generally, vid. 2 Bla. Com. 321, 322; Bac. Ab. tit. Leases; 1 Leon. 306; Crabbe's Dig. of Statutes, tit. Leases; Burn's Eccles. L. tit. Leases. Acceptance of rent by a master of a college, not having authority from the college to do so, does affirm a voidable lease during the continuance of such master in the headship; Gibs. Cod. 746; stat. 18 Eliz. c. 6, which is a private act, 1 Leon. 306; Savil. 129.

the several colleges and halls in the two Universities, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tenements, tithes, and hereditaments, and in many cases the boundaries or quantities, and the identity of the lands within such manors, and of such messuages, lands, tenements, and hereditaments, and of lands subject to any such tithes, or some part or parts thereof, are unknown or disputed, empowers colleges to enter into agreements or deeds of reference with their lessees, to ascertain and settle unknown or disputed boundaries, or quantities of such manors, &c., and modes of performing the same are minutely chalked out and provided.

By 6 & 7 Will. 4, c. 70, colleges were empowered(s) to convey portions of their lands for sites for schools, but by 4 & 5 Vict. c. 38, this act was repealed, leaving untouched, however, acts done under it, [*550] *and further and more enlarged provisions were substituted for the same object.(t)

With respect to benefices which are annexed by act of parliament, or otherwise, to the headships of colleges in the two Universities, arrangements are authorised by the Ecclesiastical Duties and Revenues Act(u) to be made, to enable the respective colleges, if they shall think fit to sell, or themselves to purchase, the advowsons, and to invest the proceeds in proper securities, with provisions for the payment of the interest and annual profits thereof to the respective heads of the colleges for the time being. We may here observe, that where a college consists of a master, fellows, and scholars, or a master and fellows, or the like, the head is an integral part of the college, which in the first case consists of three, in the second of two integral parts, and therefore the college cannot present the master to a benefice of which they have the advowson; for such presentation would be liable to the objection founded on the principle often before noticed, that a man cannot do an act to himself.(x) Therefore a master of a college cannot hold a college living, strictly so called, though the master, as master, not unfrequently holds a living annexed to the headship, and invariably descending along with it. A head of a college is expressly exempted from penalties for non-residence on any benefice.(y)

By stat. 1 & 2 Vict. c. 23, s. 5, colleges in the two Universities are empowered to advance money from funds of which they have the power of disposing, without interest, in order to aid in the purposes of that act, i. e. for building, repairing, or purchasing houses or buildings for the habitation or convenience of the clergy, or sites for such houses or buildings, with respect to benefices in the patronage of such colleges, upon mortgages, &c., as in the act is directed; and the stat. 1 & 2 Vict. c. 106, s. 73, empowers them to do the same for the purposes of that act.

(s) Sect. 3.

(t) 4 & 5 Vict. c. 38, ss. 6, 7, 9; et vid. the explanatory act, 6 & 7 Vict. c. 37; and 12 & 13 Vict. c. 49, s. 3.

(u) 3 & 4 Vict. c. 113, s. 69. By s. 71 sinecure preferments belonging to a college in the Universities may be permanently united to a benefice held together with or in the patronage of the holder of such sinecure, &c.

(x) Vid. *Wood v. Mayor, &c., of London*, Salk. 393; sup. p. 197.

(y) 1 & 2 Vict. c. 106, s. 37.

In numerous decisions of the courts of law and equity there are to be found principles laid down affecting the rights of colleges, or different members of them, in their collegiate capacity, as well as constructions of the statutes and constitutions of the colleges respectively, which it may often be useful for persons connected with those bodies to be acquainted with: we have endeavoured to construct as perfect a list as possible of the cases in which such decisions are contained, which are given below, opposite to the name of the college to which they respectively relate.(z) Most of these cases have been already alluded [*551] to or *cited in the course of the foregoing statement of the law respecting collegiate corporations.

(z) All Soul's College, Oxford, *R. v. Warden's &c., of All Souls*, T. Jones, 175; S. C. Skin. 13; 2 Show. 170; *Spencer v. Warden of all Souls*, Wilm. Notes, 163; vid. 3 B. & P. 635.

Baliol College, Oxford, *Att.-Gen. v. Baliol College*, 9 Mod. 407.

Brazen Nose College, Oxford, *Att.-Gen. v. Brazen Nose college*, 2 Cl. & F. 295.

Caius College, Cambridge, *Protector v. Craford*, Styl. 457; *Att.-Gen. v. Caius College*, 2 Keen. 10; vid. 5 Russ. 76; 2 Russ. & M. 111, note.

Catherine Hall, Cambridge, *R. v. Catherine Hall*, 4 T. R. 233; 1 Jac. 381; 5 Russ. 85.

Christ Church, Oxford, *Dean, &c., of Christ Church case*, 4 Leon. 190.

Christ College, Cambridge, *Widdrington's case*, T. Raym. 31; *Case of Christ College*, 1 W. Bla. 92; vid. 2 Russ. & My. 111, note.

Clare Hall, Cambridge, *Att.-Gen. v. Talbot*, 3 Atk. 662. 673; vid. 1 Burr. 200; *R. v. Blythe*, 5 Mod. 404; *Jenning's case*, 5 Mod. 421; vid. 2 T. R. 312.

Corpus Christi College, Cambridge, 4 Leon. 223; S. C. Dalis, 31; *Coleman v. Coleman and Bennett College*, Finch, R. 30.

Corpus Christi College, Oxford, 17 Vin. Abr. 150; pl. 4; *Wood v. Hantsell*, 2 Rol. Abr. 198.

Downing College, Cambridge, *Att.-Gen. v. Bowyer*, 3 Ves. 713; *Att.-Gen. v. Downing*, Wilm. Notes, 10; *Downing College v. Purchas*, 3 B. & Ad. 162; *In re Downing College*, 2 My. & C. 642.

Exeter College, Oxford, *Philips v. Bury*, 2 T. R. 346; S. C. Skin. 447; *Holt's opinion affirmed in Dom. Proc.*, Show. P. C. 35.

King's College, Cambridge, *Feistell v. King's College*, M. R. Pasch. 1847, 10 Beav. 491.

Magdalen College, Oxford, *Att.-Gen. v. Sibthorp*, 2 Russ. & M. 107; *Att.-Gen. v. Magdalen College*, Oxford, 10 Beav. 402. The king's visitatorial power asserted by Nath. Johnston, A. D. 1688, *Magdalen College*, Oxford v. Ward, Coop. Sel. Cas. (1846) p. 265.

Merton College, Oxford, *Fisher v. Boys*, 10 Rep. 125; vid. 1 W. Bla. 76; *Martin v. Archbishop of Canterbury*, 1 Burn's Eccles. L. tit. Colleges.

New College, Oxford, *Dyer*, 247 a; 1 Mod. 82; 1 Lev. 23. 65; 2 Lev. 14; Raym. 56. 94. 100; *Siderf.* 94. 152. 346; *Att.-Gen. v. Mayor, &c., of Bedford*, 2 Ves. sen. 505.

Pembroke Hall, Cambridge, *Att.-Gen. v. Pembroke Hall*, 2 Sim. & Stu. 441.

Peterhouse, Cambridge, *R. v. Bishop of Ely*, 2 T. R. 290; *Sandys v. Sandys*, 1 Q. B. 317, note.

St. John's College, Cambridge, *R. v. St. John's College*, 4 Mod. 233; *Green v. Rutherford*, 1 Ves. 471; *Att.-Gen. v. Andrew*, 3 Ves. 640. 646; *Att.-Gen. v. St. John's College*, 7 Sim. 241; *In re St. John's College*, 2 Russ. & My. 603; vid. 1 Burr. 195; Finch, R. 222; Statutes printed, Report of Charity Commissioners, 8th June, 1818.

St. John's College, Oxford, *R. v. St. John's*, 4 Mod. 260; S. C. Comberb. 238; stat. 18 Eliz. c. 6.

Trinity College, Cambridge, *R. v. Bishop of Ely*, 1 W. Bla. 52; *Walker's case*, Cas. T. Hardw. 212; *Bentley v. Bishop of Ely*, Fitzgib. R. 307. Statutes printed, Report of Charity Commissioners, 8th June, 1818.

Trinity Hall, Cambridge, *R. v. Gregory*, 4 T. R. 240, note; overruled, 4 T. R. 244; *Ex parte Wrangham*, 2 V. & Bea. 609; *Ex parte Inge*, 2 Russ. & M. 590.

*FREE SCHOOLS:

[*552]

WE now proceed to examine the principal points in the law relating to scholastic incorporations, or incorporated free grammar schools.

Primâ facie an endowment of a free grammar school, without more words, ascertaining the founder's intention, means a school for teaching the elements of the learned languages; but an usage to teach other branches of learning may be taken as explanatory of the words, and may suffice to put a different construction upon them.(a) Accordingly, where there were several endowments, partly for a school, and partly for a free grammar school, and the constant usage had been to devote the whole to the latter purpose, the court refused to disturb the arrangement.(b) The power of the courts of equity has been, since the above decision, largely extended by enactment,(c) which reciting, "whereas(d)

Queen's College, Cambridge, R. v. Grundon, Cowp. 319; In re Queen's College, 5 Russ. 64; case of Queen's College, Jac. R. 35; Patrick's case, T. Raym. 101; S. C. 1 Lev. 65.

Queen's College, Oxford, 2 T. R. 325; Ayray's case, 11 Rep. 18 b; Ayray v. Lovelas, 1 Bulstr. 91.

University College, Oxford, Davison's case, cited Cowp. 319; Usher's case, 5 Mod. 452; vid. 1 W. Bla. 38; 3 Atk. 667; 1 Burr. 203; In re University College, Oxford, 2 Phill. 521.

Wandham College, Oxford, R. v. Windham, Cowp. 379.

(a) Att.-Gen. v. Hartley, 2 Jac. & W. 375, 376; vid. tam. Att.-Gen. v. Jackson, 2 Keen. 541. In construing the statute mentioned in the text, perhaps it may be useful to observe the doctrine laid down, that even where summary powers are given to the Lord Chancellor to vary provisions relative to a trust, that does not extend, though given by parliament, to empower him to alter the *general constitution* of the trust itself; Ex parte Bolton School, 3 Bro. Chanc. Cas. 662. Therefore the trustees of a free grammar school were not allowed to convert it into a commercial school, though it had ceased from before the time of living memory to be a school for classical education, and though elementary instruction in English had formed a part of the original institution; Att.-Gen. v. Earl of Mansfield, 2 Russ. 501. So an application to allow part of the funds of a grammar school to be devoted to the teaching of French, German, and matters of commerce, was rejected on the ground that the nature of the charity cannot be altered, and the funds transferred to objects other than the founder intended, merely on the notion of an advantage to the inhabitants of the place; Att.-Gen. v. Whiteley, 11 Ves. 241.

(b) Att.-Gen. v. Hartley, 2 Jac. & W. 379; vid. tam. as to mixing funds for different charitable purposes, Att.-Gen. v. Mayor, &c., of Norwich, 3 M. & K. 651, inf. No agreement of parishioners, where several charities are given for several purposes, can alter or divert them to other uses; Man v. Ballett, 1 Vern. 42, pl. 43.

Where a testator bequeathed lands, &c., for the maintenance of a free school, and desired that the town should exempt the land from payment of poor rates, and the school was established, and the usage of 125 years had been, not to assess them to the poor rates, yet it was determined that such assent of the parishioners to the condition of the will did not exempt the beneficial occupier of the lands from being assessed to the relief of the poor in respect of such lands; Reg. v. Ellis, 2 Dowl. N. S. 361.

(c) 3 & 4 Vict. c. 77.

(d) Sect. 1. Nothing in the act gives any power to obtain funds for the purposes of the act by taking a portion of surplus enjoyed, as of right, by trustees, whether corporate or individuals. "I apprehend the act can have no application whatever, except where there are certain revenues appropriated to the instruction there pointed out. If there be a certain amount of revenue devoted to a school, and you cannot apply that beneficially for the instruction of boys in grammar, in consequence of the situation in which the school is placed by change of circum-

[*553] there are in England and Wales many endowed schools, *both of royal and private foundation, for the education of boys or youth wholly or principally in grammar; and the term grammar has been construed by courts of equity as having reference only to the dead languages, that is to say Greek and Latin; and whereas such education, at the period when such schools or the greater part were founded, was supposed not only to be sufficient to qualify boys or youths for admission to the Universities, with a view to the learned professions, but also necessary for preparing them for the superior trades and mercantile business; and whereas, from the change of times and other causes, such education, without instruction in other branches of literature and science, is now of less value to those who are entitled to avail themselves of such charitable foundations, whereby such schools have in many instances ceased to afford a substantial fulfilment of the intentions of the founders, and the system of education in such grammar schools ought, therefore, to be extended and rendered generally beneficial, in order to afford such fulfilment; but the patrons, visitors, and governors thereof are generally unable of their own authority to establish any other system of education than is expressly provided for by the foundation, and her majesty's courts of law and equity are frequently unable to give adequate relief, and in no case but at considerable expense; and whereas, in consequence of the changes which have taken place in the population of particular districts, it is necessary for the purpose aforesaid that in some cases the advantages of such grammar schools should be extended to boys other than those to whom, by the terms of the foundation, or the existing statutes, the same is now limited, and that in other cases some restriction should be imposed, either with reference to the total number to be admitted into the school, or as regards their proficiency at the time when they may demand admission; but in this respect also the said patrons, visitors, and governors, and the courts of equity, are frequently without sufficient authority to make such extension or restriction; and whereas it is expedient that in certain cases grammar schools in the same place should be united; and whereas no remedy can be applied without the aid of parliament;" proceeds to declare and enact that whenever, after the 7th August, 1840, "any question may come under consideration in any of her majesty's courts of equity concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, whether such question be already pending, or whether the same

stances, and so on, the court may then apply that amount to a more general subject of education; but it cannot obtain a further fund for the purpose of general education, by encroaching on the private right of another party," per Lord Langdale, M. R.; therefore where a testator had left an estate for charitable purposes, in such a way as was construed to mean that the corporation he vested it in were to have a certain surplus, the court refused to increase the aggregate funds of the school by trenching on that surplus; *Att.-Gen. v. Grocers' Company*, 6 Beav. 55. This act relates to free grammar schools, as it appears the stat. 43 Eliz. c. 4, does exclusively; for where a school had been erected by voluntary subscription of inhabitants, it was held that, not being a free school, it was not within 43 Eliz. c. 4; *Att.-Gen. v. Hewer*, 2 Vern. 387; *S. C. Eq. Cas. Abr. 49, vid. tam. 2 Y. & Jerv. 211, note (c)*; *Att.-Gen. v. Ld. Dudley, Coop. Ch. Cas. 146.*

shall arise upon any information, petition(e) or other proceedings [*554] which may be now or at any *time hereafter filed or instituted for whatever cause the same may have been or may be instituted, according to the ordinary course of proceedings in courts of equity, or under the provisions of this act, it shall be lawful for the court to make such decrees or orders as to the said court shall seem expedient, as well for extending the system of education to other useful branches(f) of literature and science in addition to or (subject to the provisions hereinafter contained) in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the then existing statutes, as also for extending or restricting the freedom or the right of admission to such school, by determining the number or the qualifications of boys who may thereafter be admissible thereto as free scholars or otherwise, and for settling the terms of admission to and continuance in the same, and to establish such schemes for the application of the revenue of any such schools as may, in the opinion of the court, be conducive to the rendering or maintaining such schools in the greatest degree efficient and useful, with due regard to the intentions of the respective founders and benefactors, and to declare at what period and upon what event such decrees or orders, or any directions contained therein, shall be brought into operation, and that such decrees and orders shall

(e) Stat. 42 Geo. 3, c. 101, enacted that certain charities, and, among others, free schools, might be regulated in a summary manner in the courts of equity, by way of petition instead of information; vid. *Ex parte Berkhamstead Free Grammar School*, 2 Ves. & B. 134, the former being much the less expensive mode, vid. *Att.-Gen. v. Coopers' Company*, 19 Ves. 189. But it had also been decided that if, on the petition coming on for hearing, the trustees of the charity did not appear, not having been served with notice of the petition, they would be given a day to show cause why the order prayed should not be made; *Ex parte Seagears*, 1 Ves. & B. 496. It has also been settled that in all cases of charitable incorporations, as such corporations are always liable to some visitatorial jurisdiction, where the thing sought to be done was within the competence of such jurisdiction, and the crown had become visitor, for want of heirs of the founder, or was visitor as heir of the founder, the application to do the thing required ought to be made by way of petition to the great seal, and not by way of bill or information; *Att.-Gen. v. Dixie*, 13 Ves. 519; et vid. *Att.-Gen. v. E. of Clarendon*, 17 Ves. 497, where the object was to remove a person who was unqualified from the office of one of the corporators of the corporation of the Governors of Harrow School.

Where a college were trustees of a school, and had committed great errors, and made misapplications of the charitable funds for two centuries, but without corrupt or improper motives being brought home to them, the Court of Chancery refused to appoint new trustees, but gave liberty to the master in Chancery to approve of a plan for adding instruction in writing and arithmetic to the grammar already taught in the school; *Att.-Gen. v. Caius College*, 2 Keen. 150, 151; vid. *Att.-Gen. v. Haberdashers' Company*, 3 Russ. 530.

Where a college was bound to pay out of the revenues of charity lands a certain annual sum to a school, and, 4th Jac. 1, demised for a term of 1000 years, to the school, lands of that annual value in satisfaction of the annual sum, and these lands became in time of much greater value in proportion than the lands which were reserved by the college for the other purposes of the charity, the Court of Chancery nevertheless refused to undo an arrangement which was fair at the time, and had the approbation of the executor of the founder; *Att.-Gen. v. Pembroke Hall*, 2 Sim. & St. 441.

(f) Provision for giving instruction in writing and arithmetic introduced into the system of instruction in a grammar school; *Att.-Gen. v. Haberdashers' Company*, 3 Russ. 531; *Att.-Gen. v. Dixie*, 3 Russ. 534; *Att.-Gen. v. Gascoyne*, 2 My. & K. 647.

have force and effect notwithstanding any provisions contained in the instruments of foundation, endowment, or benefaction, or in the then existing statutes: provided always, that in case there shall be any special visitor appointed by the founder or other competent authority, opportunity shall be given to such visitor to be heard on the matter in question in such manner as the court shall think proper previously to making such decrees or orders." By a further proviso, (g) "in making any such [555] decree or order, the court shall consider and have regard to the intentions *of the founders and benefactors of every such grammar school; the nature and extent of the foundation and endowment; the rights of the parties interested therein; the statutes by which the same has hitherto been governed; the character of the instruction theretofore afforded therein; and the existing state and condition of the said school; and also the condition, rank, and number of the children entitled to and capable of enjoying the privileges of the said school, and of those who may become so capable, if any extended or different system of education, (h) or any extension of the right of admission to the said school, or any new statutes, shall be established."

Also, (i) "unless it shall be found necessary, from the insufficiency of the revenues of any grammar school, nothing in the act shall be construed as authorising the court to dispense with the teaching of Latin and Greek, or either of such languages, now required to be taught, or to treat such instruction otherwise than as the principal object of the foundation; nor to dispense with any statute or provision now existing, so far as relates to the qualification of any schoolmaster or undermaster."

Also, (k) "in extending, as hereinbefore provided, the system of education, or the right of admission into any grammar school in which the teaching of Greek or Latin shall be still retained, the court shall not allow of the admission of children of an earlier age, or of less proficiency than may be required by the foundation or existing statutes, or may be necessary to show that the children are of capacity to profit by the kind of education designed by the founder." And whenever, (l) on account of the insufficiency of revenues, the court shall dispense with the teaching of Greek or Latin, it is bound to prescribe such a course of instruction, and to require such qualifications for admission, as will tend to maintain the character of the school as nearly as, with reference to the amount of the revenues, it may be analogous to that which was contemplated by the founder; and whenever the court dispenses with any statute

(g) 3 & 4 Vict. c. 77, s. 2. Entrance of boys under twelve years of age when refused; *In re Rugby School*, 1 Beav. 457. Where exhibitions are provided out of the surplus funds, none but boys who are objects of the charity ought to be eligible to them; *Att.-Gen. v. Mayor, &c., of Ludlow*, 2 Phill. R. 685.

(h) *Vid. In re Rugby School*, 1 Beav. 457.

(i) Sect. 3.

(k) Sect. 4. Generally, before the statute, the internal regulation and management of the charity was the exclusive subject of visitatorial control and jurisdiction; though in case of an abuse of trust relating to the revenue equity would interfere; *Ex parte Berkhamstead Free Grammar School*, 2 Ves. & B. 138; even to the extent of preventing the masters from erecting a power given by the statutes of leasing for three lives or thirty one years, when the court considered it for the benefit of the institution that such power should be acted on, *S. C.*

(l) Sect. 5.

or provision as far as relates to the qualification of any schoolmaster or under-master, it shall substitute such qualification as will provide for every object implied in the original qualification which may be capable of being retained, notwithstanding such insufficiency of the revenues; and(*m*) in case the appointment of any additional schoolmaster or under-master shall be found necessary for the purpose of carrying the objects of the act into execution, the court is bound to require the same qualification in such new schoolmaster or under-master *respectively as may be required by the existing statutes in the present schoolmaster or under-master, except such as may be wholly referable to their capability of giving instruction in any particular branch of education, but that every other qualification implied in the qualification of the original schoolmaster or under-master, and capable of being retained, shall be retained and required in such new schoolmaster or under-master, and the court is to declare in whom the appointment of the additional master shall be vested, so as to preserve, as far as may be, the existing rights of all parties with regard to patronage.

And although, (*n*) under the above provisions, the teaching of Greek or Latin shall be dispensed with, the school and schoolmaster shall be considered a grammar school and grammar schoolmaster nevertheless, and shall be subject to the jurisdiction of the ordinary as heretofore; and no person shall be authorised to exercise the office(*o*) of schoolmaster or under-master therein without having such license, or without having made such oath, declaration or subscription as may be required by law of the schoolmasters or under-masters respectively of other grammar schools.

“Provided also, (*p*) that whenever the court shall think fit to extend the freedom of, or the right to admission into, any grammar school, such extension shall be so qualified by the court, that none of the boys who are by the foundation or existing statutes entitled to such privilege shall

(*m*) Sect. 6.

(*n*) Sect. 7.

(*o*) In *Gibson v. Ross*, 7 Cl. & F. 254, a public schoolmaster was stated by Lord Cottenham, C., to be a public officer, and as such, not to be dismissed without an assigned and sufficient cause; but that it is clear the rule does not apply in case of a private trust. As to what would be good grounds of dismissal, *vid. S. C.*; *Whiston v. Dean and Chapter of Rochester*, 18 Law J. (N. S.) Chanc. 478. Neglecting the scholars a good ground, *Hemmett v. Hughes*, 2 Barnard. 423; *per Patteson, J.*, in *Doe d. Coyle v. Cole*, 6 Car. & P. 359. In general the office of vicar is not incompatible with that of master; *Att.-Gen. v. Hartley*, 2 Jac. & W. 375, 376; *vid. tam. Att.-Gen. v. Earl of Mansfield*, 2 Russ. 501.

Visitors of a free grammar school, having dismissed the schoolmaster for misconduct, cannot maintain ejectment for the recovery of possession of the school house till they have determined the master's interest therein, upon summons and hearing him in his defence; *Doe d. Earl of Thanet v. Gartham*, 8 J. B. Moore, 368; *vid. R. v. Gaskin*, 8 T. R. 109. But it is not necessary for them, as lessors of the plaintiff in ejectment, to prove the grounds of their sentence, nor can the defendant disprove them; *Doe d. Davy v. Haddon*, 3 Dougl. 310.

A mandamus to restore a schoolmaster of a free grammar school was granted where the school was of royal foundation; *R. v. Bailiffs of Morpeth*, 1 Stra. 58; *vid. Gibson, Cod. 1110.*

(*p*) Sect. 8. Cases as to schools admitting foreign boys, 17 Ves. 491; 19 Ves. 189; 2 Jac. & W. 353. Master's boarders excluded from participating in exhibitions; *Sol.-Gen. v. Mayor, &c., of Bath*, 18 L. J. (N. S.) Chanc. 275; *vid. In re Rugby School*, 1 Beav. 457; *vid. 2 Jac. & W. 353.*

be excluded, by the admission of other boys into the school, either from such school itself, or from competition for any exhibition or other advantage connected therewith."

When in any city, town or place there are two or more schools, the revenues of which are respectively insufficient to carry into effect the intentions of the founders, they may, with the consent of the visitor, patron, and governors of each, be united.(g)

[*557] *Where adequate powers for enforcing discipline at present exist, to be exercised by way of visitation or otherwise, the persons in whom they are vested are empowered(r) to exercise the same when and so often as they shall deem fit, either by themselves personally or by commission, without being first requested or required so to do, &c.; and where such powers are not adequate, the Court of Chancery may enlarge them as shall seem fit.(s) Where there are no such powers, the bishop of the diocese may apply to the Court of Chancery, which may create them as shall seem fit.(t) Where a visitor refuses or neglects to act, that court is empowered,(u) on the application of any person or persons interested in the school, to appoint a visitor pro hac vice; and so if it be uncertain in whom the visitatorial power resides. "Provided, that nothing herein contained shall exempt any visitor from being compelled by any process to which he is now amenable to perform any act which he is now compellable to perform."

The proceeding by way of mandamus to a visitor to entertain and enter upon a complaint is therefore preserved.

The Court of Chancery is empowered(x) to enable a visitor, whether regular or appointed under the act, and the governors, or either of them, after such inquiries, and by such mode of proceeding as the court shall direct, to remove any master who has been negligent in the discharge of his duties, or who is unfit or incompetent to discharge them properly and efficiently, either from immoral conduct, incapacity, age, or from any other infirmity or cause whatsoever.

"And (y) whereas it is expedient to facilitate applications to the Court

(g) Vid. sect. 9. Provisions respecting the schoolmaster, new statutes, and rights of nomination, follow in ss. 10, 11, 12.

A right of nominating the master or masters may be aliened by the founder or his heirs; Att.-Gen. v. Brentwood School, 3 B. & Ad. 59. Semb. it may be forfeited by corrupt or improper nomination, or by neglecting to nominate; Att.-Gen. v. Leigh, 3 P. Wms. 146. But it is not subject to the ordinary rules of lapse; Att.-Gen. v. Wycliffe, 1 Ves. 80.

(r) Vid. s. 13. If a founder appoints persons with a power of superintending the proceedings of the governors of a school, of removing them for misbehaviour and appointing others, then, when the governors refuse to act, those persons are the proper tribunal to apply to in the first instance, and not the Court of Chancery; Att.-Gen. v. Middleton, 2 Ves. sen. 330.

(s) Vid. sect. 14.

(t) Vid. sect. 15.

(u) Vid. sect. 16.

(x) Vid. sect. 17. Governors, with approbation of visitor, may assign a retiring pension in certain cases of removal, s. 18. Premises belonging to the school, held over by such removed master, to be recovered in a summary way, s. 19; and he is restrained from setting up any title, &c., s. 20.

(y) Sect. 21. Schools in the patronage of the crown are to be appointed to by the Lord Chancellor, except within the county palatine of Lancaster, where the chancellor of the duchy is to appoint, s. 22. Before this statute, equity did not in general interfere where there was a visitor, Att.-Gen. v. Price, 3 Atk. 108; nor to

of Chancery under this act; be it enacted, that all applications may be heard and determined, and all powers given by this act to the Court of Chancery may be exercised in cases brought before such court by petition only, such petitions to be presented, heard and determined according to the provisions of an act passed, &c." (52 Geo. 3, c. 101.)

The act is not to prejudice the jurisdiction or power of the ordinary, *nor to extend to either of the two Universities, or any college [*558] or hall therein, nor to the University of London or any colleges connected therewith, nor to the University of Durham, the colleges of St. David's or St. Bee's, the schools of Westminster, Eton, Winchester, Harrow, Charterhouse, Rugby, Merchant Tailors', St. Paul's, Christ's Hospital, Birmingham, Manchester, Macclesfield, Louth, or such schools as form part of any cathedral or collegiate church.(z)

Various statutes have subsequently passed with the object of increasing facilities for the conveyance and endowment of sites for schools,(a) by which corporations are empowered to convey land held for public or charitable purposes (which words, it seems, would include lands held by municipal corporations to the use of the corporation), under the limitations imposed by parliament, for the purpose of forming such sites:(b) and grants of land may also be made to corporations to hold as trustees for the purpose of the education of poor persons.(c)

A singularity in the case of corporations of schools is presented in this respect, that two persons only, the master and undermaster, are frequently incorporated, contrary to the maxim of the civil law, which, as we may remember, holds that three persons at least are required to make a corporation aggregate; and the same was generally true in our old law. But there are many examples of two masters of a school being constituted a corporation.(d)

Though a school may have been established in a place time out of mind, yet the master has no right of action against a person who comes

carry into execution the statutes of the school; *Att.-Gen. v. Middleton*, 2 Ves. sen. 377. But in all cases of charities it would act without complaint being made, if there was ground for doing so; *Att.-Gen. v. Cooper's Co.*, 19 Ves. 194.

(z) Vid. sect. 24. The 25th section is an interpretation clause. The Charity Commissioners Acts, 58 Geo. 3, c. 91, 59 Geo. 3, c. 81, exempted from the operation of their provisions all colleges, schools, &c., having special visitors appointed by the founders; vid. 2 Russ. & M. 461. 465. As to jurisdiction of the ordinary, 15 East, 132; 17 Vin. Abr. 559, pl. 7; Com. R. 448; in licensing masters, *R. v. Abp. of York*, 6 T. R. 490; vid. *Stra.* 1023. Prohibition lies to stay a suit in the Ecclesiastical Court for keeping school without license; *Chadwick v. Hughes*, 464; vid. 2 Atk. 671, 672. So indictment against free schoolmaster, for keeping school without license, quashed; *R. v. Douse*, 1 Ld. Raym. 672. Power of interpretation of the school statutes given to the ordinary, though coupled with other great powers, does not make him visitor; *R. v. Kirkby Ravensworth School*, 8 East, 221.

(a) 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49.

(b) 4 & 5 Vic. c. 38, s. 6. The quantity granted to each school is not to exceed one acre, s. 9, explained 12 & 13 Vict. c. 49, s. 3. (c) 4 & 5 Vict. c. 38, s. 7.

(d) Ex parte Berkhamstead School, 2 Ves. & B. 144. The master and undermaster of Middleton School, Yorkshire, were incorporated by Queen Elizabeth by the name of "The Master of the Free School of Queen Elizabeth in Middleton;" *Att.-Gen. v. Brazen Nose Coll.*, Oxford, 2 Cl. & F. 296, 297. Vid. another instance in case of Pocklington School, *Reresby v. Farrar*, 2 Vern. 414.

and sets up another school in opposition to the old one,(e) but there seem to have been cases in which such interloping schoolmaster has been inhibited in the ecclesiastical courts.(f)

A devise of a debt, whether by statute-staple, bond, judgment, or recognizance, for the erection of a school, has been held to be a good appointment under the stat. 43 Eliz. c. 4.(g)

[*559] *The question does not appear to have been hitherto decided, what is the effect of a devise of lands, or money to buy lands, for the maintenance of a school, upon a condition, which, although illegal, as it turns out, has been acted on for a long time, ex. gra. a century and a quarter; at least, the question whether in such case the lands revert to the heir, since the condition cannot be performed, has not been settled, though it has been ruled that the parties cannot be allowed to execute such illegal condition.(h) Where a corporation has accepted an annuity granted upon a condition, and the condition has been acted on, they cannot afterwards renounce it at pleasure, although the gift was directed by the donor to be applied to another purpose specified, in case the corporation at any time should refuse or neglect to perform the condition.(i)

In many cases of charitable corporations, and very often in cases of scholastic charities, the estates given by the founders, or subsequently to the foundation, bequeathed by benefactors, have much increased in value beyond the amount at which the rents and profits originally stood. The question, therefore, has very frequently arisen in the courts how to appropriate the surplus. Where the testator or donor has himself (after providing for the charity) given the residue, if any, of the rents and profits to the corporation, whom he made trustees and visitors of the school, then it would seem to be beyond all dispute, and it has been decided, that such corporation is not placed in the situation of trustees as to the residue, but may dispose of it at their will and pleasure;(k) and they cannot be compelled to make any apportionment of the residue among the objects of the charity.(l) But it is a general rule, that where the founder, or testator, or benefactor, has pointed out what was the yearly value of the property he dedicated to the objects of his charity at the period of the foundation, bequest, or donation, and he has parcelled out the whole of such revenue to the objects of the charity, there, if the revenue increases, in process of years, the charity shall have the benefit of the augmentation: the intention that it should be so being inferred from his dividing the whole revenue at that time accruing from the estates; from which it appears he meant that it should continue in future

(e) Yearb. 11 Hen. fol. 47, pl. 21. Case by schoolmaster for keeping slaughter-house near the school, 3 Chit. Plead. 341, 1st edit.

(f) 2 Gibson, Codex, 1101, Append. p. 1571.

(g) Ex parte Inhabitants of Sherborne, Toth. 91; S. C. Duke, 79, pl. 21; id. 112.

(h) Reg. v. Ellis, 2 Dowd. N. S. 361. 376.

(i) Att.-Gen. v. Christ's Hospital, 1 Russ. & My. 626.

(k) Att.-Gen. v. Skinners' Co., 2 Russ. 407. 435, the case of Tonbridge School; et vid. Att.-Gen. v. Drapers' Co., 4 Beav. 67; et vid. 8 Rep. 130; 12 Cla. & F. 826. In Att.-Gen. v. Mayor, &c., of Bristol, 2 Jac. & W. 294. 318, Lord Eldon, C., reviewed the former decisions from the earliest times; vid. the effect of the decisions in that case stated, per Lord Cottenham, C., 12 Cla. & F. 826. (l) 2 Russ. 438.

to be proportionately divided, as it increased, to the same purposes.^(m) The reason is, that the gift of the rents and profits of an estate is the gift of the estate itself; and a gift or devise of the above kind, showing that the whole of the rents and profits were intended to be absorbed by the charity, *is a gift of the whole rents and profits, and therefore [*560] a gift of the estate;^(m) and so it would be, though the land were not given, but granted, in consideration partly of a sum of money, paid by the corporation to whom it was granted in trust for the charity, if it appeared that the whole of the rents then arising from the land was devoted by the grantor to the charitable objects.⁽ⁿ⁾

Where an act of parliament has provided for the application of surplus funds of a school, vid. as to the jurisdiction of equity under 52 Geo. 3, c. 101, upon petition, &c.; In re Shrewsbury School, 19 Law J. (N. S.) Chanc. 287.

Another case is this. Though the founder, testator, or benefactor has not pointed out what was the yearly value of the estate, yet if he has sufficiently manifested his intention to give the whole of the estate to the charitable purposes, the increased rent must be applied to the charitable uses which he has mentioned.^(o) When he does not so manifest his intention, the trustees will be held to take the surplus upon trust for the charitable purposes, exclusive of any application of it to their own benefit; but they will be entitled to a proportion of the surplus rents, in respect of the gift of the remainder, pro ratâ with the other specified objects of the founder's bounty.^(p)

Generally it has been laid down, that in searching for the intention of the donor (which is the standard to govern a deed of gift), the facts—1. That the gift is subject to a condition of making certain payments to others; 2. That a forfeiture will be incurred by non-performance of the condition; 3. That the donee may be subjected to loss by the performance of that condition—are sufficient to raise the presumption that, in case of increase of the funds, the donor intended to give to the donee the benefit of that increase.^(q)

A. B. arranged with a corporation for the endowment of a school, and conveyed real estate to them of a computed definite value. The corporation stipulated to maintain the charity for certain fixed sums, payable out of the rents, of a computed definite amount (by which they agreed to abide), and they became bound to maintain it, though the rents should fail, *with a clause of forfeiture on their non-performance*: held, that

^(m) 2 Russ. 441; Att.-Gen. v. Christ's Hospital, 4 Beav. 73.

⁽ⁿ⁾ Att.-Gen. v. Mayor, &c., of Coventry, 2 Vern. 398; 4 Vin. Abr. 488.

^(o) 2 Russ. 442; vid. Hynshaw v. Mayor, &c., of Morpeth, Duke, 69; Arnold v. Att.-Gen., Duke, 591, Bridgm. edit.; Att.-Gen. v. Wilson, 3 M. & K. 362; Att.-Gen. v. Sparks, Ambl. 201.

^(p) Att.-Gen. v. Caius Coll., 2 Keen. 150.

^(q) Jack v. Burnett, 12 Cla. & F. 812. Thus if a fund was given to the members of a college as trustees for the maintenance of a school, and it were not given out-and-out to the school, but only as the trustees might think best to apply it for the good of the school, the surplus, after satisfying the exact charge first created on the fund, belongs to the trustees, Att.-Gen. v. Brazen Nose Coll., Oxford, 2 Cla. & F. 295, where see as to evidence of donor's intention; et vid. Thetford School case, 8 Rep. 130; 4 Vin. Abr. 488.

although the corporation were bound to maintain the charity, even if the rents fell short, yet the charity was not entitled to the benefit of any increase in the rental; the decision chiefly rested, it should seem, on the above clause of forfeiture, which would have been idle, it was observed, if the corporation had nothing to lose.^(r)

[*561] *If a testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not, in specifically directing the application of portions of the proceeds, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail. So, though he does not make such express declaration of devoting the whole, but gives each and every portion of the whole income *at the time* to the charitable purpose, and by that means exhausts the whole, then (as we have seen), if the income should afterwards increase, the increase will also be applicable to the charity.^(s) So if certain specific sums are directed to be applied to the charity, but there are, either preceding or following such direction, general words to show that the testator intended to apply the whole revenue to the charity, there, whatever may be the amount of the rents or revenues of the property, and however they may exceed the particular stated applications of them, the whole must be applied to the charity.^(t)

An incorporated company were grantees of an estate for the benefit of a school, of which they were constituted visitors by the grantor, and ordered to make certain payments to the school, which did not exhaust the rents, the company, in his lifetime, and with his knowledge, applied the surplus to their own use, and had ever since continued to do so; under these circumstances an information claiming the surplus for the school was dismissed.^(u)

Where the surplus rents and profits of an estate, charged with certain payments for the benefit of a school, are expressly devised, by the will of the founder, to his executors and their heirs, for their sole use and benefit for ever; the school can claim only the specified payments, although, by the change in the value of money, such payments have become inadequate to the charitable intentions of the founder.^(x)

Where a corporation, following the practice of their predecessors in the application of the profits of estates belonging to a free school, had themselves committed no wilful breach of trust, and no improper motives are attributed to them, the account of the profits, which they will be obliged to render, will not be carried back beyond the time at which they had notice that the propriety of such application of the property was questioned; but if the estates have been alienated, though at a

(r) *Att.-Gen. v. Merchant Venturers' Co.*, 5 Beav. 338; *vid. Att.-Gen. v. Cordwainers' Co.*, 3 My. & K. 534; *Att.-Gen. v. Coopers' Co.*, 3 Beav. 29; *Commissioners of Charitable Donations v. De Clifford*, 1 Dru. & War. 245.

(s) *Att.-Gen. v. Coopers' Co.*, 3 Beav. 29.

(t) *Att.-Gen. v. Grocers' Co.*, 6 Beav. 546; *Arnold v. Att.-Gen.*, Show. P. C. 22.

(u) *Att.-Gen. v. Skinners' Co.*, 5 Sim. 596.

(x) *Att.-Gen. v. Gascoigne*, 2 My. & K. 647, which see remarked on by Sir. E. Sugden, C. Ir., in *Commissioners of Charitable Donations v. De Clifford*, 1 Dru. & War. 256.

very distant period, the corporation will be made to compensate the present value of the lands, so alienated, out of such general property of the corporation as was not granted or devised to them on specific trusts.(y)

*Previously to the above cited statute,(z) the courts of equity did not interfere, where there was a private visitor, in the regulation of matters within the scope of his authority(a) respecting the school; but if a corporation be seized of lands, derived from grant by the crown, of the value, at the time of the grant, of 20*l.* a year, to maintain a schoolmaster of a school, of which by the grant they are also made visitors to see that the master and scholars behave according to the donor's orders, and the lands become of the yearly value of 100*l.* but still they pay only 20*l.* to the master, equity in such case was used to interfere; for though the corporation be visitors of the school, and have the receipt of the rents and profits, yet, the not paying the whole to the purposes of the charity is a breach of trust as trustees, there being no other use expressed in the letters-patent to which the surplus was to be applied.(b)

As has before appeared, where visitors are interested, they cannot exercise the visitatorial power, because no man can be judge in his own case, and then the right of visitation devolves upon the crown;(c) or, where there is a trust, the Court of Chancery will compel them to perform it; and its jurisdiction in such case is independent of the stat. 43 Eliz. c. 4;(d) for the courts of equity have an inherent jurisdiction in matters of charity, prior to, and apart from, all consideration of that statute.(e)

Also, previously to the statute,(f) it had been determined that a visitor had not in general power to order a new distribution of the revenues of the charity; and that such new arrangement must be made, if at all, by the lord chancellor, not on the petition of the visitor, but in the Court of Chancery, as presiding over the charitable foundations of the

(y) Att.-Gen. v. Bailiffs of East Retford, 2 My. & K. 35, where see as to costs.

(z) 3 & 4 Vict. c. 77, sup. p. 552.

(a) Vid. sup. p. 555, note (k); Att.-Gen. v. Governors of Harrow School, 2 Ves. sen. 551. But a limited power of visitation only having been given by the founder, the rest of the visitatorial power, it was said, the Court of Chancery would exercise; at least the jurisdiction of the court was not thereby excluded; 8 East, 221; 15 Ves. 305.

(b) Hynshaw v. Mayor, &c., of Morpeth, Duke, 69; Eden v. Foster, 2 P. Wms. 325 (Birmingham School); et vid. Duke, 84, 124, pl. 27; 15 Ves. 314. The appointment of a corporation to take the legal estate, with the receipt of the rents and profits, does not constitute them visitors without express words; 2 P. Wms. 325; vid. Att.-Gen. v. Middleton, 2 Ves. sen. 327. Vid. list of cases respecting jurisdiction of equity in matters of charity, 1 Coop. Ch. Rep. (1846), Tables of Cases, p. lxxxi.

(c) Eden v. Foster, 2 P. Wms. 325; vid. Whiston v. Dean and Chapter of Rochester, 18 L. J. (N. S.) Chanc. 478.

(d) Att.-Gen. v. Lock, 3 Atk. 164; Att.-Gen. v. Foundling Hospital, 2 Ves. jun. 42. 47; Att.-Gen. v. Dixie, 13 Ves. 519. 533. 539.

(e) Att.-Gen. v. Corporation of Dublin, 1 Bli. N. S. 337, per Lords Redesdale and Eldon; Incorporated Society in Dublin, &c., v. Richards, 1 Dru. & War. 258.

(f) 3 & 4 Vict. c. 77, sup. p. 554.

kingdom. (*g*) Now, it seems, the matter may be settled upon petition; at any rate in cases under the statute of Victoria.

By 59 Geo. 3, c. 91, s. 5, the trustees of any free school were empowered, with the consent of five or more of the Charity Commissioners to petition the Lord Chancellor praying relief, in cases where the statutes [*563] *of the foundation are insufficient for the due administration of the funds.

Before the statute, (*h*) if, in respect of the same charity, it was desired to attain two objects of the following kind—one comprising an account of the estates, an application of the surplus rents, and the setting aside leases; the other comprising the appointment of the schoolmaster and the removal of some of the governors—it had been determined that the first object could only be attained by means of an information in equity, but that the second was to be effected by way of petition to the great seal as visitor. (*i*) Now, as it seems, the whole might be accomplished by a petition. (*k*) But, it seems, that still a petition must not combine an application as to the abuses in a school with one as to the abuses in a college, though the latter are abuses in relation to estates given to the college for the benefit of five scholars from the school, the college and the school being distinct foundations; for it was held that an information (before the late statute) was bad for multifariousness on this ground; and, moreover, the late statute does not extend to colleges, so as to render available, under it, the mode of petition for relief with respect to them. (*l*)

If lands be vested in an incorporated school for the purposes of the charity, and any improvident disposition of them be made by the corporation, it may be set aside in equity. Thus the master and undermaster of Pocklington school, being a corporation, had leased some school lands for eighty-one years, in consideration of a fine and the surrender of a former lease, &c., &c., at a considerably under value; and the lease was set aside, and the lessee decreed to pay arrears of rent according to the full value of the land, and to deliver up the possession. (*m*) A lease of school lands to one of the governors is always bad, and will be set aside on general principles as inconsistent with his duty; and he will be charged with the full value, if that be found to exceed the amount of the rent reserved. (*n*) But it does not follow that, when the governors of a school have been convicted of a breach of trust in letting the lands at under values, fines, &c., they will be removed by the Court of Chancery,

(*g*) Att.-Gen. v. Smythies, 2 Russ. & M. 717. 737. Where there is a visitor appointed with powers of management, yet if the charter or foundation deed expresses a trust as to the revenue, equity will interfere to compel a due application thereof; Att.-Gen. v. Berkhamstead School, 2 Ves. & B. 134.

(*h*) 3 & 4 Vict. c. 77, sup. p. 554.

(*i*) Att.-Gen. v. Dixie, 13 Ves. 519.

(*k*) Vid. sect. 21, sup. p. 557.

(*l*) Vid. Att.-Gen. vid. St. John's Coll., 7 Sim. 241; vid. 5 Sim. 670. Decisions to similar effect on petitions under 52 Geo. 3, c. 101, Mayor, &c., of Ludlow v. Greenhouse, 1 Bli. N. S. 17; Ex parte Rees, 3 Ves. & B. 10; Ex parte Brown, Coop. 295; In re Upton Warren, 1 My & K. 410.

(*m*) Reresby v. Farrer, 2 Vern. 414.

(*n*) Att.-Gen. v. Earl of Clarendon, 17 Ves. 497. (Harrow school.) Inf. p. 576.

and others appointed in their place; the course has been, upon a bill being exhibited against them, and proof of the breach of trust, to give relief to the school, but to leave things as nearly as possible in the state in which it was the intention of the founder they should continue.^(o) Still a corporation will *be divested, by the court, of a trust in the same cases that any other trustees would be divested of a [*564] trust for an abuse.^(p)

If, however, lands be vested in a corporation for the maintenance of a schoolmaster, usher, &c., and statutes are settled, and the corporation appoint, contrary to those statutes, the Court of Chancery will remove a master so appointed, and order the corporation to proceed to a fresh appointment, and to pay the costs;^(q) and though in general such a power of appointment, being a trust, could not be delegated, yet it was held in one case, after 250 years' usage, that they might continue to delegate the power to St. John's College, Cambridge, so far as that the college should nominate to them a fit person, on a vacancy, the corporation retaining to themselves the power of approval or disapproval.^(q)

A power to appoint a schoolmaster given to the vicar and churchwardens, of whom there were eleven, and in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result, in the dernier resort, to the same vicar and churchwardens to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens; especially if such an election be supported by usage.^(r)

Where visitors and feoffees, having a power of dismissal, had exercised it, they could not nevertheless maintain ejectment to recover the schoolhouse until they had determined the master's interest therein, upon a summons to him to appear before them, and giving him the opportunity of being heard in answer to the charges on which the ground of his dismissal rested;^(s) for he was entitled to the schoolhouse, unless he had been in due manner removed from his office.^(t) But the above statute renders the ejectment unnecessary in most cases of this kind.

With respect to the effect of lapse of time on charity property, it was laid down by Lord C. J. Holt, that no statute of limitations, nor any length of time, shall bar a charity; but if anything in it be obscure and dark, and there has been an enjoyment for a very long time, without interruption, that is a great evidence of a right;^(u) and this doctrine was

(o) *Poor of Chelmsford v. Mildmay, Duke*, 83. (Chelmsford school).

(p) *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 499.

(q) *Mayor, &c., of Shrewsbury v. Att.-Gen.* 2 Bro. P. C. 402.

(r) *Withnell v. Gartham*, 6 T. R. 388. After acting as schoolmaster for several years, without there being any imputation against the mode of his discharge of the duties, the validity of his appointment cannot be questioned; *Att.-Gen. v. Hartley*, 2 Jac. & W. 353. 376. An appointment under a conveyance to charitable uses may be made in general by trustees without writing; *Wilkinson v. Malin*, 2 Cro. & J. 636; and as it divests no interest out of them, a corporation may also appoint without deed, as it seems; *sup.* p. 60.

(s) *Doe d. Earl of Thanet v. Gartham*, 8, J. B. Moore, 368; *vid.* 8 T. R. 109.

(t) *Doe d. Coyle v. Cole*, 6 Car. & P. 359; *vid.* 4 & 5 Vict. c. 38, ss. 17, 18.

(u) *Att.-Gen. v. Mayor, &c., of Coventry*, 3 Madd. 368; S. C. 2 Vern. 399; *vid.* *Att.-Gen. v. Hungerford*, 2 C. & F. 357; 4 Vin. Abr. 488, marg.; 3 & 4 Will. 4, c. 27, s. 29. As to demand of tithes by a corporation, 2 & 3 Will. 4, c. 100, s. 1.

confirmed by Lord Eldon.(x) A possession of 150 years was held by [*565] *the house of lords to be very strong evidence to show a right;(y) and an adverse enjoyment for a series of years forms a very material consideration in construing an instrument by which a charity claims.(z) The distinction between the old statutes of limitation and the 3 & 4 Will. 4, c. 27, is, that the former acts only barred the remedy; whereas under the latter, when the remedy is barred, the right and title of the real owner are *extinguished*, and are, in effect, transferred to the person whose possession is a bar. Cases of charities were not included in any of the early statutes of limitations, nor were charities bound by that analogy to those acts which equity applied in all other cases; and they would seem not to have been included within the enactments of the 3 & 4 Will. 4, c. 27, but to form a *casus omissus*.(a) With respect to that statute, adverse possession has *now* no operation.(b) On the other hand, as regards lapse of time, it is to be considered that it will not by itself legally justify a departure from a charitable trust, though it is nevertheless a circumstance which is always very material to be taken into consideration, and may have different weight attached to it according to the circumstances which have taken place.(c)

It is desirable to notice, that though a gift for the maintenance of schools of learning or free schools is good as a charitable use;(d) and so a gift for furniture, &c., of the schoolhouse, or for provision for the master, or under-master;(e) yet the statute of Elizabeth does not extend to schools for dancing, fencing, &c.,(e) or for instructing in the catechism, for that is matter of religion;(e) nor to schools which are not free schools.(f)

We will not quit the subject without remarking, although the observation does not, for the most part, apply to incorporated free schools, that such of the charities for purposes of education among others, as were vested in municipal corporations as trustees previously to the passing of the Municipal Corporations Act, are now divested out of them; and all the interest, and all the powers of the corporation, as trustee in each case, ceased on that act, which provides that the Lord Chancellor shall

(x) Att.-Gen. v. Mayor, &c., of Bristol, 2 Jac. & W. 314. Except in cases of charitable trusts, corporations will be barred by (*South Sea Company v. Wyndham*, 3 P. Wms. 143), or have the advantage of (*Wyndham v. East India Company*), 3 P. Wms. 310, statutes of limitations just as individuals.

(y) Att.-Gen. v. Brazen Nose College, 2 C. & F. 330.

(z) Att.-Gen. v. Mayor, &c., of Bristol, 2 Jac. & W. 294; *vid. Reg. v. Ellis*, 2 Dowl. N. S. 361.

(a) The Incorporated Society in Dublin for promoting English Protestant schools in Ireland v. Richards, 1 Dru. & War. 258. However, in that case, Sir E. Sugden, Ch. Ir. expressly disclaimed deciding the point; *vid. S. C.* as to taking an account in favour of a charitable corporation by annual rests.

(b) 1 Dru. & War. 289; *vid. 2 M. & W.* 894.

(c) Att.-Gen. v. Grocers' Company, 6 Beav. 544; *vid. further cases*, Jac. 443; 1 Meriv. 495; 5 My. & C. 16.

(d) Porter's case, 1 Rep. 22 b; commented on, Att.-Gen. v. Bower, 3 Ves. jun. 726; Com. Dig. Uses, N. 3. (e) Duke, 134.

(f) Com. Dig. Uses, N. 3; 2 Vern. 387; as to Winchester College, Broadnax's case, cited 1 W. Bla. 58; *Moseley v. Warburton*, Salk. 320; Eton College, Phillip Williams's Report of the Proceedings against Provost of Eton College, 1816; statutes printed in Report of Charity Commissioners, 5 June, 1818.

make orders for the administration of the trusts. Therefore, where new trustees have been appointed by him, all that it is necessary to do, in order to find what are their powers, is to look and see what were the powers of the corporation antecedently to the *passing of the act; [*566] for the act only substitutes one authority for another; and there is no ground for dividing the trust by vesting the legal property in one party and the discretionary in another;(*g*) and therefore the power of nominating and removing the head master, when formerly lawfully exercised by the corporation, is now in the hands of the trustees.(*h*) Also it may be considered as now settled, after some hesitation, that where there are exhibitions provided out of the surplus funds of the school, none but boys who are objects of the charity, and not the master's boarders, ought to be eligible to them.(*h*)

*HOSPITALS.

[*567]

A CLASS of corporations next comes to be examined which differs but little, in *legal consideration*, from that of colleges; and perhaps the principal distinction between the two is, that the constructions which have been put upon their statutes have interpreted the founder's intentions more strictly in the one case than the other, so as to devote the former foundations more exclusively to their original object of the sustentation and maintenance of poor persons than has been done with respect to the latter, whose original object was the education and maintenance of poor persons; but, however that may be, the legal sense of the word hospital is a corporate foundation, endowed for the perpetual distribution of the founder's charity, in the lodging and maintenance of a certain number of poor persons, according to the regulations and statutes of the founder. Such institutions are not necessarily connected either with medicine or surgery, and in their original establishment had no necessary reference either to sickness or accident; though it was not uncommon, in ancient times, to found hospitals for lepers and other diseased persons.(*i*)

Strictly, such corporations are only, in a legal sense, hospitals, when all the inmates of the foundation are incorporated, and have a common seal, and, in all other outward respects, resemble a college; when the trustees or governors only of the house were incorporated, that is to say, whether certain persons were appointed to manage the concerns of the house in which the poor resided, and such persons were incorporated, and a mode of maintaining the succession pointed out, but the poor objects of the charity were not themselves incorporated, the institution was not held to be, in the strict legal sense, a hospital;(*k*) and the same

(*g*) *Att.-Gen. v. Mayor, &c., of Ludlow*, 2 Phill. 687, which is at variance with *Doe d. Governors of Bristol Hospital v. Norton*, 11 M. & W. 913, on this point; sup. p. 511.

(*h*) 2 Phill. 685; vid. sup. p. 554, n. (*g*).

(*i*) 10 Rep. 33 b; vid. 2 Inst. 726, marg. Colleges and hospitals are the same in their nature and properties, differing only in degree; *Phillips v. Bury*, 2 T. R. 353; vid. 1 Leon. 215.

(*k*) 10 Rep. 31 a; vid. tam. 2 Inst. 724; *Att.-Gen. v. Brown's Hospital*, 19 Law

was the case if a body already incorporated were again incorporated as governors of the foundation, of which there are many instances.^(l)

[*568] *Corporations of hospitals in the first sense are essentially local, and cannot be detached or removed from the place where they are founded, except by act of parliament; indeed, the name of the place where they are situated usually forms part of the corporate name of the body; and though it is not requisitive that the true place of their location should be stated in the corporate name,^(m) yet they are not the less bound to the locality of their foundation; but the charter may incorporate the body before the house be erected for their reception, and in the meantime the corporation subsists as a corporation in abstracto, as Sir E. Coke terms it;⁽ⁿ⁾ and such a corporation, whether founded in the name of the master and brethren, &c., or warden and brethren, &c., would have capacity to take by grant of remainder, or to take a remainder by devise before the master, or warden, or brethren were nominated or established in their house,^(o) provided that the nomination be made during the continuance of the particular estate.^(p)

Hospitals erected for the reception and aid of diseased or sick persons are not nuisances;^(q) but now, whenever it is intended to build or open any hospital for the reception of patients afflicted with contagious or infectious diseases or disorders, the trustees, or other persons by whose authority such hospital is intended to be built, &c., shall give notice of such intention to the General Board of Health; and no such hospital shall be built, &c., until the said General Board of Health have approved thereof in writing.^(r)

Previously to the stat. 39 Eliz. c. 5, hospitals might be founded either by royal license or by letters-patent of incorporation; and before the act, a hospital was founded for bedesmen who were appointed for life: held, that the hospital must be presumed to have been founded regularly, in pursuance of a license, but that the court was not bound to presume that it had been incorporated, no deed of any description, nor trace of one, being found; no enrolment under 39 Eliz. c. 5, nor letters-patent being in existence; nor was there any common seal, nor any trace appearing of the hospital ever having sued, or having been sued, as a corporation.

J. (N. S.) Chanc. 73. In other hospitals the estates are vested in the master; and though there is a common seal the brethren have only power to consent; Co. Litt. 342. In other hospitals none but the master or warden or other head is incorporated, and the estates are vested in him, and he cannot lease them for other than twenty-one years, or three lives, at the accustomed rent or more, payable yearly during the term; 13 Eliz. c. 10, s. 3, and 14 Eliz. c. 14; 14 Eliz. c. 11, s. 17.

If a master is removable for certain specified causes, and for other reasonable causes, as often as to a majority of the governors shall seems convenient, he has not such a freehold as gives a vote for the county; Davis v. Waddington, 8 Sc. N. R. 807, nor have the brethren, S. C.

(l) Governors of Bridewell v. Germain, cited 10 Rep. 31 b; Doe d. Governors of Hospital of Queen Elizabeth of Bristol v. Norton 11 M. & W. 913.

(m) 10 Rep. 32 a; Yearb. 44 Edw. 3, fol. 16, pl. 4.

(n) 10 Rep. 31, 32. Meaning of domus as applied to a hospital, 10 Rep. 32 a; 2 T. R. 325. It may not be demised by the corporation, 14 Eliz. c. 11, s. 17.

(o) 10 Rep. 31 b.

(p) Co. Litt. 264 a.

(q) 3 Atk. 21, 726, 750; Case of Small Pox Hospital, Ambl. 158.

(r) 11 & 12 Vict. c. 123, s. 8. The enactment does not apply to the building or opening of an addition to a hospital previously established, s. 8.

The hospital was presumed to have been established during the period of twenty years in which the stat. 35 Eliz. c. 4, was in operation.^(s)

He who first-endows the hospital is the founder.^(t)

In general, the name of incorporation states, or has some reference to, the name of the founder;^(u) and when it does include the name *of the founder, his name, if so included at the incorporation of [*569] the body, used to be thought an essential part of the corporate name;^(uu) but a corporate name will not be bad as a name of incorporation, because the name of the person referred to in it is not the actual founder's name; thus when Hen. 8 founded the hospital of the Savoy, by the name of "The Master and Chaplains of the Hospital of Henry, late King of England, the Seventh, of the Savoy," it was admitted in argument, that, the foundation being made in pursuance of the will of Hen. 7, the name was sufficiently good, though Hen. 8, in fact, endowed and erected the hospital;^(x) and this appears to be the law.^(x)

Formerly, very minute accuracy was required in regard to stating the name of a corporation of this kind in suits by or against them, and in grants and leases by or to them, &c., &c. Thus a writ of scire facias against the provost, &c., of St. Nicholas of Canterbury was supposed to abate because it called them the provost, &c., of St. Nicholas in Canterbury.^(y) So to an assize by a body calling themselves in the writ by the name of "The Master and the Brethren of the Fraternity of Nine Orders of Angels in Brentford," it was pleaded in abatement, that the fraternity was incorporated by the name of "The Master and the Brethren of the Fraternity of all Saints and the Nine Orders of Angels," sans ceo that they were incorporate as they had called themselves;^(z) and in leases by or to hospitals, variations in the name had been held to invalidate the demise, at least if they applied either to the name of the persons of the house, of the foundation, or of the dedication, or of the lieu conus where the house was situate.^(a) From the reign of Edw. 6 to the end of the reign of James I, many decisions are to be found turning on many nice points of this nature; and many, now apparently frivolous, objections were entertained; but a greater liberality of sentiment now prevails in the decisions of courts of justice. Accordingly it is now quite settled, that if a hospital lease or convey property by a name which is not exactly their name of incorporation, and seal the instrument with their common seal, and receive the rent or consideration money, they

(s) Simpson, app., Wilkinson, resp., 7 M. & Gra. 50.

(t) 10 Rep. 33 b. Whether the hospital be founded at common law or under the stat. 39 Eliz. c. 5; 2 Inst. 724; vid. inf. p. 571.

(u) Mariatt v. Pascall, Anders. 210; S. C. cited 10 Rep. 32 b.

(uu) Vid. cases cited in Croyden Hospital v. Farley, 6 Taunt. 467. Though the courts take notice that "A. B. and Company" is *not* a corporation, R. v. Harrison, 8 T. R. 508; yet it seems, nevertheless, that the incorporation of a hospital ought to be stated in pleading, for it will not be presumed; per Maule, J., 7 M. & Gra. 63; therefore, they must say in pleading seisin, that they were seised in right of the corporation, not of the hospital; 10 Rep. 34 a.

(x) Mariatt v. Pascall, Anders. 210; S. C. cited 10 Rep. 32. b.

(y) Yearb. 15 Edw. 4, fol. 15, p. 20.

(z) Yearb. 22 Edw. 4, fol. 34, pl. 13; et vid. Com. Dig. Capacity, B. 5.

(a) Per Manwood, C. B., Moor. 235.

cannot be allowed to say the lease or conveyance is void because they misnamed themselves in the deed.(b)

Notwithstanding, however, the ancient precision, a hospital, it was considered, might be named, and known, and used to plead, and be impleaded *as well by one name as another. Thus the master of [*570] St. Lazarus hospital had been for a century and a half used to be named, known, &c., as well by the name of "The Master of the Hospital of St. Lazarus of Burton, of the Order of St. Lazarus of Jerusalem in England," as by the name of "The Master of Burton St. Lazarus of Jerusalem in England." (c) But it has since been considered that the law is otherwise, for Sir E. Coke says, "There is a difference between ancient corporations and corporations made of late times; for ancient corporations may, by usage, have divers and several names; and leases, grants, &c., by any of them, shall be good enough;" (d) but the others he intimates may not.

A devise to a corporation to the use of a hospital was held good, though the corporation to whom the devise was made was misnamed in the will; for it was said a devise to a charity shall be favoured.(e)

There are four principal and substantial particulars to be observed with regard to these corporations aggregate, as it has been said; and the effect of the rule laid down is, that 1. Each corporation must be known by a name, as master and fellows, or rector and confreres, or master and brethren, or warden and brethren, or master and brethren and sisters, warden and poor, &c. 2. There must be a place certain where all the persons incorporated shall be resident, which must also have a name certain, as college, hospital, &c. 3. The corporation must have the name, either of a saint to whom it is dedicated, or that of the founder, included in, and making part of, its corporate name, under which it sues and is sued. 4. There must be a place known in which the house shall stand, and such place shall be known by some name before the foundation of the hospital, &c.; ex. gra. in Oxford, in London, &c.(f) To erect a hospital by the name of such a hospital in the county of A., or the bishopric of B., or the like, is not good, as being uncertain;(g) it

(b) *Croydon Hospital v. Farley*, 6 Taunt, 467. Most of the old objections would now, if apparent on the pleadings, either be set right on summons to amend as in case of misnomer of individuals, or might be amended by the judge at Nisi Prius under the Law Amendment Act, and the established practice thereon; vid. Lush, Pract. 309, 310.

(c) *Master of Burton, &c., v. Prior of Sempringham*, Yearb. 9 Edw. 4, fol. 19, 20, pl. 22; vid. Yearb. 3 Hen. 6, fol. 28, pl. 10.

(d) *Case of Mayor, &c., of Lynn Regis*, 10 Rep. 126 a. Deed of grant to a corporation by such a name is evidence against persons claiming under the grantor, that the corporation was known by such name at the time; *Mayor, &c., of Carlisle v. Blamire*, 8 East. 487.

(e) *Case of Mayor, &c., of London*, Duke, 83; et. vid. stat. 14 Eliz. c. 14.

(f) *Per Manwood, C. B., in Fanshaw's case*, Moor. 231; vid. 6 Taunt. 467. 469, that the name of incorporation may include both the name of the saint, &c., to whom dedicated, and also the founder's name; et vid. per Whitlock, J., 1 Leon. 126; S. C. Moor. 266, cited 10 Rep. 126; vid. as to the effect of omitting the name of the saint in a grant, &c., 11 Rep. 21; et vid. 6 Taunt. 467; 3 Rep. 75.

(g) *Per Popham, C. J., in Button v. Wrightman*, Poph. 57.

must be of some place, ex. gra., city, town, village, or hamlet, in the county of, &c.

But if these matters be stated, in pleading or demising, in such a way as sufficiently to distinguish the corporation from any other, it will suffice, and advantage cannot be taken of such misnomer; for it is immaterial to the merits of the cause.^(h) However, if they grant or make an indenture by a name substantially different from their own name, such indenture is invalid.⁽ⁱ⁾

*An addition to the real name was never held material^(k) in [*571] pleading or leasing.

Still wider latitude is allowed (as we have seen) in a devise to a corporation of this kind, for there the deviser will be allowed to use the name by which the hospital is usually known and named in common parlance, which seldom, or never, contains all the above particulars; and so if a corporation of this kind is mentioned in a statute;^(l) and "he who would avoid a writing, demise, grant, &c., made by a corporation, or to it, by reason of any verbal or literal misnomer, ought to show that there are two corporations within the same city, borough, or town, &c., viz. one by the true name, and another by such name as is contained in the deed, &c., and to have the deed good for, or to, one of them; but where in truth there is but one corporation, leases, grants, &c., made by them or to them, ought not to be avoided by such nice and verbal variances, when in substance the true name of the incorporation, either by matter expressed or necessarily implied within the words themselves, appeareth to the court."^(m) The proper mode of taking the objection at present, if the declaration stated the deed to have been made by or to the corporation by its correct name, while in truth the deed was made in a name which might be either that of the corporation made a party to the suit, or the other corporation of a somewhat similar name in the same place, seems to be doubtful.⁽ⁿ⁾

With respect to the manner of founding a hospital at common law, it is laid down, that to erect a hospital there is nothing required in law,

(h) *Marriott v. Pascal*, 1 Leon. 126; *Case of Mayor, &c., of Lynn*, 10 Rep. 123; *Croydon Hospital v. Farley*, 6 Taunt. 467; *Abbot of York v. Abbot of Selby*, Yearb. 8 Edw. 3, fol. 68, pl. 35.

(i) *R. v. Inhabitants of Haughley*, 4 B. & Ad. 650, 655.

(k) *Ayray's case*, 11 Rep. 20 a; *Button v. Wrightman*, Poph. 56.

(l) 10 Rep. 57 b; *Com. Dig. Capacity*, B. 5; 11 Rep. 21 b; 2 Leon. 165.

(m) Sir E. Coke's note to the *Mayor, &c., of Lynn's case*, 10 Rep. 126, commenting on Yearb. 25 Edw. 3, fol. 91, pl. 3, the *Prior of Worcester's case*, where in a *præcipe quod reddat* the writ was abated (it being shown that there was a prior of the church of St. Mary of Worcester, and a prior of the friars preachers also in Worcester) for the uncertainty of it, as it ran *præcipe priori Wigorniae, &c.*; et vid. 11 Rep. 21 b.

The grant of the crown of lands to a corporation by another name than that by which they were known before has the effect of passing the lands, and also incorporating them by the new name; *Dean and Chapter of Christchurch v. Parot*, 3 Leon. 190; vid. 3 Rep. 75.

(n) Compare *Smith v. Jennings*, 9 Dowl. 155, with *North v. Wakefield*, Q. B., East, T. 1849; vid. 6 Dowl. & L. 96; 6 C. B. 290. Quare whether the right course is to set out the deed on oyer, and plead *non est factum*.

but incorporation and dotation, or endowment. (o) But the incorporation may be effected in two ways. Either the crown, in the charter of incorporation, may designate the place in, or at, which the buildings or tenement of the hospital is to stand, and appoint the number of corporators, and give the name, so that the incorporation is complete by the charter, and there remains for the founder nothing to do, but to grant the lands or property forming the endowment, which he may do by an instrument not containing any words of erection or foundation, such as *fundo, erigo, stabilio*, or the like; (p) or the crown, by the *charter of incorporation, may reserve for the founder the nomination of the persons, and the giving of the corporate name, when the founder must nominate the parties, and impose the corporate name by which they shall sue and be sued, which he may likewise do without any of the above-mentioned description of words. In this case, it is not until the founder has stated these particulars in writing, that the incorporation is complete: and in either case it is the crown, and not the founder, who incorporates the body. (g)

But from the principles of corporation law, it follows that the incorporation must, in either case, precede the endowment; for until the incorporation of the persons, who are to be the objects of the charity, there is nothing for the endowment to operate upon; because a body of persons, not incorporated, cannot take to them and their successors, as they cannot, *quâ* individuals, have any successors; and therefore, in order to effect the purpose, that the lands or property granted may perpetually feed the charity, there must be a corporation already established, to whom the lands or property may be granted in perpetuity. (r) Of course, also, for this purpose, the corporation must have a license in mortmain to enable them to hold the lands (if lands be granted,) for the reasons fully explained above. Therefore, the license to hold in mortmain, as well as the incorporation, ought to precede the endowment of the hospital, if it is intended by the founder to endow it with real property, either wholly, or in part. (r)

On the whole, it appears that the best and least troublesome mode of founding a hospital is to obtain the insertion in the charter of incorpora-

(o) 10 Rep. 33 b. 15 Hen. 6 is the earliest date on record of incorporation of a hospital.

(p) 10 Rep. 33 b.

The nomination of persons to be corporators of the hospital, if not otherwise disposed of, vests in the founder and his heirs, being incident to the foundership; *Att.-Gen. v. Ripley*, 3 P. Wms. 145; *vid. Att.-Gen. v. Brentwood School*, 3 B. & Ad. 59.

But the heirs may forfeit the right by a corrupt and improper nomination of unfit objects of the charity, or by making no nomination at all, and having had due notice of the vacancy; *Att.-Gen. v. Leigh*, 3 P. Wms. 146.

Where one seised in fee of a manor granted a rent in fee out of it for the support of poor persons, and afterwards grants the manor to J. S., the right of nominating the poor persons does not pass with the manor, but remains in the grantor and his heirs; *Att.-Gen. v. Rigby*, 3 P. Wms. 145.

(g) 10 Rep. 33 b. Where the hospital was, by charter, created to consist of a certain number, in pleading such number ought to be stated; *Case of Master of Wycombe Hospital*, Yearb. 34 Hen. 6, fol. 27, pl. 6; but it is otherwise in pleading a hospital by prescription, S. C.

(r) *Vid* 10 Rep. 26 b.

tion of the names of the parties whom it is intended should be the first objects of the charity, together with the intended name of the corporation, because then the whole that is necessary to be done may be accomplished by the charter alone, for as we have seen, a charter of incorporation may always also contain the license to hold in mortmain, and if it contain all these particulars, then nothing remains for the founder but to grant the lands and frame the statutes, and name the visitor;(s) other wise if the charter leaves to the founder to nominate *the parties [573] and give the name, then, as we have said, the incorporation is only complete when he has done so, and the crown must again be resorted to to grant the license in mortmain,(t) before the founder can proceed to grant the donation or endowment of lands. Of course the founder, if he pleases, may erect, furnish, and complete the buildings, &c., for the reception of the master and brethren, before the charter or license is actually obtained. But his deed of grant of the building, lands, &c., must not be delivered before the incorporation, even though it should profess to grant to the body by the name in which they were subsequently incorporated; for though a grant of lands rendering rent to the inhabitants of Islington (according to an old illustration) is good (if made by the crown) to incorporate them for the purpose at least of the payment of the rent, yet there appears to be no authority denying that a grant by a subject to the mayor and commonalty of Islington, where there is no such corporation, is void, although the inhabitants of Islington be afterwards incorporated by the name of the mayor and commonalty of Islington,(u) and there are authorities in affirmance of the proposi-

(s) Where the founder gives the visitors power to place and displace the officers of the hospital at pleasure, that fully empowers them to amove without assigning any cause: and when a founder's statutes say that in such and such cases *they shall and may amove*, the words are to be construed *they must*; Att.-Gen. v. Lock, 3 Atk. 164; Davis, app., Waddington, resp., 7 M. & Gra. 45. As to interpretation of founder's statutes, vid. In re University College, Oxford, 2 Phil. 521.

A mandamus to restore a sister of the hospital of St. Bartholomew's, in Sandwich of royal foundation, was refused, because the almswoman there were removable at will, R. v. Wheeler, 3 Keb. 360; and semb. even if she had had a freehold interest, as this was a removal by the governors, the proper course, in that case, as well as in the former, would have been to apply to the visitor, vid. Reg. v. Dean and Chapter of Chester, Q. B. T. T. 1850.

Where the governors or trustees of the hospital are incorporated, but the inmates are not, and the latter are removable by the former, toties quoties sibi *conveniens fore videbitur*, they have not an estate for life in the property enjoyed by them as inmates; Davis, app., Waddington, resp., 7 M. & Gra. 37. Secus if the right of partaking in the founder's bounty had been given to the inmates, *quam diu se bene gesserint*; Yearb. 37 Hen. 6, fol. 26, pl. 1.

(t) Perhaps a license to hold in mortmain might be good, though it were contained in a charter from the crown of the first kind above mentioned, which reserved to the founder the power of nominating the corporators and giving the name, although the corporation would not be complete until he had done so; for a license to grant in mortmain to a chaplain or chantry priest, whom the grantee was afterwards to name, the name not being contained in the license, was held good in Buckland v. Fowcher, cited from the Yearb. 2 Hen. 7, fol. 13, in 10 Rep. 27; but the judgment there proceeded partly upon the ground that all grants with respect to charities were in that form. It has been observed before, that the license to grant in mortmain appears to be disused in practice at present. For licenses in mortmain to various hospitals, vid. Shelf. Mortm. 46—49.

(u) Vid. sup. CHARTERS, p. 26; et vid. 10 Rep. 27 b, the doctrine in which will be found, on examination, not inconsistent with the statement in the text.

tion.(x) The founder's statutes, it must be remembered, may, like the by-laws of other chartered corporations, be looked at to expound the meaning of the charter.(y)

The above are the requisites and formalities to be observed in establishing a hospital *as at common law*; but the charges of incorporation and of the license in mortmain, being found to have the effect (as we are told)(z) of discouraging many from undertaking these pious and charitable works, an act of parliament was passed empowering any person seised of an estate in fee simple, his heirs, executors, or assigns, by deed inrolled in Chancery, to erect, found, and establish, and in all respects fully to incorporate, hospitals, provided the endowment did not exceed the yearly value of 200*l.* above all charges and reprises, nor be under 10*l.* a year, of any one such house, and provided the lands be not holden [*574] in chief of the crown—immediately, without license in mortmain, *or writ of *ad quod damnum*, “as well for the finding, sustentation, and relief of the maimed, poor, needy, and impotent people, as to set the poor to work,” &c.(a) And the effect of the enactment is, that every one desiring to found a hospital, with a yearly revenue not exceeding the above sum, for the purposes mentioned, may at present do so, by deed inrolled, subject to the provisions of the stat. of Geo. 2.(b) and the body so erected, having a name given them, the members who are to enjoy the charity ascertained, and a common seal, and statutes appointed for them, will become and be *ipso facto*, without more, a corporation, to all intents and purposes, within the scope of their institution.

All leases, &c., by such hospital, exceeding twenty-one years' term, “and that in possession,” and whereupon the customary yearly rent for the greater part of twenty years next before the making of the lease, or more rent, shall not be reserved yearly payable, shall be void, and the corporations so constituted are strictly inhibited to do, or suffer to be done, any act or thing by means of which any property whatever, or any interest in any property whatever, of the hospital, shall be vested or transferred in or to any other whatsoever, contrary to the true meaning of the act; and it is further enacted, that the statute shall be construed as shall be most available and beneficial for the maintenance of the poor, &c.:(c) and nearly the same is enacted with respect to

(x) Vid. sup. p. 111.

(y) 7 M. & Gra. 44.

(z) 2 Inst. 722.

(a) 39 Eliz. c. 5, made perpetual by 21 Jac. 1, c. 1. In 2 Inst. 722, the statute is said to extend to empower corporations to found hospitals, on the ground that the words “all and every person or persons” extend to bodies politic; but the words “any person or persons whatsoever,” in 9 Geo. 2, c. 36, have been held to exclude bodies politic; 2 M. & W. 890; vid. sup. p. 4.

(b) 9 Geo. 2, c. 36. Therefore the deed must be “indented, sealed and delivered in the presence of two or more credible witnesses, twelve months before the death of the donor or grantor, and be inrolled in chancery within six months next after the execution thereof,” &c. &c., s. 1; et vid. 2 Inst. 723, where a form is given. A lease of lands belonging to an ecclesiastical corporation, ex. gra. to a bishop in right of his bishopric, being already in mortmain, might be made to a hospital, notwithstanding this statute; *Walker v. Richardson*, 2 M. & W. 882; vid. 13 Bacon's Works, 349, edit. Montague; *Att.-Gen. v. Glynn*, 12 Sim. 84. As to renewals by masters of hospitals, 6 & 7 Will. 4, cc. 20. 64; 5 & 6 Vict. c. 108.

(c) 39 Eliz. c. 5. Vid. 4 Burr. 2154. 1975. They may take goods and chattels to any amount, 2 Inst. 722.

leases by any other hospital whatever, viz. that they must not be for more than twenty-one years, or three lives, at the ascertained rent or more. (*d*)

This power of leasing is further restricted by a provision, (*e*) that houses situate in any city, borough, or town corporate, or grounds belonging to them, may be demised by a hospital as theretofore they lawfully might have been, except where the house is the dwelling-house of the corporators, or has granted above the extent of ten acres, belonging to it; and moreover, (*f*) no lease whatever can now be made by a hospital in reversion, nor without reserving the accustomed yearly rent at least, nor for longer term than forty years at most; and no houses *are permitted to be aliened, "unless in recompense thereof [*575] there should be afore, with, or presently after such alienation, good, lawful, and sufficient assurance made, in fee simple, absolutely," to the hospital, "of lands of as good value, and of as great yearly value, at the least, as those which should be so aliened."

The power is further restricted by provisions intended to check the granting of concurrent leases, (*g*) the effect of which is, that no lease is to be made by a hospital of any of their real property, "of which any former lease for years was in being not to be expired, surrendered, or ended, within three years next after the making of any such new lease; and that any lease made contrary to this should be void;" as was made every bond and covenant for the renewal of leases contrary to the act, or that of 13 Eliz. c. 10; and by another statute, confirmatory of the last-mentioned one, and by the subsequent explanatory statutes, it is provided, (*h*) that all judgments had for the intent to have or enjoy any lease, contrary to the said statutes, or any of them, should be void. However, a lease made under the corporate seal, at the customary rent, before the expiration of a former lease, to a person who had only a partial interest therein at the time, but to whom the whole interest was assigned within three years afterwards, is good to bind the succeeding head and brethren of the hospital. (*i*) When the estates have once vested in the corporation under this statute, neither the founder nor the hospital can alienate them; nor can the hospital confirm the alienation of them by the former, (*k*) except under the land-tax acts; (*l*) for the corporation cannot do anything to the prejudice of the charity, or in breach of the founder's statutes in general; but they may, it seems, improve the estate, even though in doing so they act contrary to those statutes. Thus where the founder had ordered that no more than the old rent should be re-

(*d*) 13 Eliz. c. 10, s. 3; Magdalen College case, 11 Rep. 76 a; 14 Eliz. c. 14. The house for the habitation of the corporators may not be demised; 14 Eliz. c. 11, s. 17.

(*e*) 14 Eliz. c. 11, s. 17.

(*f*) 14 Eliz. c. 11, s. 19; Hunt v. Singleton, Cro. Eliz. 564. Before this act they could not have aliened in fee; Crane v. Taylor, Hob. 269.

(*g*) 18 Eliz. c. 11; 43 Eliz. c. 9. The first of these statutes does not apply to the 14 Eliz. c. 11, and consequently a bond or covenant for renewing a lease of a house within a city, &c., may be enforced; Crane v. Taylor, Hob. 269; vid. tam. 43 Eliz. c. 9.

(*h*) 43 Eliz. c. 9, s. 8.

(*i*) Grumbell v. Roper, 3 B. & Ald. 711; vid. 4 Burr. 1975. 1980.

(*k*) Mayor, &c., of Newcastle v. Att.-Gen., 12 Cl. & F. 402.

(*l*) 39 Geo. 3, c. 6; 42 Geo. 3, c. 116; 54 Geo. 3, c. 173.

served in their leases, and yet the corporation in their leases had reserved nearly double the old rent, it was decreed to be paid.^(m)

[*576] ^{*}The character of these corporations is evidently, in a peculiar manner, local, as appears from what has been said above; and accordingly it has been held, that a deed made by a hospital situate locally in West Smithfield, in the city of London, being dated at Chelmsford, was bad on that account.⁽ⁿ⁾ Where the ex-mayor of the town, in or near which the hospital was locally situate, was, by the constitution of the hospital, to be the governor; the masters and assistants of the hospital were elected from the corporation; and the mayor and aldermen of the town were the visitors; it was considered in equity that the hospital and municipal corporation were incapable of contracting together, and a purchase by the corporation of property belonging to the hospital was set aside.^(o)

The hospital cannot present the master to a church in their gift, for if they did, the master would be, in two ways, party to the transaction; for he would give in one capacity and take in another from himself; and a man cannot be donor and donee, nor do any act to himself, except from necessity, as where executor pays himself, &c.^(p)

The founder may appoint such person or body politic to visit, or appoint to places in, the hospital, as he pleases, according to statutes,^(q)

^(m) *Lydiatt v. Foach*, 2 Vern. 412, pl. 376; *vid. Watson v. Hemsworth Hospital*, 2 Vern. 596, pl. 535; *et vid. 2 Ves. & B. 138*; *et vid. Taylor v. Dulwich Hospital*, 1 P. Wms. 655.

A lease for twenty-one years, with a covenant for renewal, so as to make it a lease for sixty years, is merely an evasion of the statute, being as prejudicial to the interests of the charity as a lease originally for sixty years, and the covenant is void in equity; *Lydiatt v. Foach*, 2 Vern. 410.

As to renewal of leases where founder gives power to renew, *vid. 14 Ves. 324*; *Duke*, 49; 2 P. Wms. 655; *sup. n. (b)*.

Where leases are granted under 13 Eliz. c. 10, for three lives, the Court of Chancery will not compel the hospital to renew, upon certain terms, under two years reserved rent; *Somerville v. Chapman*, 1 Bro. Ch. Cas. 62; *Bettesworth v. Dean, &c.*, of St. Paul's, 3 Bro. P. C. 389; *vid. Att.-Gen. v. Clements*, 1 Turn. & R. 58.

Where the leases, by order of the founder, were for twenty years, the Court of Chancery repudiated the power of ordering that they should be made for ninety-nine years, though the master reported that it would be for the benefit of the charity to do so; *Att.-Gen. v. Mayor, &c.*, of Rochester, 2 Sim. 34.

⁽ⁿ⁾ *Master of St. Bartholomew's Hospital case*, Yearb. 22 Edw. 4, fol. 18, B; *vid. 21 Edw. 4*, fol. 13; *et vid. sup. p. 147*, note ^(h).

A master having the fee in him is bound, like a hospital aggregate, not to make any lease, gift, grant, or conveyance, estate, charge, or incumbrance to bind his successor, other than for twenty-one years, or three lives in possession, at the customary rent; *Co. Litt. 342 a*.

^(o) *Att.-Gen. v. Mayor, &c.*, of Plymouth, 9 Beav. 67. As to setting aside leases by hospitals, *vid. cases Chitty, Eq. Ind. p. 306*; 1 Platt, Leases, 347. 351; 5 Vict. sess. 2, c. 27; 5 & 6 Vict. c. 108; 33 Hen. 8, c. 27; 12 Rep. 120.

^(p) *Per cur.*, Yearb. 14 Hen. 8, fol. 30, 31; *vid. Lyn v. Wyn*, O. Bridg. 148; *Wood v. Mayor, &c.*, of London, Salk. 398; 8 Mod. 304; 3 Burr. 1563; 17 Vin. Abr. 330.

^(q) 39 Eliz. c. 5.

The best mode of securing the general visitatorial power to the visitor is, to prescribe that no act shall be done without his assent; *Att.-Gen. v. Dulwich College*, 4 Beav. 341.

Sir E. Coke recommends that the statutes be inrolled, and that they bear date after the endowment of lands, 2 Inst. 725; which is best effected, he says, by way

to be set forth in writing under his hand and seal, not being repugnant to the laws of the realm; or may reserve to himself, or his heirs, or assigns, the power of removing and appointing the corporators in the hospital.^(r)

A right of appointing the master, and, as it seems, of appointing all *the corporators, may be aliened,^(s) and the patronage of a hospital may be specially limited, so as to be a desultory kind of [*577] inheritance.^(t) The appointment of the master, where he is a corporation sole, does not vest in him individually the estate in the lands, &c., of the hospital for his life, though it gives him a life estate in the mastership or office, subject to be divested on deposal or deprivation, when he loses ipso facto all right and interest in the property.^(u)

The master has no power of taking to him and his successors unless he is incorporated. Therefore, where a devise was made of the residue and remainder of all the testator's estate to the governors of the Foundling Hospital and their successors forever, it was held that, not being a corporation, the persons so designated could not take.^(x)

On the other hand, when he is incorporated, and recovers in debt

of bargain and sale, between the founder of the one part, and the master and brethren, &c., of the hospital of the other part, 2 Inst. 725.

A declaration of an use by a founder was presumed from an entry in an ancient book purporting to be such declaration, but without signature or date, the book being kept by the trustees for entering their proceedings, and containing an order of the trustees, dated six years after creation of the trust, that the declaration should be entered as a direction to the trustees; Att.-Gen. v. Boulton, 2 Ves. 380.

(r) 39 Eliz. c. 5.

Wherever the founder omits to appoint a visitor, Sir E. Coke says, the bishop of the diocese shall visit; 2 Inst. 725. Visitor, when not entitled to general visitatorial powers; Att.-Gen. v. Brown, 19 L. J. (N. S.) Chan. 73. Spiritual hospitals are mostly visitable by the ordinary, except those under 25 Hen. 8, c. 21, s. 20, where the visitation is to be exercised by the crown by commission under the great seal.

As to hospitals founded at common law, if the founder appointed no visitor, he was to visit during his life: and after his death, the bishop of the diocese or his chancellor; 14 Eliz. c. 5.

Hospitals founded by the king or his progenitors, kings of England, are visitable by the great seal, and a prohibition will go to the ordinary if he attempts to visit; Fitz. N. B. 42, A.; vid. 17 Vin. Abr. 245.

(s) Vid. Williams v. Bishop of Lincoln, Cro. Eliz. 790. The patronage of a hospital is treated as assignable in stat. 39 Eliz. c. 5; and in 31 Eliz. c. 6, the rights of patronage to churches, colleges, schools, and hospitals, are considered of the same nature.

Att.-Gen. v. Master of Brentwood School, 3 B. & Ad. 59, shows that the right of appointment to the mastership of a free grammar school may be aliened; vid. 3 P. Wms. 145.

Quare impedit lay for the mastership of a spiritual hospital; Mayor, &c., of Bedford v. Bishop of Lincoln, Willes, 608. Form of declaring; Rast. Entr. 463, B.

Nonage of the master is no plea to an action of debt against the hospital; Yearb. 21 Edw. 4, fol. 13, 14; 2 Vin. Abr. 151, pl. 10, marg.

The mastership is not grantable in reversion; Lord Brouncker v. Atkins, T. Jones, 176; S. C. 1 Chan. Cas. 215.

(t) Atkins v. Montague, Cas. in Chanc. temp. Car. 2, 214; vid. 3 Salk. 250; 3 B. & Ad. 72; Att.-Gen. v. Butler, Skin. 644; The Case of St. Katherine's Hospital, cited sup. p. 540; 2 Dugdale, Monast. 460.

(u) Per Herle, J., in Shiraks v. Archbishop of York, Yearb. 8 Edw. 3, fol. 70, A.

(x) Arnold v. Chapman, 1 Ves. sen. 108; vid. 17 Ves. 466; vid. Graves v. Colby, 9 A. & E. 356.

money owing in respect of the charity, his successor, and not his executors, shall have scire facias on the judgment; for he cannot make executors in respect of anything appertaining to the house or corporation.(y)

When in an action the master claims as master, but he is not sued as such, but only in his individual character, he ought to state how he is appointed, or became, master, and, if elected by the brethren, he must state how he was so.(z) If he is sued as master, then his character is admitted, and it is not necessary to state how he acquired it.

The master of a hospital is liable in equity to refund fines, which he had received contrary to his duty, though according to the example and usage of his predecessors, for the renewal of leases of the hospital lands.(a)

Whatever be the nature of the incorporated hospital, purity of election by the corporators is provided for by special enactment, thus,(b) that "if any which have election, nomination, voice or assent thereunto, of any person, to have room, or place, in any hospital, shall have or take any money, reward, or profit, directly or indirectly, or promise of money, reward, or profit; then such room and place to be void, and another to be preferred to the place by those that have authority to elect," &c. But [*578] it seems that a quo warranto information, under the *stat. 9 Ann. c. 20, is not the proper mode of questioning the election or appointment of a master of a hospital, although the affairs of the hospital be managed under an act of parliament for the purpose,(c) and the hospital had been originally founded by the royal charter.

In general all acts, in these, like other corporations, are to be done by the simple majority of the whole body, in the absence of special directions to the contrary in the founder's statutes. Therefore where a corporation of a hospital consisted of a master and brethren, and an advowson was conveyed to them, to the use of the master and brethren and their successors forever, the right to nominate belongs to the majority of the entire body of master and brethren, and the master's concurrence in the act of the majority is not necessary.(d) And the master, in such case, will upon his refusal, be compelled to affix the common seal to the nomination, and this though there are visitors, appointed by the founder, to whom all disputes between the master and brethren are to be referred(e) the application being made *on behalf of a stranger to the corporation*; for to such a case, as we have seen, the visitatorial power does not extend, and the court has always interfered.(f) Indeed it is very ques-

(y) 8 Vin. Abr. 42, pl. 6, marg. As to claim of tithes by master, 2 C. B. 775.

(z) Yearb. 34 Hen. 6, fol. 27, pl. 6.

(a) Att.-Gen. v. Pretyman, 4 Beav. 462.

(b) 31 Eliz. c. 6; 2 Inst. 726.

(c) Reg. v. Mousley, 8 Q. B. 946. Mandamus does not lie to restore to a place in a hospital; Parkinson's case, Carth. 92.

(d) Reg. v. Kendall, 1 Q. B. 366; et vid. 33 Hen. 8, c. 27.

The act, to be binding, must be done at a meeting convened for the purpose; R. v. Theodorick, 8 East, 543. But it seems that the corporation may be constituted of two persons only, vid. instance, Att.-Gen. v. Brown's Hospital, 19 L. J. (N. S.) Chanc. 73.

(e) Reg. v. Kendall, 1 Q. B. 366; et vid. R. v. Windham, Cowp. 377. What is a sufficient demand and refusal, 1 Q. B. 385, 386.

(f) R. v. Vice-Chancellor of Cambridge, 3 Burr. 1647; R. v. Bland, 2 Burn's Eccles. L. 117, 8th edit.; R. v. Mayor, &c., of Bedford, cited 1 Q. B. 378, note (c).

tionable, whether a private founder of a hospital incorporated of master and brethren could legally impose statutes depriving the corporation of the common law incident to corporations in general of acting by a majority, unless he were specially empowered by act of parliament to do so.^(g) At any rate the courts will lean against such a construction of the statutes of such a corporation as gives a *veto* to the master. Even in case of a corporation erected by royal charter, it might be doubtful whether such an arrangement would be binding, although there, it might be contended, that the acceptance of the first corporators of the charter, which is always necessary to give it validity, and must therefore be stated in pleading, might make a difference; it does not however appear that there is any authority to show that statutes must be accepted *by a hospital*, in order to give them a binding effect. They rather seem to be *imposed* by the founder on the corporators, who are in all respects the creatures of his bounty.^(h) At any rate we may with much probability conclude, that a founder, acting under the 39 Eliz. c. 5, would be considered to *have exceeded his powers if he took upon him to introduce a [*579] rule unknown to the common law, and either give a *veto* to the master, or prescribed any other mode of passing corporate acts than that of a simple majority of the entire body.

The body must also of course vest or divest an interest by deed under their common seal; but in pleading, it is not necessary for their lessee to plead that they *took* (even in the case of an incorporeal hereditament, as a way, which lies in grant) by deed, where the way is incident to the land and not in gross, and the statement is but inducement, and where he cannot have the deed to make profert of; thus a lessee for years of a hospital may plead that the hospital and all they whose estate they have in a house, &c., have had a footway to the river Thames, &c.⁽ⁱ⁾ But if they had themselves had occasion to plead the right of way, they must have shown how they came by it;^(k) that is to say, supposing they were founded within time of memory, and they might allege that such an one was seised; and he and all those whose estate he hath have used, &c., and then, from such person, derive their title, making profert of the deed.^(l)

(g) Per cur. 1 Q. B. 383. Vid. 33 Hen. 8, c. 27, that in corporations none shall have a negative voice, in affirmance of the common law, and making invalid all statutes of founders to the contrary; vid. inf. p. 586.

(h) Per cur. 2 Q. B. 96. There are instances in which the crown has, by a subsequent charter, empowered the visitor to alter the previous statutes, although they ordained that the constitution thereby fixed should never be changed; vid. 19 L. J. (N. S.) Chanc. 73.

(i) Slackman v. West, Cro. Jac. 673; S. C. Palm. 387; 2 Roll. R. 376; et vid. 2 Vent. 139; Com. Dig. Pleader, E. 24; Savile v. Master, &c., of Sidney Sussex College, 18 Vin. Abr. 137; Co. Litt. 121 a.

(k) Bishop of Salisbury's case, 10 Rep. 59 b; Co. Litt. 121 a.

(l) Per Doddridge, J., 2 Rol. R. 376.

A bailiff making consuance on behalf of a hospital need not say that he was authorized by deed; for it shall be intended that all was done regularly; Com. Dig. Pleader, 2 B. 2; but a verdict finding an entry, by bailiff of hospital, for condition broken, must find also that he had authority to do so by deed, Com. Dig. Pleader, S. 20.

If the hospital avows that in consideration of maintaining a way, ferry, port, or the like, they shall have toll, it need not allege that the consideration is performed,

If an action be brought by a stranger, for an injury done him by an illegal act of corporation, and he recover damages, they must be paid by the guilty majority, not out of the corporate funds,^(m) but out of their own pockets.

Equity will not marshal assets in favour of a charity. Thus where the testator left real and personal estate, and directed, after payment of debts, charges, &c., a legacy should be given to the corporation of the Sons of the Clergy, and the residue to Christ's Hospital, the court refused to marshal the assets, by throwing the debts on the real estate, in order to leave the personalty clear for effecting the charitable legacies:⁽ⁿ⁾ and though the contrary was at one time held, yet now the doctrine of marshaling assets so as to give charities the full benefit of the pure personal estate, is wholly exploded, as an evasion of stat. 9 Geo. 2, c. 36.^(o)

By the 19 Geo. 3, c. 91, the trustees of any hospital are empowered, with the consent of five or more of the charity commissioners, to petition [*580] *the Court of Chancery, praying relief in cases where the statutes or regulations are insufficient for the due administration of the funds. This extends to incorporated hospitals.^(p)

Where in covenant, a demise purporting to be made under the common seal of an incorporated hospital appears on the record, the court will not, on demurrer, take notice judicially, that no such corporation was or is in existence;^(q) and so if on the plea it had appeared that the body was treated as a corporation, though it were not expressly named as such, yet its incorporation would be presumed.^(r)

Women, as well as men, may be members of these corporations, and a hospital may be incorporated of so many brethren, and so many sisters; and if all the sisters die, and their places are not filled up, so that no sister is left, the brethren cannot make a lease, "for *then* it was no corporation."^(s)

A dean and a chapter may, it is said, surrender to the crown all their lands, &c., and all the rights and privileges that they hold in right of their corporation, but still the corporation remains; for it seems a dean and chapter having duties to perform as council to the bishop, cannot cut off the perpetual succession, which is indispensable to supply the bishop

for it is sufficient that they are bound to perform it; *Vinkestone v. Ebden*, Salk. 249. But the verdict must find that the hospital was bound to maintain, &c.; *S. C. Carth.* 359.

^(m) *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507.

⁽ⁿ⁾ *Foster v. Blagden*, Amb. 704; *Att.-Gen. v. Hurst*, 2 Cox, 365; *Rodgers v. Morrison*, 1 Cox, 180; *Moggs v. Hodges*, 1 Cox, 9; *Att.-Gen. v. Tyndall*, 2 Eden, 207.

^(o) *Foy v. Foy*, 1 Cox, 165; *vid. Rodgers v. Morrison*, *id.* 180; *Hoare v. Chapman*, 4 Ves. 542.

^(p) *Vid. instance*, 6 Taunt. 467.

^(q) *Cooch v. Goodman*, 2 Q. B. 580. The courts take notice, however, that "A. B. & Company," is not a corporation, i. e. that there is and can be no such corporation; *R. v. Harrison*, 8 T. R. 508.

^(r) *Arundel's case*, Hob. 64; *case of the Lombards of London*, Yearb. 19 Hen. 6, fol. 80; *R. v. Bothe*, Yearb. 34 Hen. 6, fol. 49, 50; *vid. 9 Edw. 3*, fol. 19.

^(s) *Dyer*, 282, B. pl. 2, note; *Manwood v. Lovelace*, *vid. Litt. s.* 657; 1 Rol. Abr. 514, l. 40; according to which last authority the corporation is dissolved; and so is *Com. Dig. Franchises*, G. 4.

with a constantly enduring council;(t) but it is obviously otherwise of a hospital.

The above appear to be the principal points in the law of hospitals considered as corporations.(u)

*DEAN AND CHAPTER.

[*581]

A DEAN and chapter is an ecclesiastical or spiritual corporation, founded in every cathedral, church, and consisting of a head (the dean,) and the chapter or canons, who must all be in holy orders.

Though the dean and chapter together make up one corporation, yet each one of the entire body may be, and mostly is, a corporation by himself singly; that is to say, having perpetual succession, and the ability to take, &c., to him and his successors, and to bind them by his acts duly performed.(x)

But this is now of the less importance, as all the real estate and other hereditaments or endowments whatsoever, (except any right of patronage,) which had been enjoyed separately by the holder of any deanery or canonry, is now vested absolutely in the corporation of the ecclesiastical Commissioners for England, for the purposes of the Ecclesiastical Duties and Revenues Act.(y) We shall consider the body as a corporation aggregate merely, without reference to its duties, except to remark, that the object of the institution of this corporation being for the sake of the duties it has to perform, the corporation may exist, though its lands be gone; for its object is not to hold lands, but other and independent matters.(z)

(t) Case of Dean and Chapter of Norwich, 3 Rep. 73, 75; S. C. Anders. 167; Quo. Warr. Cas. Treby's arg. p. 10, 11; 2 T. R. 531, 532; 14 Lords' Journ. 424.

(u) For questions respecting the rateability of hospitals to the poor, vid. cases collected Harrison's Digest, tit. Poor, 5225 et seq.; 2 Q. B. 453; 10 Q. B. 861; 10 A. & E. 267; 6 A. & E. 429; 3 Q. B. 22; 16 Vin. Abr. 426; 5 A. & E. 1.

Rateability to the land tax, 3 B. & P. 635 et seq.; Harrison v. Bulcock, 1 H. Bla. 68; vid. 3 B. & Ad. 170.

Property tax, 5 & 6 Vict. c. 35, s. 61, No. VI.

Servants belonging to certain hospitals exempted from duty, 25 Geo. 3, c. 43, s. 10; 48 Geo. 3, c. 55; 52 Geo. 3, c. 93.

Officers of hospitals rateable to poor and window tax for houses or apartments in the building in which they reside; 2 Burr. 1059, 1060.

(x) Vid. CORPORATIONS SOLE; 10 Rep. 31 b; 3 Com. Dig. 147. Except the dean, each of the body corporate is now styled canon; 3 & 4 Vict. c. 113, s. 1. No one can be either canon or dean who has not been six years in holy orders, s. 27. Before the Act of Uniformity, canonries were lay fees; Fitz. N. B. 195, note (b).

(y) 3 & 4 Vict. c. 113, s. 50. For the distinction between deans and chapters of the old and of the new foundation, vid. Co. Litt. 95 a; Case of Dean and Chapter of Norwich, 3 Rep. 73 a; Harg. note (102), on Co. Litt. 95 a. The deaneries are now, in all cases, in effect donative by the crown, both on the old and new foundations; Harg. notes (104), (105), on Co. Litt. 95 a; vid. 12 A. & E. 512, 522; 2 & 3 Vict. c. 14.

(z) 3 Rep. 76 b; 2 Anders. 167; 2 T. R. 531; 3 Com. Dig. 148; 2 Burn. Eccles. L. 95; per Bayley, J., in Dom. Proc. 1 Cla. & F. 583; vid. sup. p. 580.

These corporations have been founded for the most part by the crown, but in some instances by subjects; (a) but in either case, though the dean is a corporation sole, yet the corporation we are treating of at present is the corporation of dean and chapter, and consequently a gift to a dean and chapter and their successors, or without mentioning their successors, is good, on general principles of corporation law, but a gift to the dean and chapter, and the successors of the dean, and the successors of the chapter, is not good, for that is contrary to the mode in which they are incorporated and have succession. (b)

[*582] *The crown is visitor of these corporations in general, as founder's heir, in case of such as were of royal foundation; otherwise the bishop of the diocese is visitor, (c) under the restrictions pointed out by the statutes of the foundation. In the first case the visitation has sometimes been exercised by means of a commission to the bishop, or to commissioners, (d) but it may be exercised by the great seal; (e) but semb. an appeal lies to the Judicial Committee of the Privy Council, for the office is spiritual; and the dean might formerly have appealed to the Delegates, as before the Reformation he might have appealed to the Pope. (f)

But besides such visitorship, as to the internal affairs of the corporation, exercised according to the statutes of the foundation, the ordinary in every diocese has a general right and power of visitation of the dean and chapter as an ecclesiastical body; (g) we have here only to do with the former.

The same rule does not hold good in all respects here as in other cases of survivorship; that the visitor has power to suspend or deprive, and of course to inflict minor punishments; (h) although it is true that the sentence of a visitor, generally, even though extending to deprivation, is not examinable at common law, and it need not state the grounds of deprivation; but if it merely say that the visitor had deprived pro certis causis, and were pleaded accordingly, that would suffice; (i) and it would even suffice to plead contumacy as a reason, for contumacy is a good cause of deprivation. (k) However, where, according to the statutes, the dean and chapter have deprived, there, though the office be a freehold office, yet the visitor may, upon appeal,

(a) Ex. gra. that of Norwich, 3 Rep. 73 a; Chester, 1 Wils. 206. Stat. 35 Eliz. c. 3, gives the crown power to found by letters-patent.

(b) Dean and Chapter of Stoke v. Master of Hospital of St. Mary Overy, Yearb. 39 Hen. 6, fol. 13, pl. 17, where see as to prescribing by a dean and chapter, which has been constituted out of a prior and convent.

As to a mortgage by a canon of his share of the revenues of the dean and chapter, vid. Grenfall v. Dean, &c., of Windsor, 2 Beav. 544.

(c) Co. Litt. 344 a; Pemerton v. Allen, Dav. R. 46, B.; Goodman's case, Dyer, 273. They are spiritual, not lay, corporations; Lessees of Dean and Chapter of Christ Church, Oxford's case, Bunb. 209. (d) Walrond v. Pollard, Dyer, 273, A.

(e) Co. Litt. 344 a. (f) 13 Rep. 70; vid. tam. Moor. 782.

(g) Vid. In re Dean of York, 2 Q. B. 1; 1 Eliz. c. 2, s. 23; 1 Bla. Com. 480.

(h) Bp. of St. David's v. Lucy, 1 Ld. Raym. 541; Phillips v. Bury, 2 T. R. 353.

(i) 2 T. R. 354; Allen v. Nash, W. Jones, 353; R. v. Walker, cited 1 W. Bla. 24; R. v. Bp. of Chester, 1 W. Bla. 22; Kenne's case, 7 Rep. 44 a; Rast. Entr. 1; Yearb. 9 Edw. 4, fol. 24, pl. 31.

(k) 2 T. R. 358; 2 Q. B. 14.

review and confirm, or annul their decision, for he is to see that the statutes are carried into execution;(l) but still, it seems, that on a general visitation as diocesan, he can no longer deprive. And moreover, with reference to the infliction of punishment, it seems that even the power of visitation according to the statutes, of any dean and chapter, must now be exercised, notwithstanding such statutes, in such a way as not to deal with any offences or causes to which the "Act for better enforcing Church Discipline"(m) applies, and for the cognizance of which it traces out a particular, and perhaps it may be said, a new mode of proceeding, and this idea is confirmed by the authorities which have appeared relative to the subject;(n) and as that act comprehends **"any offence against the laws ecclesiastical,"* it may be difficult to say what degree of power is left to the bishop when acting as [*583] visitor (*not* in the general right of visitation of an ecclesiastical body, inherent in him as diocesan ordinary, but) according to the founder's statutes, of punishing any but offences, which, not being ecclesiastical, are pointed out and prohibited in the founder's statutes themselves; and it even seems that if the founder had expressly said that such and such ecclesiastical offences should be grounds of amotion from participation in his foundation, and directed that the visitor should proceed to amove and deprive the delinquent, the bishop as visitor under the statutes, could not do so, but must proceed according to the Church Discipline Act;(o) for that act has deprived his visitatorial court of all jurisdiction, of an original character, in relation to ecclesiastical offences.

Where the crown remains visitor under the founder's statutes, there the great seal might deprive, it seems at common law, for an offence against the founder's statutes, to which such penalty was duly therein attached and the exaction of it entrusted to the visitor.(p)

But the bishop's power as visitor according to the founder's statutes, not only, as it seems, does not extend in general without express words to deprivation, but even for a contempt of him in his visitation as founder's visitor, *ex. gra.* shutting the doors of the cathedral against him, the proper course is to proceed by suit in his ecclesiastical court as ordinary against the dean or other party to the act.(q)

A late enactment(r) gives the power of altering (to a certain extent)

(l) Reg. v. Dean and Chapter of Chester, Q. B. T. T. 1850.

(m) 3 & 4 Vict. c. 86.

(n) *In re Dean of York*, 2 Q. B. 1.

(o) 2 Q. B. 1—41; *vid.* 3 & 4 Vict. c. 86, s. 23; *Pasham v. Templer*, 3 Phillim. 245.

The absence of proof that bishops acting as founder's visitors had ever proceeded to deprive, appears to have been assumed as proof that they did not possess the powers which visitors of eleemosynary corporations possess of deprivation, &c., and that therefore the above act of parliament was made necessary; *vid.* 2 Q. B. 35.

(p) *Vid.* Co. Litt. 344 a; Yearb. 27 Edw. 3, fol. 8, pl. 25. It seems that in such case the dean might appeal to the Judicial Committee of Privy Council; 13 Rep. 70.

(q) *Bp. of Kildare v. Abp. of Dublin*, 2 Bro. P. C. 179; *vid.* 2 Q. B. 37, 38.

(r) 3 & 4 Vict. c. 113, s. 47, (*vid.* 6 Ann. c. 21). The authority spoken of is given ss. 83, 84, 85, 86, 87.

It is questionable that statutes of a dean and chapter, though granted or imposed by the crown as founder, have the force of law; 1 B. & Ad. 790; *vid.* 2 T. R. 636. 638; 7 B. & C. 169.

the founder's statutes, subject to qualifications, by which every dean and chapter are directed, from time to time, of their own accord, or upon being required by the visitor, to propose to such visitor such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of the minor canons, and as shall make them consistent with the constitution and duties of the bodies corporate respectively as newly arranged; and all such alterations if approved, may be confirmed by the visitor; and where such alteration shall not be approved by the visitor, or where requisition to propose, &c., to him, shall not be complied with within [*584] *twelve calendar months after the making thereof, the visitor himself may make the necessary alterations; and all such statutes and rules shall be submitted to the ecclesiastical Commissioners for England, and may be confirmed by authority, given subsequently in the statute; the Commissioners to communicate a draft of any alteration, made by the visitor alone, to the chapter, and shall altogether with any scheme to be prepared by them, under the authority subsequently stated, lay before the Queen in Council, such remarks as may, within three months, have been made thereon by the body corporate; but this is without prejudice to any existing right of these bodies, with their visitors, to make statutes.(r)

The ecclesiastical patronage held by the dean and chapter in their corporate right, is reserved to them by the statute, under certain regulations.(s) This patronage has arisen from the bounty of the crown chiefly; before the stat. 1 Ann. stat. 1, c. 7, restraining the alienation of the possession of the crown, it might appropriate to a dean and chapter a benefice in its gift.(t)

Where a grammar school is attached to a cathedral, and both the dean and chapter and the school are governed by the statutes of the common founder, and subject to the jurisdiction of a special visitor; the ordinary relation of trustee and cestui que trust does not subsist between the dean and chapter and the head master of the school, though the master is paid out of the corporate funds of the dean and chapter; for he is to be looked on as a mere officer of the dean and chapter, and therefore the Court of Chancery will refuse to interfere by injunction, either pendente lite, or otherwise (the dean and chapter having summarily dismissed him according to, and by virtue of one of, their statutes,) to restrain from removing him from his office, or appointing another head master in his room; and that although the party had not

As to operation of stat. 6 Ann. c. 21, and interpretation of various statutes of deans and chapters, vid. 2 Burn. Eccles. L. 93, et seq.

At common law the corporation could not, even with consent of visitor, have made new statutes to bind their successors *and not themselves*; Garnett v. Gordon, 1 M. & Selw. 205. And it seems doubtful that they could have made any new statutes inconsistent with the old ones; S. C.

(s) 3 & 4 Vict. c. 113, s. 44; inf. p. 560.

They cannot present the dean to a church in their gift; Lyn v. Wyn, O. Bridgm. 148; Hecker v. Provost de Cambridge, Yearb. 14 Hen. 8, fol. 2, pl. 2.

(t) Grendon v. Bp. of Lincoln, Plowd. Com. 403; vid. 1 B. & Ad. 792.

been heard in his defence.(u) The visitor is the proper tribunal to appeal to, or if he be so much interested in the matter in dispute as to make it evident that to adjudicate on it would be acting as judge in his own cause, the Court of Queen's Bench must be applied to ex necessitate.(u)

With respect to the power of the visitor in regulation of the internal affairs of the corporation, it has been held, in case of a dean and chapter, the statutes of which, it was alleged, gave the bishop, as visitor, power over the temporalities of the church, and the question was, whether the successor of the deceased prebendary had a right to two-and-a-half-year's profits of the stall, accruing during the vacancy, the other *prebendaries having received and divided such intermediate profits; [*585] that supposing the bishop to have, as visitor, cognizance of such a case, his jurisdiction could not practically be available here, because he could have no power over the executors and administrators of the deceased person, with whom, as well as with the members of the corporation, who had divided the profits, this question must come to be litigated; and the court would probably have refused the motion for a mandamus to command the bishop to exercise his visitatorial power over the temporalities of the church in the case, had not the counsel agreed to take nothing by his motion.(x) It is to be observed, that for anything that appears, the claim was in respect of a share in the *aggregate property or revenue* of the corporation of dean and chapter, not with respect to rents and profits of the prebend itself, as distinguished from the *canonica portio*, or share in the corporate property of the whole body.(y) For the former case the statute 28 Hen. 8, c. 11, s. 3, had provided, by enacting that the proceeds of prebends arising in the vacancy should be payable to the successors; but that statute did not extend to the *canonica portio*, and it is now in effect, as it seems, repealed as to the successor, because the estates, as before observed, held in the separate rights of members of these corporations, are vested in the Ecclesiastical Commissioners, although the statute has not been expressly repealed;(y) and it seems, therefore, that the profits accruing in a vacancy are recoverable by the Commissioners by the same means that the successor would formerly have had.(z)

(u) Whiston v. Dean and Chapter of Rochester, 18 Law J. (N. S.) Chanc. 473; vid. Reg. v. Dean and Chapter of Chester, Q. B. T. T. 1850.

(x) R. v. Bp. of Durham, 1 Burr. 567. That a bishop may be appointed by the founder, visitor with power over the temporalities, vid. R. v. Bp. of Chester, 1 Wils. 206.

(y) Repton v. Hodgson, 7 Q. B. 95; vid. 2 Burn, Eccles. 92, edit. Phillim.

For difference between prebenda and *canonica portio*, vid. Hob. 154; 1 Cla. & F. 592, 593, 594; Cowell, Interp. in voc.

A canon has no right to any definite proportion of the corporate revenues of the dean and chapter until the audit or division of them has been made, and each member's share is ascertained; Young v. Lynch, Sayer, 84. Therefore, though his separate estate might be sequestered on a *levari facias*, his *canonica portio* cannot be touched; Moseley v. Warburton, 1 Ld. Raym. 265.

(z) 3 & 4 Vict. c. 113, s. 57, and 4 & 5 Vict. c. 39, s. 6. The commissioners are not vested under this act with trusts of such a nature as to be cognizable in equity; Att.-Gen. v. Wimborne School, 10 Beav. 209.

The dean is the head of the corporation,^(a) and his appointment is for life; and though the letters-patent should limit it to be *at will*, yet he takes for his life, and has the fee, or freehold, in the office;^(b) and now in all cases the deanery is in the grant of the crown by letters-patent, though formerly there were deaneries which were elective by the chapter, under a license or *congé d'élire* from the Bishop.^(c) But [586] *if the crown had either the right to present absolutely, or to nominate a person to be presented by the chapter, to the bishop for institution, in either case the proper mode of trying the right was held to be by *quare impedit*, and not by *mandamus*.^(d)

It is a question whether any legal right could reside in the crown of recommending to a chapter a person whom, upon such recommendations, they were bound to elect as dean, where the deanery was of private and not royal foundation; the probability was held to be that no such legal right existed; but where it did, there the remedy, in case of refusal by the chapter to elect the person so recommended, would undoubtedly have been by way of *mandamus*.^(e)

Where a deanery is donative, the crown is said to be visitor in respect of temporalities.^(f)

As in other corporations, having a head, the corporation is said to be imperfect during the vacancy of the deanery, and, in general, can do no acts vesting or divesting an interest in or out of the corporation; though they may do small acts, such as are necessary for the purposes of the corporation, as appointing servants, &c.;^(g) but a gift to them during such vacancy is said to be good, *by way of remainder*,^(h) provided the vacancy be filled up during the continuance of the particular estate.⁽ⁱ⁾ Generally, a gift or alienation to them during such vacancy is bad.^(k)

Neither by the founder's statutes, nor at common law, can the dean, as head of the corporation, exercise a negative voice either in grants,

(a) Co. Litt. 95, a; 3 Rep. 60; Bac. Abr. Grants, A. 2. As to deputy dean, Dyer, 145, B.; 233, B.; 4 Rep. 77, b; Dav. R. 44. Deanery a spiritual dignity at common law, Cro. Eliz. 633; Dyer, 273; Dav. R. 44; therefore might appeal from sentence of visitors to Delegates, because formerly he had an appeal from the visitor to the Pope, 13 Rep. 70.

(b) Vid. Com. Dig. Eccles. Persons, C. 3; Yearb. 18 Edw. 4, fol. 8, pl. 11; Com. Dig. Prærogative, D. 24; Dav. R. 45. He has not the freehold till he is installed; Com. Dig. Eccl. Persons, C. 3. Therefore, grant of an annuity, made before that, was void to charge the deanery; Hare v. Bickley, Plow. Com. 429, B.

(c) Reg. v. Chapter of Exeter, 12 A. & E. 512. The deanery of every old foundation in England is placed in the direct patronage of the crown by 3 & 4 Vict. c. 113, s. 24, as was and is the case in the new foundations; 1 Bla. Com. 382, 383; vid. 1 B. & Ad. 768; 2 Burn's Eccles. Law, 106.

(d) 12 A. & E. 512. A usage of above two centuries is not sufficient ground by itself, to enable the court to presume either an act of parliament or a composition, giving to the crown the right of presenting absolutely; S. C.

(e) 12 A. & E. 535.

(f) Co. Litt. 344 a; Yearb. 27 Edw. 3, fol. 8, pl. 25; Dav. R. 46, B.

(g) Lyn v. Wyn, O. Bridgm. 148; Vin. Abr. Corporations, K. 1 pl. 7; Kerwil's case, 12 Edw. 4, fol. 10, A. So they may borrow money for the supply of the necessary wants of the corporation, and the lender may recover against it; 11 Hen. 6, fol. 30.

(h) Lyn v. Wyn, O. Bridgm. 148; vid. 10 Rep. 31 b. (i) Co. Litt. 264 a.

(k) Lyn v. Wyn, O. Bridgm. 148; Co. Litt. 264 a; 6 Vin. Abr. 314, pl. 21.

leases, gifts, or elections;(*l*) and the dean cannot, by his single acts, divest any interest or right, or conclude, or estop, the corporation;(*m*) nor can he demand a rent without authority under the seal of the dean and chapter;(*n*) and it is held that they must accept their rent by *acquittance, under their common seal, or by warrant of attorney appointing their receiver to accept, or by matter tantamount [*587] appearing by deed.(*m*)

Acceptance of rent by the dean and chapter, after the death, or removal, or resignation, of the dean, in whose time the lease was made, does not, it has been held, set up, as against them a lease void under stat. 13 Eliz. c. 10;(*n*) but a lease, which is voidable only, as at common law, may be so set up, during the time of such succeeding dean, against the corporation(*o*) by acceptance; but even though the lease were absolutely void, on the death or other removal of the dean in whose time it was made, the acceptance of rent by succeeding deans and chapters for a number of years has been lately held to be evidence, from which a demise *from year to year* by the dean and chapter might be presumed.(*p*) They might avoid a lease, bad under 13 Eliz. c. 10 (at any rate *before* they accepted rent,) though they had themselves (i. e., the same dean and chapter,) granted it.(*q*)

The law, as above stated, ignoring the negative voice of a dean on determinations of the majority, extends to presentations to benefices, and rests on the common law, as restored and confirmed by the stat. 33 Hen. 8, c. 27, which has before been stated at length.

As we have seen, the concurrence of the master of a hospital in such a presentation is not necessary, and the dean stands precisely on the

(*l*) 33 Hen. 8, c. 27; Yearb. 14 Hen. 8, fol. 29; 21 Edw. 4, fol. 27; 15 Edw. 4, fol. 2, A.; 9 Hen. 6, fol. 32; per Broke, J., 13 Hen. 8, fol. 13, B.

With respect to leases by dean and chapter, vid. 13 Eliz. c. 10; 3 Meriv. 427; 2 Preston, Abstr. Convey. 10, 11; 8 Q. B. 139; Baugh v. Haynes, Cro. Jac. 76; Dean and Chapter of Worcester's case, 6 Rep. 37; Harg. Note, (377), on Co. Litt. 57 a; 12 M. & W. 361, 362; 18 Law J. (N. S.) Q. B. 49; Cro. Eliz. 564; 3 Bac. Abr. Leases, H. 1; 1 Rep. 79 a; 1 Freem. 504; 5 Geo. 3, c. 17; Cruise, Dig. vol. iv. c. 5; Lyn v. Wyn, O. Bridgm. 144; Co. Litt. 44, 45; Carter, 16. Must be by indenture, and not deed-poll, Finch, Law, 110, note. Where in concurrence with their lessee they sell land under a railway act, as to how the conveyance should be made, vid. Ex parte Ward, 17 Law J. (N. S.) Chanc. 249.

As to decreeing specific performance of covenants, Dean and Chapter of Ely v. Stuart, 2 Atk. 44. As to renewal of leases, 6 & 7 Will. 4, c. 20, c. 64; 5 & 6 Vict. c. 108. Bailiff to be expressly warranted by dean and chapter, or his acceptance of rent for them will not set up void lease; Lyn v. Wyn, O. Bridgm. 149.

An agreement for a lease executed by the dean for *himself and the chapter* will bind the corporation in equity; 2 Atkins, 44; vid. Dyer, 40, B.

(*m*) Lyn v. Wyn, O. Bridgm. 149; vid. 11 Rep. 78; Cro. Eliz. 862; 2 Burn, Ecc. L. 118.

(*n*) Rickman v. Garth, Cro. Jac. 173; 3 Com. Dig. 254, citing Bishop of Salisbury's case, 10 Rep. 62 a; vid. Doe v. Butcher, Dougl. 50; Jenkins v. Church, Cowp. 483.

(*o*) S. C. Cro. Jac. 173; per Bridgman, C. J., in Dean and Chapter of Westminster's case, Carter, 16; 5 Vin. Abr. 365, pl. 5; vid. Owen v. Thomas, Cro. Car. 94, 96; Com. Dig. Estates, G. 5; Doe d. Pennington v. Taniere, 18 Law J. (N. S.) Q. B. 49.

(*p*) Doe d. Pennington v. Taniere, 18 Law J. (N. S.) Q. B. 49; vid. Doe d. Tucker v. Morse, 1 B. & Ad. 365.

(*q*) Morrice v. Antrobus, Hardr. 326; Bac. Abr. A. 2.

same footing in this respect; the master and brethern are one person in law; so are the dean and chapter; but still the master is head, and so is the dean; and the determination of the headship produces a wholly different effect from the determination of the membership of any other of the corporators; for many acts, which may be good against the corporation during the continuance of the head under which they were done, may be set aside by the corporation under his successor; but the death or removal of any other corporator produces no effect of the kind upon the rights or liabilities of the body.

In bringing an action by a dean and chapter, it is not necessary, and in fact it is preferable not, to state the name of the dean: As the possession of a dean, formerly held in this separate right as a corporation sole, are now, as will be pointed out, vested in the Ecclesiastical Commissioners, it is no longer important to notice that, in respect of them, actions ought to have been commenced in his Christian name.^(r)

If rent be due to the dean and chapter, and the dean die, the rent is payable to the succeeding dean and chapter; and the executors of the deceased have no claim upon any part of it; for the dean has no right [*588] to any part of the profits of the estates belonging to the body corporate of dean and chapter until after a division is made.^(s) But it seems they cannot compel the tenant to pay the rent, until the succeeding dean be fully appointed, for until then they are incomplete as a corporation, and cannot sue, or give a valid acquittance, for the amount. If the dean and chapter make a voidable lease, and the dean dies, and the succeeding dean and chapter accept rent, such acceptance set up the lease during that dean's time, but not against his successor and the chapter, who *may* avoid the lease^(t) if they choose.

The dean as a corporation sole, is capable of taking lands and all kinds of real property to him and his successors in succession, which, as we shall find, is common to all corporations sole; and it has been usual, for a length of time, that deans had separate estates in lands, &c., vested in them as deans, over and above their share of the revenues of the corporate property belonging to the general body of dean and chapter. These estates are now vested in the ecclesiastical commissioners for England.^(u)

(r) Dyer, 86, A. pl. 96; 1 Campb. 466.

(s) *Lyn v. Wyn*, O. Bridgm. 145, where, p. 148, and in *Ayre v. Orme*, Dyer, 222, see as to accepting rent during vacancy. It is not necessary in pleading acceptance of rent by dean and chapter to state that it was by deed; *Dean and Chapter of Windsor v. Gover*, 2 Saund. 305, A.; and so of pleading entry for forfeiture by dean and chapter, *Edgar v. Sorrell*, Cro Car. 169; *vid. Dyer*, 102, B.; 11 Q. B. 127; and so of pleading entry by leave and license of the corporation, *Yearb. 21 Edw. 4*, fol. 19, pl. 22; or by their command as their servant, *Yearb. 18 Edw. 4*, fol. 8, pl. 11. Where a verdict finds that they accepted so much rent, it shall be intended that it was accepted by deed; *Lyn v. Wyn*, O. Bridgm. 151.

(t) *Lyn v. Wyn*, O. Bridgm. 148, 149. Covenant lies on a lease only bad under 18 Eliz. during incumbency of some dean, &c.; *Walter v. Dean and Chapter of Norwich*, Moor. 875: *vid. acc. O. Bridgm. 146, 147*; Harg. note (266), on Co. Litt. 45 a.

(u) 3 & 4 Vict. 113, s. 50. The section enacts the same with respect to canons, and the separate patronage of all benefices with cure of souls, possessed by either in right of their separate estates respectively, are given to the bishop, sect. 41; that in the gift of the corporation is regulated by sect. 44.

Also all founders' statutes, and customs, in cathedrals, by which any land, tithes, or other hereditament, had been assigned to the dean, in addition to his share of the corporate revenues, or by which had been appropriated separately to him, during his incumbency, the proceeds of any land, &c., being part of the corporate property of the body, are wholly annulled as regards any dean appointed since 11th of August, 1840; (c) provided, that the lands, &c., annexed or belonging to, or usually held and enjoyed with, the deaneries, or any of the canonries in the cathedrals of York, Chichester, Exeter, Hereford, Litchfield, Salisbury, and Wells respectively, may, if it seem proper to the Ecclesiastical Commissioners for England, be transferred to be vested in the general body corporate of dean and chapter in each case, so as to augment the divisible revenues, &c. (y)

The practical effect of these arrangements transferring the fee in the estates held by the deans and canons in their respective separate rights, *to the Ecclesiastical Commissioners for England, appears to go [*581] far to deprive them, for most practical purposes, of the character of corporations sole. Such questions as the following can no longer arise: A canon, seised, in right of his canonry, of lands, leases them, and the lessee dies, having before his death assigned over his lease, and then the canon dies, and the question was whether his successor could bring debt against the lessee's executors for rent accrued due after the assignment; by three judges against one, the action was held not to lie. (z)

A bond given to a dean and his executors, or to a canon and his executors, goes to the executors at his death, and not to the successors, (a) although it be given to him in respect of matters connected with his office exclusively, and which he might be enabled to take merely by virtue of his office, (a) and though it might be for the benefit of his successor. But it has been said that a bond, given to a bishop and his successors, shall not go to his executors; (b) for that an obligation may as well go in succession as land. (c) This, however, has been contradicted by other authorities, who have laid it down that both in the case of a bishop and a dean a bond made to him and his successors goes to his executors. (d) As to the distinction taken, (e) in a work of the greatest authority, between corporations sole, who represent a number of persons, and those who represent no one but themselves, one instance of the former class there given being, "the dean of some ancient cathedral, who stands in the

(x) 3 & 4 Vict. c. 113, s. 28. This section enacts the same with respect to canons. As to power of sale, transfer, or exchange of lands, &c., belonging to any dean and chapter, *vid. sect. 68*. The inheritance in such property being in the entire body, could not have been sequestered for the private debt of the dean or a canon; *Salk. 320, 321.* (y) *Sect. 52.*

(z) *Overton v. Syddall*, *Gouldsb. R.* 120.

(a) *Howley v. Knight*, *Q. B.*, *Mich. T.*, 1849; 19 *Law J. (N. S.) Q. B.* 3; *Archbishop of Canterbury v. House*, *Cowp.* 140; *vid. Dyer*, 48, pl. 15.

(b) *Per Shelley, J.*, *Dyer*, 48, A. pl. 15; *et vid. Arundel's case*, *Hob.* 64, acc.

(c) *Per cur.*, *Bird v. Welford*, *Cro. Eliz.* 464, which, however, is contrary to the first resolution in *Fulwood's case*, 4 *Rep.* 65.

(d) *Per Littleton and Choke, JJ.*, in *Robinson v. Lewis*, *Yearb.* 20 *Edw. 4*, fol. 2; but these were obiter dicta.

(e) 2 *Bla. Com.* 431.

place of, and represents in his corporate capacity, the chapter," it is submitted that no sufficient authority is to be found for the statement, that a bond given to *such* a dean and his successors is good in law, but not in the case of such corporations sole as represent nobody but themselves.^(f)

The only difference between this and other forms of corporation aggregate is introduced by the legislation of the reigns of Henry 8 and Elizabeth with respect to leases; and that difference is only for the benefit of the successors.

What then is the real difference in the above respect as to chattels personal and choses in action between a dean and any other corporation sole? How can he be said to represent the chapter more than the bishop? It was laid down generally, before 13 Eliz. c. 10, that the dean and [590] canons are one person in law;^(g) and that there is no *difference, as to the nature of their incorporation, between them and mayor and commonalty.^(h)

The law, it is submitted, now is, that a bond given to a dean or other corporation sole must go to his executors, whether given to him and his successors, or to him and his executors, &c.;⁽ⁱ⁾ because generally a corporation sole cannot take in succession chattels real or personal in possession or action.^(k)

When it is necessary to give an administration bond to a dean and chapter as guardian of the spiritualties in the vacancy of the see, the bond is always made to them and successors, and goes in succession.^(l)

The successors are said to stand in the place of heirs,^(m) and that is the reason why they might have covenant upon a lease of the deanery lands made by their predecessors, for it was in the realty;⁽ⁿ⁾ but this does not extend to give the successors the benefit of a condition collateral, unless they were named in the deed; thus, if dean and chapter were to let lands for a term, with a proviso that if the said dean, or any of the chapter, wished to take the lands into his own hands to reside on them, &c., then the lessee should go out upon a year's warning, notwithstanding

(f) Semb. the only other authority for this statement is contained in certain dicta in *Robinson v. Lewis*, Yearb. 20 Edw. 4, fol. 2, pl. 7. The authorities (*Dyer*, 48; *Cro. Eliz.* 464) cited by Blackstone, do not seem to go the length of his text.

(g) Yearb. 21 Edw. 4, fol. 33, A.; and Yearb. 9 Edw. 3, fol. 18, pl. 3. That a juror is brother of one of the canons, or under the distress of the dean and chapter, is a good challenge in an action to which the dean and chapter are parties; *S. C.*, and 21 Edw. 4, fol. 63; 1 *Chit. Archb. Pract.* 425, 8th edit.; à fortiori, that he is one of the corporation; 3 *Bla. Com.* 363; et vid. *Hob.* 87; Yearb. 28 Hen. 6, fol. 10; 3 *Burr.* 1857; *Co. Litt.* 157; 10 *M. & W.* 274; *Andr.* 85. 104.

(h) *Per cur.*, Yearb. 21 Edw. 4, fol. 63, B.; vid. *Abbot of Newenham v. Dean, &c.*, of York, 7 Edw. 3, fol. 4.

(i) *Fulwood's case*, 4 Rep. 65, 1st Resolution; *Howley v. Knight*, 19 L. J. (N. S.) Q. B. 3.

(k) *Harg. Note* (47), on *Co. Litt.* 9 a; per *Coke, C. J.*, in *Corven's case*, 12 Rep. 106; *Howley v. Knight*, 19 Law J. (N. S.) Q. B. 7; vid. *Fitz. N. B.* 120, D.

(l) 19 Law J. (N. S.) Q. B. 7.

(m) *Fulwood's case*, 4 Rep. 65; 6 *Vin. Abr.* 295; *Prior of St. Cuthbert's of Hertford v. Kinton*, Yearb. 47 Edw. 3, fol. 23, pl. 57; vid. *tam.* 2 *Wms. Saund.* 319, note (4).

the lease; the condition cannot be taken advantage of in time of a succeeding dean.(n)

The patronage formerly enjoyed by deans and canons severally, in right of the corpus of the deanery or canonry respectively, is now, with certain qualifications, vested in the bishop or the diocese;(o) but it had been held that, where an advowson belonged to a canon in right of his canonry, and became vacant just before the canon's death, and before he had presented, the presentation was part of the canon's private estate, and went to his executors and not to his successor;(p) and, as has been mentioned, the separate estates of the dean and canons, where they had any, are respectively vested in the ecclesiastical commissioners; but nevertheless such of them as were corporations sole before may, perhaps, for some purposes, remain so.(q)

The patronage in the gift of the dean and chapter, as a corporate body, is reserved to them, with some slight limitations upon the exercise of it, *by the late enactment;(r) but it does not appear that they are [591] thereby empowered to alter the common law rule that they cannot present the dean;(s) for the dean, being the head of the corporation, cannot, it is said, be severed from the corporation as an ordinary member of it may; for though an action (ex. gra., trespass) may be brought against a corporation, together with J. S., a member of that corporation, that is otherwise if J. S. is the head of the corporation.(t)

It seems that if a person be once duly instituted, inducted, and installed dean, all acts regularly done by the corporation during his headship shall bind the corporation; and if they be acts of confirmation, shall bind the bishop and his successors, although the dean be afterwards attainted or deprived,(u) and *that*, even though he were deprived for a defect in his eligibility ab initio;(x) for his installation and occupation as dean are sufficient to make his acts good during his incumbency;(x) but it is otherwise if he be an usurper or intruder.(y)

An obligation given by a dean, purporting that by it he, "J. S., dean of, &c., is held and firmly bound, &c., in testimony whereof he has thereto put the common seal," does not bind the corporation after the

(n) Prior of St. John of Jerusalem's case, Yearb. 27 Hen. 8, fol. 14. 28; vid. 1 Show. 332.

(o) 3 & 4 Vict. c. 113, s. 41.

(p) Mirehouse v. Rennell, 8 Bingh. 490; S. C. 1 Cl. & F. 527; vid. 7 B. & C. 113; 7 Q. B. 97; 2 T. R. 355.

(q) Dean and Chapter of Norwich's case, 3 Rep. 75 b; vid. sup. pp. 588, 589.

(r) 3 & 4 Vict. c. 113, s. 44. They cannot grant the next avoidance of a benefice, for that is within 13 Eliz. c. 10; Dean and Chapter of Hereford v. Ballard, Cro. Eliz. 440; S. C. 5 Rep. 15.

(s) Lyn v. Wyn, O. Bridgm. 148; vid. Salk. 398; Co. Litt. 264 a; per Broke, J., 13 Hen. 8, fol. 13; per Brudenel, C. J., Yearb. 14 Hen. 8, fol. 31; Jenk. Cent. 199, 200.

(t) Yearb. 8 Hen. 6, fol. 1, pl. 2; Yearb. 21 Edw. 4, fol. 32.

(u) Vid. Dyer, 123, B. pl. 37; Costard v. Winder, Cro. Eliz. 699; vid. Cas. Temp. Hardw. 150; 3 B. & Ald. 271; Cro. Eliz. 534. If not duly appointed, &c., his acts do not bind the succeeding dean and chapter; Abbot of Fountain's case, Yearb. 11 Hen. 6, fol. 29, 30.

(x) Abbot of Fountain's case, Yearb. 9 Hen. 6, fol. 33, B. Semb. it would be otherwise of acts done that divested an interest out of the corporation; for, semb. the acts of a dean de facto, being voluntary, are not good to charge his successor; O'Brian v. Knivan, Cro. Jac. 522.

(y) Yearb. 9 Edw. 4, fol. 11. B.

accession of the succeeding dean ;(z) for it does not bind the corporation during the continuance of the incumbency of J. S., because it is informal in not alleging the participation of the rest of the corporation in the act of executing the deed ;(a) for they are an entire body, and the dean cannot execute a deed, and the chapter confirm it, but they must all make it at once, and not by two deeds, as the above would in fact be.(a) So the dean cannot lease to, or enfeoff, the chapter ; for they have no separate existence as an aggregate body corporate ;(b) that is to say, though the dean has a separate corporate existence as a corporation, the chapter by itself is not a corporation aggregate.

If a dean be appointed, and afterwards, for a supposed defect in his appointment, be deprived, and another be made dean, and, with the chapter, do corporate acts, and then the first is restored by the proper authority, these acts do not bind the corporation after the restoration.(c)

If a dean or canon be presented by the crown, and the demise of the [*592] *crown happens before induction, a presentation made by the succeeding sovereign is good, though it makes no mention of the first presentation.(d) The reason seems to be this : in general, at common law, a lay patron may revoke his presentation at any time before the freehold is in the presentee,(e) and therefore the crown may ;(f) and if the presentee die before induction, the crown (in case of a presentation by lapse) may present again, for it has not had the fruits of the presentation ;(g) and so it is if the party who is presented comes before the bishop and declines to avail himself of the presentation.(h)

If dean and chapter recover judgment in debt on annuity or otherwise, and before execution the dean die, it seems the succeeding dean and chapter must sue out a sci. fa. to execute the judgment.(i)

Semb. a dean and chapter are not impeachable of waste, for they are not within the statutes as to waste ;(k) and at common law only three descriptions of persons at most could commit waste, tenants in dower, guardians in chivalry, and tenants by the curtesy ;(l) though perhaps where the crown is founder, they might be prohibited or enjoined in chancery at the instance of the attorney-general.

With respect to the canons, we may observe that great changes have been wrought in their situation and circumstances, as well as their corporate rights, by the late legislation regulating ecclesiastical duties and revenues.

(z) Yearb. 14 Hen. 6, fol. 16, pl. 54 ; Yearb. 22 Hen. 6, fol. 4, pl. 6 ; Fitz. N. B. 194, l. 1 ; 5 Vin. Abr. 372.

(a) Dyer, 40, B.

(b) Salter v. Grosvenor, 8 Mod. 303 ; vid. Yearb. Chapter of Lincoln v. Dean of Lincoln, 9 Edw. 3, fol. 18, pl. 3.

(c) Abbot of Bristol's case, Yearb. 34 Hen. 6, fol. 35, pl. 43.

(d) Calvert v. Kitchen, Lane, R. 71. 100 ; vid. Dyer, 292, A., note (70) ; 17 Vin. Abr. 344 ; Co. Litt. 344.

(e) Stone v. Sykes, Latch, 192 ; Rogers v. Holhed, 2 W. Bla. 1039 ; vid. Barling v. Bardolph, Yearb. 44 Edw. 3, fol. 35, pl. 24 ; Wright v. Bishop of Norwich, 1 Leon. 156.

(f) Yearb. 25 Edw. 3, fol. 90, pl. 35.

(g) 17 Vin. Abr. 344, pl. 4 ; Gyles v. Colshil, Dyer, 360, B. ; Fitz. N. B. 34, C. ; vid. Baskerville's case, 7 Rep. 28.

(i) Perk. sect. 499 ; 20 Vin. Abr. 28.

(h) Yearb. 20 Hen. 6, fol. 13, B.

(k) Vid. 8 Q. B. 152, 153.

(l) Co. Litt. 53, 54 ; 2 Inst. 299 ; 1 B. & Pul. 108.

The mode of appointing canons in the different chapters in England had always been various, but by a late act the following mode is established for the future. The three canonries in the cathedral of St. Paul's, London, existing on 14th August, 1840, are thenceforth to be in the direct patronage of the crown.^(m) Those of York, Chichester, Hereford, Salisbury, and Wells respectively, are to be in the direct patronage of the bishops of the respective sees,⁽ⁿ⁾ as are those of Ripon and Manchester.^(o) The rest of the chapters remain as they stood before 11th August, 1840, except that a new canonry is established in each of the chapters of St. Paul's and Lincoln.^(p) In Wales the direct patronage *of the canonries in the cathedral church of St. David is given [*593] to the bishop.^(q)

The chapter (or, speaking more correctly, the corporation, are given the power of appointing minor canons at stipends of not less than 150*l.* a year each.^(r)

Neither the dean, nor any other member of the chapter, any longer holds any separate estate in right of his deanery or canonry; the only revenue of a canon is now his canonica portio, or share of the corporate revenues of the dean and chapter, and the advantage of the residence house; but unless the house were annexed to the canonry, and always went along with it, there seems no ground to doubt that ejectionment would not lie either for the canonry or the house.^(s)

Where a person has been duly appointed to a canonry, or where he has been duly appointed to an office (ex. gra. an archdeaconry) to which a canonry is inseparably annexed, a mandamus will go to the dean, upon his refusal of a proper demand, to compel him to administer the oath, required by the statutes, to the party as canon.^(t) But in no case will a

(m) 3 & 4 Vict. c. 113, s. 24. Where the crown was founder's heir, it might, at common law, alienate a canonry, which is looked upon as an ecclesiastical benefice and not a mere office, 1 B. & Ad. 761; provided the alienee were a corporation sole, and also a spiritual person capable of discharging all the duties incident to the canonry: S. C. But an act of parliament is now necessary, since stat. 1 Ann. stat. 1, c. 7, s. 5.

(n) 3 & 4 Vict. c. 113, s. 25. Where the canons were appointed by election of the dean and chapter, it was settled that the bishop could not present by lapse in virtue of his visitatorial power; Bishop of Chichester v. Harward, 1 T. R. 650. Also it had been held that the dean, in elections, had no casting voice, and that the canons might vote by proxy, per Buller, J., 1 T. R. 652.

(o) 3 & 4 Vict. c. 113, s. 26.

(p) 3 & 4 Vict. c. 113, s. 26; vid. 1 Bla. Com. 383; 1 B. & Ad. 768, 769, 770; by which it appears that, in various cases, the right of appointing to one or more canonries in the new foundations had been granted to the bishops of the respective dioceses by various sovereigns.

(q) Sect. 38; vid. 4 & 5 Vict. c. 39, s. 14. A spiritual patron may not vary from his presentation before induction as a lay patron may; Stock v. Sicks. Noy, R. 91.

(r) Sect. 45; vid. s. 75; vid. s. 93; 4 & 5 Vict. c. 39, s. 15. For the number of canons in each corporation of dean and chapter, as settled by the act, vid schedule.

(s) Doe d. Butcher v. Musgrove, 1 M. & Gra. 625. If the house had been appropriated in severalty to the canon, semb. ejectionment might have been brought for it, S. C.; Sherard's case, 2 W. Bla. 353. Dilapidations; Radcliffe v. D'Oyley, 2 T. R. 630; vid. 9 M. & W. 170; 4 & 5 Vict. c. 39, ss. 6, 18.

(t) R. v. Dean, &c., of Rochester, 3 B. & Ad. 95. The party had already been declared entitled to the canonry in virtue of his being archdeacon; King v. Baylay, 1 B. & Ad. 761. Where the crown is founder's heir, it might, at common law, grant to an archdeacon and his successors (an archdeacon being a corporation sole,) that

mandamus go, either to the dean, or to the corporation aggregate, to fill a vacant office where the party has a remedy either by quare impedit, or other action at common law, or by suit in equity.^(u) And where no such remedy is available, still plenarty of the office is a good answer to the application for a mandamus, if an information in the nature of quo warranto is applicable.^(x) Nor would a mandamus have gone to a visitor having under the statutes power to visit, examine the dean and canons upon oath, if necessary, and expel, &c., to command him to restore a canon he had amoved and deprived.^(y)

It may be useful to point out here, that where the crown presents by a title which is not the proper one, as where the crown is, in fact, patron, and ought to present as such, but presents as though entitled by reason of lapse, as well as where the crown presents by reason of lapse, having in truth no title to present in any way, the presentation is void; and so is an admission, institution, and induction made thereon; except so far [*594] as this, that the presentee makes a plenarty so as to avoid *lapse; and therefore the rightful patron may present even seven years after, and, if his clerk be inducted, the former presentee is immediately ousted.^(z) This rule will apply to cases where canonries are in the direct patronage of the crown, and, probably, with some qualifications, in other cases of canonries not presentable by the crown but by the bishop.

In case of a canonry, to which a corporation sole is entitled in right of an office, as an archdeacon, who is a corporation sole by prescription, the canonry is ipso facto full upon institution and induction to the archdeaconry, although the statutes of the foundation may require institution and induction into a canonry in all cases; for it is questionable whether such statutes, though imposed by the crown as founder, have the force of law,^(a) and the general law not requiring such acts to constitute a person in *such circumstances* a canon, the practice under those statutes will not, it seems, make any difference.^(b)

With respect to a dean in general, however, it has been laid down by high authority that he has not the freehold in his office until he is installed.^(c)

Yet a person in the above circumstances is ipso facto, upon being inducted into the archdeaconry, inducted into the annexed canonry, and may claim to be sworn in without being installed, and, upon refusal, the dean will be compelled by mandamus to administer the oath required by

a canonry be for ever annexed to the archdeaconry, 1 B. & Ad. 761; and such annexation cannot be dissevered, and the archdeacon becomes canon in fact and in law by institution and induction into the archdeaconry; S. C. An act of parliament is necessary to perfect such annexation at present; 1 Ann. Stat. 1, c. 7, s. 5.

^(u) Vid. sup. p. 269; Reg. v. Chapter of Exeter, 12 A. & E. 512.

^(x) 12 A. & E. 527.

^(y) R. v. Bishop of Chester, 1 W. Bla. 22. See now 2 Q. B. 1—41, sup. p. 583.

^(z) Green's case, 6 Rep. 29 b, compared with Vaugh. R. 14; Cro. Car. 589; Com. Dig. Grant, G. 9; 17 Vin. Abr. 98. 100. 336; Hob. 302; Dyer, 339, pl. 47.

^(a) 1 B. & Ad. 790; vid. 2 T. R. 636. 638.

^(b) 1 B. & Ad. 794; R. v. Dean and Chapter of Rochester, 3 B. & Ad. 95; vid. 17 Vin. Abr. 354, pl. 5.

^(c) Com. Dig. Eccles. Persons, C. 3.

the statutes from canons at their admission. *(d)* But the ground of this decision is, that an archdeacon being connected by the nature of his office with the cathedral, his title must needs be known to the dean and chapter, and, therefore, that a fresh institution and induction, which are forms practised for the purpose of making notorious who is holder of the office, or, as it were, of openly giving seisin of it, are needless in that case; *(e)* but it would be different in case of persons not connected with the cathedral by the office which gives the right to the canonry in it; ex. gra. the provost of Oriel College, or the master of Pembroke Hall, Oxford, each of which is a corporation sole, *(f)* or the Margaret's Lecturer of Divinity in the same university, who is also a corporation sole, *(g)* and all have canonries annexed, for it seems they must be installed, though they need not be instituted, in order to become canons, and upon the accession of either of them to his headship or lectureship, and refusal of the dean to instal without institution, a mandamus would go to compel him to instal. *(h)*

*The words in a charter of foundation, "a stall in the choir, and a voice and place in the chapter in all chapter acts," give a [*595] vote to the person they are applied to in all corporate acts of the dean and chapter, and not merely in its acts as council to the bishop; *(i)* and it seems such person may, under the authority of such words, vote by proxy. *(i)* But it is an invariable rule in the canon law, that no one can be proctor or commissary, either of a canon or dean, to give the vote of either at an assembly of the dean and chapter, so as to take part in corporate acts, unless he be a member of the body. A stranger to the corporation cannot hold a proxy. *(k)* Moreover, members cannot vote by proxy where the question is whether the corporation shall divest an interest or not; at least, no member can give his consent, to an act which divests an interest out of the corporation, by a proctor or substitute. *(l)* Words in a charter, granting to a dean and chapter that "they and all their men shall be quit of toll, passage, cheminage, &c., in city, fair, &c., in the passage of bridges and all ports of the sea, in all places throughout England," exempt their lay tenants from market-toll and toll-traverse, not only for articles going to or coming from the lands, for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandize; but it is a question whether, in the latter case, they exempt the goods of ecclesiastical persons. *(m)*

(d) R. v. Dean, &c., of Rochester, 3 B. & Ad. 95. Mandamus to instal, 1 Barnard. 40; vid. 15 Vin. Abr. 193. A person cannot be obliged by the spiritual court to take an oath established by a dean and chapter by a bye-law, though they have a power to make bye-laws; Com. Dig. Serement, B. *(e)* 3 B. & Ad. 98, 99.

(f) 12 Ann. st. 2, c. 6, s. 7.

(g) By letters-patent of Charles 1; 1 B. & Ad. 770.

(h) 3 B. & Ad. 97, 98, 99; 1 Barnard. B. R. 40; cases cited 1 Wils. 13.

(i) Bishop of Kildare v. Smyth, 5 Dow. P. C. 225.

(k) Deanery of Ferne's case, or Pemerton v. Allen, Dav. R. 42. 47; vid. Dyer, 145, B., marg.

(l) Abbot of Battle's case, Yearb. 11 Hen. 4, fol. 64; Pemerton v. Allen, Dav. 47, B.

(m) Lord Middleton v. Lambert, 1 A. & E. 401; vid. 2 Inst. 4. From Yearb. 14 Hen. 6, fol. 12, it seems that "homines" in a grant of this kind extends only to villains and homagers; vid. 40 Ass. pl. 21; 12 Ass. pl. 35; 2 Show. 668.

In an action of account, brought by a canon against the dean, for part of the profits of his canonry, he may, on a proper demand and refusal, have a rule to inspect the charters, statutes, and acts of chapter;⁽ⁿ⁾ but, semble, he may inspect the charters at the Rolls, and, therefore, they need not be included in the rule.^(o)

It is an absolute rule that their deed, to be good, must be executed at one and the same time by a majority of the whole body, capitulariter congregati; that is to say, they cannot give their consent to it by signing or annexing their seals to it at several times, until a majority of the whole have expressed their consent; but the deed must be executed at once by a majority of the body assembled for corporate purposes, not by chance, or for purposes of sociality, &c. (which majority must be actually and personally present if the deed purports to divest an interest out of the corporation, otherwise assent by proxy is admissible, if consistent with the statutes), ordering the common seal to be affixed to the parchment, &c., of the deed. It is the consent, it is said (not the aggregate [*596] of the assets), of the majority that sanctions and gives efficacy to the deed of a dean and chapter.^(p)

A majority of the existing canons, whether the number fixed by the founder is full or not, will always be sufficient to constitute a chapter, with or without the dean, according as the matter under consideration requires, or does not require, his presence, in order to give validity to a vote or decision upon it.^(q)

If a lessee surrender a lease to the dean and chapter, and they by parol agree to grant a renewal, an action does not lie, it has been held, against the corporation for the breach of the agreement, because they cannot bind themselves except under their common seal;^(r) but an action on the case might perhaps be maintained against the individuals composing the majority.

Where a dean and chapter and their lessee for twenty-one years, under covenant not to assign without their leave, entered into a joint contract for sale of part of the demised premises to a railway company at an aggregate price; and the company, on the conveyance being made to them, paid the money into court, as directed by the Lands Clauses Consolidation Act, 1845, the Court of Chancery would not, on petition, apportion such purchase money between the corporation and the lessee; but, by consent, the money was ordered to be invested, and the dividends paid to the lessee for his term, or until further order.^(s)

A release by dean and chapter cannot be pleaded to an action by one of the corporation suing in a separate right, and with respect to a mat-

(n) *Young v. Lynch*, 1 W. Bla. 27; *vid. Ord. v. Stubbs*, Andr. 247; *R. v. Babb*, 3 T. R. 579.

(o) *Wood v. Morewood*, 9 Dowl. 669; *vid. R. v. Hughes*, 1 Barnard. 41; *R. v. Tinker*, *id.* 28.

(p) *Pemerton v. Allen*, Dav. 48, A. B. So 21 Edw. 4, fol. 70, ubi major pars ibi totum. Of common right, there must be a majority of the body present, and a majority of them must do the act; but a usage may warrant holding a chapter with less than the whole; per Holt, C. J., *Haricot's case*, Comperb. 203.

(q) *Vid.* 4 & 5 Vict. c. 39, s. 16.

(r) *Frevill v. Ewbank*, 1 Rol. R. 82.

(s) *Ex parte Ward*, 2 De G. & S. 4.

ter independent on and disconnected with his corporate character and rights.^(t)

That a dean and chapter may surrender their lands, &c., to the crown, has already been stated to have been laid down in the old authorities, and that their corporate character, nevertheless, remained, has also already been pointed out;^(u) but that this would be held to be law at the present day, it is not easy to conceive; for it is scarcely reasonable to hope that the body should continue competent to perform its functions of council to the bishop, or that its succession could be perpetually kept up, without any provision for the subsistence of the members of it.

It was also held formerly, that a canon did not lose his stall nor his voice in the chapter by a grant of the property attached to the office;^(x) and that, if he leased his canonry, an advowson of a vicarage thereto belonging in fee did not pass by the words, "commodities, advantages, *profits, and emoluments to the canonry belonging," but that it would pass by the words "tenements or hereditaments."^(y) [*597]

Generally, in these, as in other corporations, acts, to be valid, must be under the corporation seal, and by deed properly delivered by attorney, where a delivery on the land is necessary, but this important qualification has been engrafted on that doctrine, that where, in any case (ex. gra. in a lease), there is an executory contract, though to enforce it against them it may be necessary to show that it was by deed, yet, on the other hand, where they have acted as upon an executed contract, it is to be presumed against them that every thing necessary to make it a binding contract on both parties was done, they having had all the advantage they would have had if the contract had been regularly made:^(z) another instance of the application of the rule of *omnia ritè acta præsumuntur*, even against the corporation. In equity the recognition of a deed by a dean and chapter in their chapter house, capitulariter congregati, has been held as good, without making letter of attorney to deliver it, as a deed to which they put their common seal without attorney, which is perfectly good.^(a) So, in ejectment, bringing the action against a tenant from year to year recognizes and adopts the act

(t) 17 Assis. pl. 29, Treasurer of Wells' case.

(u) Vid. sup. p. 581; et vid. sup. p. 137, note (t), for the principle that a corporation having undertaken a public trust cannot divest itself of the means of *fully* performing it. In the Bishop of Bath's case, G. Benl. 81, held that surrender of a deanery extinguishes the corporation of dean altogether.

(x) Sharrock v. Bouchier, T. Raym. 88.

(y) London v. Chapter of Southwell, Hob. 303; Anon., Dyer, 323, A., 350, B. pl. 21; vid. 10 Rep. 65 b; 9 Rep. 52; 1 Cl. & F. 562. As to canons' leases, vid. Cro. Jac. 458, pl. 5; 6 Q. B. 223; Com. Dig. Estates, G. 5.

(z) Doe d. Pennington v. Taniere, 18 L. J. (N. S.) Q. B. 49. They must accept a surrender in fact by deed; Lane. R. 3. They must, it seems, present to a church by deed, per Brudenel, C. J., and Broke, J., 13 Hen. 8, fol. 13, 14; Bland's case, 3 Burr. 1663. They must have accepted a feoffment by letter of attorney, per Broke, J., Yearb. 14 Hen. 8, fol. 30. If one of the corporation buys goods which come to the use of the corporation, it is said they will be chargeable for the value, though they never ordered the buyer to buy them; Abbot of Fountain's case, 12 Hen. 6, fol. 5, pl. 13. So money lent to predecessor dean, which comes to the use of the corporation, may be recovered against the corporation in time of the successor without saying how the money came, &c., 22 Hen. 6, fol. 56.

(a) Gerrard v. Dean and Chapter of Rochester, Moor. 676, per Egerton, C.

of their steward in giving the tenant notice to quit, and dispenses with the necessity of proof that he had authority under the common seal for that purpose.^(b) On the other hand, where the benefit of their land, &c., has been enjoyed by parol agreement by another equally as if the contract had been under the seal and by deed delivered, they may maintain use and occupation, and, in declaring, the personal name of the dean ought not to be mentioned.^(c) If the seal has been improperly affixed it may be disproved.^(d)

Generally, the acts of a dean and chapter shall bind them as long as the dean continues dean in whose time the act was done.^(e) The dean, it seems, may do, by deputation of the corporation, small acts, such as making a steward or such officers, provided they are for the benefit of [*598] the community, and the appointments hold good during his continuance as dean.^(f)

What is a good chapter house to seal a deed in was formally much debated, but in early times we find it held, that a chapter house, for sealing a deed with the common seal, may be wherever the dean and chapter happen to be at the time; for it was said, the walls and the timber and the mortar are not the chapter house, but wherever the corporation is at the time is to be considered the chapter house;^(g) and this is possibly still the law;^(h) for though the deed be dated in domo nostro capitulari, it may be alleged in pleading to have been delivered anywhere else; for the corporation may give authority, by letter of attorney, to deliver it anywhere in *England*.⁽ⁱ⁾

Some corporations are necessarily local, and to the existence of others possessions of some kind are obviously indispensable, from the nature of their objects and purposes; but a dean and chapter do not require either, it is said, for their existence as a corporation; and generally, it is declared that a place and possessions are not necessary to the existence of a spiritual corporation.⁽ⁱ⁾

We have seen that where a gift was made to a corporation aggregate, in trust to apply so much of it to a specific charitable purpose, the donor

(b) *Roe d. Dean and Chapter of Rochester v. Pierce*, 2 Campb. 96; but semb. no authority in writing was requisite, since giving the notice did not vest any interest in the corporation. Where an interest is to be divested out of the corporation, as under a license to enter into their wood and take trees, or the like, or under a lease, then the license or the lease must be under seal; per Fineux, C. J., Yearb. 12 Hen. 7, fol. 27 A.

(c) *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466; Dyer, 86, A. pl. 96.

(d) *Harscot's case*, Comberb. 203.

(e) *Lyn v. Wyn*, O. Bridgm. 150.

(f) Per Brudenel, C. J., Yearb. 14 Hen. 8, fol. 31; Mayor, &c., of Ludlow v. Charlton, 6 M. & W. 821.

(g) Per Danby, J., Brian, C. J., in *Dubray v. Prior of St. Mary's, Southwark*, Yearb. 5 Edw. 4, fol. 7, 8; vid. Yearb. 8 Hen. 6, fol. 6, pl. 15.

(h) *Pemerton v. Allen*, Dav. R. 48; per Cottesmore, J., 14 Hen. 6, fol. 16, pl. 54; vid. *Aprice v. Rogers*, Dyer, 233, A. pl. 10. In the case of abbot and convent it was said that a chapter house could not be out of their convent, Dyer, 233, A., note; but this seems only a hasty dictum; vid. Yearb. 21 Edw. 4, fol. 26. But where the deed appears on the face of it to be made in domo nostro capitulari, it will not be intended that it was made elsewhere than in the chapter house of their cathedral; Yearb. 21 Edw. 4, fol. 26, pl. 19. As to difference between pleading lease for life and for years by dean and chapter, Dyer, 233, A. pl. 11.

(i) Vid. cases cited 3 Rep. 75.

taking notice how much of the revenues the object he had in view would exhaust, but not manifesting his intention that the residue, either at the time of the gift, or at any future time, should be devoted to the charitable purpose, the corporation enjoyed such residue for its own benefit, irrespective of the charity; and a somewhat similar rule appears to have been adopted with respect to bequests, &c., to superstitious uses. Thus, lands having been given to a dean and chapter, charged with the payment thereof of ten marks annually for a chantry priest, it was determined that the whole of the lands did not devolve to the crown by the operation of stat. 1 Edw. 6, c. 14, but that the annual rent only was forfeited; (*k*) the gift not being expressed in such a way as to affect the entirety with cause of forfeiture. Further, a sum of 400*l*. having been devised to a dean and chapter, to fund a chantry in their church perpetually, and an *obit* for the soul of the devisor, and that the priest should have so much yearly, and by license from the crown they purchased certain lands, and agreed with the executors of the testator for finding the priest perpetually, &c., and obliged them. [*599] *selves et omnia bona sua ad performandum*, &c., but there was no settlement of the lands for this purpose, and their goods only were charged; it was held by the majority of the court that the lands were not forfeited. (*l*) There also, it would appear, that the testator did not contemplate the charge exhausting the whole rents of the lands in which his bequest was to be invested.

*QUASI CORPORATIONS AGGREGATE. [*600]

BESIDES the aggregate bodies whose legal character and attributes have been above discussed, there are various other aggregate bodies, partaking in same respects, and for some purposes, of the corporate character, but which nevertheless are not complete corporations for want of some of the essentials of corporations, and which therefore have been called quasi corporations.

CHURCHWARDENS.

The most important of these bodies are churchwardens, who, though empowered to hold goods, &c., in succession, for the church, &c., have not power, as we shall see, to hold lands in succession, have not a common seal, and want other characteristics of complete corporation.

Churchwardens, upon being elected or appointed, (*m*) and making

(*k*) Dean of St. Paul's case, Dyer, 368, A. pl. 47; S. C. 4 Leon. 156; vid. per Popham, C. J., Moor. 648, cont.; but Com. Dig. Uses, M. acc. citing 4 Rep. 110 b, 113 b; Moor. 694.

(*l*) Holloway v. Watkins, Cro. Jac. 51; Com. Dig. Uses, M.; vid. 2 My. & K. 684.

(*m*) As to election of churchwardens, Dawson v. Fowle, Hardr. 378; R. v. Bishop of Winchester, 7 East, 573; R. v. Chester, 3 Nev. & M. 413; Com. Dig. Esglise, F. 1; Stra. 1246; Burn's Just. Churchwardens, s. iii. iv.; 12 A. & E. 138, 139, 161.

the declaration required by 5 & 6 Will. 4, c. 62, s. 9, and being sworn in,⁽ⁿ⁾ are so far incorporated by operation of law as to be capable of taking and holding money or goods to the use of the parish by gift or legacy,^(o) and to be the proper parties to bring an action for injury [*601] *to the goods of the parish, possession and custody of which are vested in them; in whom such property goes in succession for the benefit of the parish;^(p) and also they may have an action for taking the goods, &c.^(q), whether in their own time or in that of their predecessors;^(r) for their predecessors cannot *commence* an action as churchwardens, after the expiration of their term of office, for any thing done or any cause of action which had arisen during that term;^(s) for the possession and custody of the goods of the church are only vested in them for the benefit of the parishioners, the property always remaining in the parishioners during such term. Therefore, as it seems, it is held, that in an indictment for stealing the goods of the parish, the property, if laid in the churchwardens at all, must be laid to have been in the church-

Appointment under Church Building Acts, 59 Geo. 3, c. 47; 1 & 2 Will. 4, c. 38. Plea that defendants never were chosen, 1 Mod. Entr. 53. Mandamus to admit, R. v. Williams, 8 B. & C. 681; Churchwardens of Chelsea v. Brampston, 3 Lev. 362; to restore, 15 Vin. Abr. 193. Aliens, Papists, Jews, children under fourteen years, convicted felons, cannot be elected, Antony v. Seger, 1 Hagg. 10, per Lord Stowell. Who exempt, Burn's Just. Churchwardens, Sect. II. Issue by consent directed to try the right between two parties, 4 T. R. 381; vid. 7 A. & E. 257; 7 B. & C. 765. Prohibition granted in order to try right by custom to appoint, Evelin's case, Cro. Car. 551; Warner's case, Cro. Jac. 532; Jernyn's case, Cro. Jac. 670; vid. Noy, R. 139; Hardr. 379. Mandamus to archdeacon to swear in, Stra. 895; 1 A. & E. 342; 7 A. & E. 256; 3 Burr. 1420; 3 A. & E. 615, 617; 4 Dowl. 15; 15 Vin. Abr. 203—206, 214; may also be adopted as a means of trying the title. Mandamus to parishioners to proceed to elect (where an election said to be void) for the remainder of the year, has been granted to try the right, R. v. Rector, &c., of Birmingham, 7 A. & E. 254; vid. R. v. Wix, 2 B. & Ad. 197. When those, against whom a rule nisi for a mandamus has been obtained, go out of office before cause is shown, the successors may be admitted to show cause on motion, R. v. Churchwardens of St. James, Westminster, 5 A. & E. 391, note. The right of naming a churchwarden cannot be tried in the spiritual courts, Williams v. Vaughan, 1 W. Bla. 28; for churchwardens are temporal officers, S. C.; R. v. Rice, 1 Ld. Raym. 138; vid. acc. 4 Vin. Abr. 525, pl. 4; Stra. 52, 145; 5 A. & E. 479; per Hale, C. B. Hardr. 379.

⁽ⁿ⁾ Prideaux, Churchwardens, 61, 62, 10th edit.; 5 A. & E. 476, 477; R. v. Whitchurch, 7 B. & C. 573; R. v. Marsh, 5 A. & E. 468; per Holt, C. J., 4 Vin. Abr. 527, pl. 12; Green v. Pope, 1 Ld. Raym. 128. As to the oath, Com. Dig. Esglise, F. 1.

^(o) Att.-Gen. v. Ruper, 2 P. Wms. 125; Yearb. 37 Hen. 6, fol. 30, pl. 11, where the gift was to the parishioners to the use of the church. But they cannot take a remainder of a term of years, Fawkner's case, Hetl. 74. That they are not a body corporate appears from Case of St. Saviour's, Southwark, Lane, 21, where the churchwardens were incorporated either by act of parliament or charter of Jac. 1; vid. Anon., Keilw. 32; 10 Rep. 66; Merew. & St. Hist. Bor. 1080. They are a quasi corporation, Withnell v. Gartham, 6 T. R. 396. Stat. 17 Geo. 3, c. 17, s. 115, incorporated the churchwardens of Enfield.

^(p) Morgan v. Archdeacon of Cardigan, Salk. 166; per cur. 1 Vent. 267; Anon., March, 67; Evelin's case, W. Jones, 439; Anon., Noy, 139.

^(q) Yearb. 8 Hen. 5, fol. 4; R. v. Rees, 12 Mod. 116.

^(r) Yearb. 8 Edw. 4, fol. 6, pl. 5; Dent v. Prudence, Stra. 852; Bac. Abr. Churchwardens, E; 2 Wms. Saund. 47 c; Marriott v. Tarpley, 9 Sim. 279; Att.-Gen. v. Ruper, 2 P. Wms. 125; Fitz. N. B. 91, K.

^(s) Vid. cases in last note; Yearb. 11 Hen. 4, fol. 12 A.

wardens who were in office at the time of the offence committed ;(*t*) but though the successors may sue for injuries done with respect to the goods of the parish, or on contracts broken, or for debts accruing due to the parishioners, in the time of their predecessors, it does not follow, nor has it ever been holden, that the successors may *always* sue for whatever their predecessors could have sued for.(*u*) Their whole power of taking and holding the possession of the goods of the church(*x*) is only for the benefit of the parishioners ; they cannot of themselves act with the parish goods or money so as to cause a disadvantageous result to the interests of the parish ;(*x*) therefore they cannot release a debt, or make a gift of the goods of the parish, without the consent of the parishioners first duly obtained ;(*y*) nor can they accept any thing which is or may be burdensome to the parish(*y*) without such consent ; and at common law, if they wasted the goods of the parishioners, or otherwise were guilty of gross breaches of duty, they might be removed by the parishioners before the ordinary determination of their office.(*z*)

In suing in trespass or trover, when churchwardens proceed for an injury done in their own time, they may lay it either *ad damnum ipsorum*, or *ad damnum parochianorum*, for the goods being the [*602] goods *of the parish they are responsible to the parish for the safe custody of them, and taking them may be said to be an injury to either churchwardens or parishioners. But if the successors bring the action, it must be laid to the damage of the parishioners, for the successors are not liable to the parishioners except for what happens in their own term of office ;(*a*) and the goods must be laid to be *bona parochianorum*.(*b*) Perhaps, however, it will be found difficult to reconcile all the decisions with the earlier authorities, which laid down absolutely that the property of the goods was in the parishioners ; it appears to have been considered, in later cases, that not only the possession, but a certain kind of property is vested in the churchwardens,(*c*) as against strangers to the parish, and wrong-doers among the parishioners.(*c*)

A prohibition will go if the trespasser, or other wrong-doer, be sued

(*t*) Vid. dictum per Patteson, J., 4 A. & E. 802. Lord Macclesfield, C., held, that the property in the goods was always in the parishioners, *Whitmore v. Bridges*, 4 Vin. Abr. 525. pl. 1, marg. It may be laid in the parishioners in an indictment *Dyer*, 99 A, pl. 58.

(*u*) *Addison v. Round*, 4 A. & E. 804.

(*x*) Yearb. 13 Hen. 7, fol. 10, pl. 5 ; *Starkey v. Barton*, Yelv. 173 ; *Anon.*, March, 67 ; *Com. Dig. Esglise*, F. 3.

N. B. The property in goods chattels, furniture, provisions, clothes, &c., provided for the use of the poor of any parish was vested in the overseers and their successors by 55 Geo. 3, c. 137, so as to enable them to prosecute for embezzlement, &c., of goods provided for the use of the poor in the workhouse, &c. ; sed vid. 5 & 6 Will. 4, c. 69, s. 7, inf. *GUARDIANS OF THE POOR*.

(*y*) Yearb. 13 Hen. 7, fol. 10, pl. 5 ; *Mottram v. Mottram*, 3 Bulstr. 264 ; *Methold v. Winne*, 4 Vin. Abr. 526 ; *Bac. Abr. Churchwardens*, B.

(*z*) Yearb. 26 Hen. 8, fol. 5, pl. 25 ; 1 Bla. Com. 394 ; vid. inf. p. 604.

(*a*) *Hadman v. Ringewood*, Cro. Eliz. 179 ; *Com. Dig. Esglise*, F. 3 ; 2 Wms. S. 47 c, note (1) ; Yearb. 8 Edw. 4, fol. 6, pl. 5.

(*b*) *Bac. Abr. Churchwardens*, B.

(*c*) *Jackson v. Adams*, 2 Bi. N. C. 402 ; *Bac. Abr. Churchwardens*, B. ; vid. *Addison v. Round*, 4 A. & E. 799 ; *Hawk. P. C. cap. 23, s. 44* ; vid. sup. p. 601.

in the spiritual court^(d) for taking the goods; for no process can issue in such case but those of trespass or trover in the temporal courts;^(e) and therefore for taking the bells, organ, chalice, books, or the like goods belonging to the church, or for taking the title deeds to the advowson out of the parish chest in the vestry, these actions in the courts of common law lie, and no other suits or proceedings elsewhere can be had;^(d) and this is true, though the person who does the tort is a parishioner, or the parson himself.^(e) But it is by no means true that they are confined, in the common law courts, to these two forms of action respecting goods, &c., for they may bring an action on the case for defacing a tombstone or monument in the church;^(f) an action of account against their predecessors;^(g) or assumpsit for money had and received against the predecessors, whether immediate or remote;^(h) and *that* they may do, although they are only churchwardens de facto.^(h) On the other hand, churchwardens de jure may sue for money had and received by churchwardens de facto.⁽ⁱ⁾ But a mandamus will not lie to the old churchwardens to *deliver up the parish books to their successors; the proper mode to try the right is by a feigned issue.^(k)

In all actions they must all join in suing.^(l)

Churchwardens may also institute a suit in Chancery to restrain a person from pulling down the churchyard wall, and, after the determination of their office, they may file a supplemental bill for the purpose of stating facts which have occurred since the filing of the original bill, and *may* join their successors as co-plaintiffs in the supplemental bill;^(m) though it does not appear that the successive churchwardens, as they are renewed, need be made parties to an original bill.⁽ⁿ⁾

Where a bequest or gift of stock, or money to be invested in stock, is made to churchwardens for a charitable purpose, as for the perpetual maintenance of a school in the parish, equity is the proper tribunal to appeal to, in order to carry it into full effect; for at common law it seems the churchwardens cannot take in succession chattels under such limitation.^(o)

On a bond given to them and their successors; their executors, and

(d) *Starky v. Churchwardens of Watlington*, Salk. 547; 2 Inst. 492; *Gardner v. Parker*, 4 T. R. 351; Com. Dig. Esglise, F. 3. Though they have a right to the custody of certain goods on behalf of the parishioners, it does not follow that they can bring trover, if they have never had them in their custody; for though a man who has a right to recover the custody of chattels may bring trover, that action will not lie to obtain the custody of them for the first time; *Addison v. Round*, 4 A. & E. 799. 804; Com. Dig. Esglise, F. 3.

(e) 2 Inst. 492; Yearb. 11 Hen. 4, 12, A.; Com. Dig. Esglise, F. 3.

(f) *Bishop v. Turner*, Godb. 279; Yearb. 26 Hen. 8, fol. 5, pl. 25; Com. Dig. Esglise, F. 3.

(g) Yearb. 8 Edw. 4, fol. 6, pl. 5; *Tarlour v. Parner*, 1 Vent. 88; S. C. 1 Mod. 65. Justices have no authority to make an order on the present churchwardens to pay over money to their predecessors, 4 Vin. Abr. 531, pl. 21. An indictment will lie against them if they take money corruptè colore officii, Com. Dig. Esglise, F. 2; *R. v. Eyres*, 1 Siderf. 307.

(h) *Turner v. Baynes*, 2 H. Bla. 559; *Astle v. Thomas*, 2 B. & C. 271; vid. Form 3 Wentw. Preced. 73.

(i) *Andrews v. Eagle*, 4 Vin. Abr. 527.

(k) *R. v. Stroud*, 8 Mod. 98.

(l) *Withnell v. Gartham*, 6 T. R. 396.

(m) *Marriott v. Tarpley*, 9 Sim. 279.

(n) Vid. 4 Vin. Abr. 529, pl. 10.

(o) Vid. 8 A. & E. 798; 2 Y. & Col. 350; 6 Scott, N. R. 537; 11 Beav. 481.

not their successors, must sue after their death; for it is said they have no capacity to take a chose en action to them and their successors. (p)

Also as they have no common seal, (q) they cannot bind themselves and their successors by that means or any other; they cannot therefore covenant as a corporation; in other words, covenants entered into by churchwardens for the time being are merely personal covenants, binding the individuals and their executors, &c., not their successors in the office. (r) For the same reason they cannot as it seems execute a power of attorney, authorizing a person to continue to receive dividends of stock, notwithstanding fluctuations in the numbers and identity of the members of their body. (s) Nor can they make a promissory note so as to bind their successors; and therefore they are responsible individually for the amount, though they make it as churchwardens, styling themselves so on the note, and though interest have been paid *on the note out of the parish funds; (t) but the amount of the note being [*604] money actually lent to the parish, probably they could have recovered the damages either in an action against their successors at common law, as money paid to the use of the parish, or by suit in equity. (u) Whatever there is of the corporate character belonging to churchwardens may reside in two persons; but in whatever number it resides, one cannot act so as to bind the others without their consent. Thus where there are two, one cannot release costs without the concurrence of the other; (x) nor can one pledge the credit of the others without their knowledge; (y) and if one of them gives orders to a person to draw plans of the church for the inspection of the commissioners for building new churches, under stat. 58 Geo. 3, c. 41, he is undoubtedly individually responsible for the

(p) Per Shelley, J., Dyer, 48, A.; per Brian, C. J., in *Robinson v. Lewis*, Yearb. 20 Edw. 4, fol. 2, pl. 7; 4 Vin. Abr. 530, pl. 5.

A bond given to churchwardens of such a place, without naming them by their individual names, said to be good, *Dolby v. Harris*, Skin. 243; *S. C. Toth*. 94; vid. *Perk.* s. 55.

(q) Vid. *R. v. Austrey*, 6 M. & Selw. 319.

(r) *Furnivall v. Coombes*, 6 Scott, N. R. 537; vid. per *Patteson, J.*, in *Rew v. Pettit*, 1 A. & E. 200; et vid. *Tufnell v. Constable*, 7 A. & E. 798.

Semb. they are only a corporation to hold goods and chattels in succession belonging to the church, but not to hold stock in succession, given for the maintenance of a school in the parish, vid. 8 A. & E. 798; nor an annual sum to be paid out of land, &c., for keeping in repair the family vault of testator, *Gravenor v. Hallum*, Ambl. 643. Qu. whether their executors might be tenants in common with their successors in such case, vid. *Co. Litt.* 190 a.

(s) Ex parte *Annesley*, 2 Y. & Col. 350; vid. *Maver v. Nixon*, 2 Y. & Jerv. 60.

A covenant to invest money in bank or government stock in the corporate names of the archdeacon, vicar, and churchwardens respectively, is legal, *Tufnell v. Constable*, 7 A. & E. 798; the dividends to be received and held by these parties in trust for a school, &c.

(t) *Rew v. Pettit*, 1 A. & E. 196.

(u) Where an agreement was entered into by the vestry beneficial to the parishioners, and the parson, churchwardens, overseers, and some other inhabitants, executed articles providing that the five o'clock morning bell should not be rung during plaintiff's life, the Court of Chancery issued an injunction, restraining the ringing of the bell, against the successors, &c.; *Martin v. Nutkin*, 2 P. Wms. 266.

(x) *Starkey v. Barton*, Cro. Jac. 234; vid. *Stra.* 1246.

By custom there may be only one churchwarden in a parish; *R. v. Catesby*, 2 B. & C. 814; *R. v. Earl Shilton*, 1 B. & A. 275; vid. 11 Q. B. 71; *Woodcock v. Gibson*, 4 B. & C. 463.

(y) *Northwaite v. Blannett*, 2 C. & M. 316.

charge;(z) but he may reimburse himself out of the church rates, if he was the proper party to procure such plan to be prepared.(a)

On the other hand, notice to one of several churchwardens is notice to all, as it is in the case of a partnership; but it is *not* so in the case of a corporation regularly formed;(b) and, as we have observed, the successors may have actions against the predecessors for their acts during their term of office. But the successors cannot proceed in the spiritual courts against their predecessors for acts done *ratione officii*.(c)

An information in the nature of quo warranto has been refused to remove a churchwarden;(d) perhaps (as it has been said) because they are only temporary officers;(e) the reason given by the court itself being, that there was no usurpation upon the rights or prerogatives of the crown, in claiming or using the office of churchwarden wrongfully; but the real ground seems to be, that they are not removable by the Court of Queen's Bench on this information, because they are removable (as [*605] already mentioned) by the parishioners;(f) and the *mode of doing it is stated, in a great variety of authorities of very considerable weight, to be by complaint to the ordinary.(g) In one book it is said the removal may be effected either by complaint to the ordinary, *or* by the parishioners themselves.(h) The result seems to be, that by a complaint properly laid by the parishioners before the ordinary, the churchwardens may be removed during their year or term of office for misconduct in their office.

Where there is a custom in a parish to pay the parish clerk a sum of money yearly, which by the custom is leviable by the churchwardens on the parishioners, the clerk may have an action on the case against them for not making a rate and levying the sum; or if they do levy it, and omit to pay it over to him, an action of assumpsit for money had and received to his use.(i)

They are entitled (at least in actions brought against them for *acts* done relative to temporal matters,(k) but not in actions for non-fea-

(z) *Brook v. Guest*, per Abbot, C. J., at *Nisi Prius*, cited 3 Bing. 481.

(a) *Sprott v. Powel*, 3 Bing. 485; *Lanchester v. Frewer*, 2 Bing. 365; *vid.* 12 East, 556; 2 H. Lords, 108.

(b) *R. v. Marsh*, 5 A. & E. 486, 487; nor of a body in the nature of a corporation, *Steward v. Dunn*, 1 D. & L. 649.

(c) *Bishop v. Turner*, Godb. 279; *vid.* *Welcome v. Lake*, 1 Siderf. 281; S. C. 2 Keb. 22; *Com. Dig.* Esglise, F. 2, that they may for neglect or breach of duty.

(d) *R. v. Daubeney*, 1 Bott, 347; *Stra.* 1196; acted on in *R. v. Shepherd*, 4 T. R. 381; commented on in *R. v. Rector of Birmingham*, 7 A. & E. 258; questioned by Lord Brougham in *Darley v. Reg.* 12 Cl. & F. 539; *vid.* per Patteson, J., 7 A. & E. 255; *et vid.* 8 Q. B. 954.

(e) Per Tindal, C. J., in *Dom. Proc.*, 12 C. & F. 539. But quo warranto lies in some cases of municipal corporate officers, whose office is not necessarily more than annual, *vid. sup.* p. 439.

(f) *Wats. Clergym. Law*, p. 400, chap. 39; *Yearb.* 26 Hen. 8, fol. 5, pl. 25; *Finch, Law*, 179; 8 *Edw.* 4, fol. 6, pl. 5; 1 *Bla. Com.* 394; 13 *Rep.* 70; 4 *Vin. Abr.* 530, pl. 3; *Comyns's Digest*, Esglise, F. 1, F. 2; *Burn, Eccles. Law*, 413; 1 *Gibs. Codex*, 396; *Prideaux, Churchw.* 30.

(g) *Burn, Eccles. Law*, 413; 1 *Gibs. Codex*, 396; *vid.* *App. Gibs. Cod.* p. 1479; *argu. Dawe v. Williams*, 2 *Add. R.* 133, 134; *Burn's Just. tit. Churchwardens*, s. 9; *Prideaux, Directions to Churchwardens*, p. 30

(i) *Parker v. Clerk*, 6 *Mod.* 253.

(k) *Cro. Car.* 285.

zance,)(*l*) to plead the general issue, and give the special matter in evidence, by the joint operation of 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 3.

Though the corporate character extends to their taking and holding, with a certain kind of property therein, the goods of the church for the benefit of the parishioners, it does not extend to enable them to take or hold lands; for churchwardens are not partakers of the corporate character for that purpose.(*m*) Therefore, neither *a feoffment nor conveyance to the parishioners vests in the churchwardens; it [**606*] cannot vest in the parishioners, for they are not a corporation at all;(*n*) nor, if made to the churchwardens in the first instance, does it vest any estate in them, but is wholly void, for want of a person to take as grantee.(*o*) And as they cannot have in them the fee, neither, can they lease lands of the parish for life or terms of years;(*p*) nor can they maintain any action for the profits of lands,(*p*) or for entry into them;(*p*) nor can they lease lands vested in feoffees for the use of the parishion-

(*l*) *Atkins v. Banwell*, 3 East, 92.

As to costs in actions against them, *Cro. Car.* 285, pl. 31; 3 M. & Selw. 131; *vid. now* 5 & 6 Vict. c. 97, s. 2.

The certificate may be granted either at, or any time after the trial, 7 T. R. 448; 3 Y. & Jerv. 203.

(*m*) *Gibs. Cod.* 241; 1 Bla. Com. 394; 2 Wms. Saund. 47 c; *Co. Litt.* 3 a; *per Fineux, C. J.*, Yearb. 12 Hen. 7, fol. 29, A.; *Keilw.* 32, A.; 1 Bla. Com. 394, 395; 3 C. B. 226, 227; *Doe d. Higgs v. Terry*, 4 A. & E. 274; *Doe d. Hobbs v. Cockell*, 4 A. & E. 478.

If, however, they have let from year to year, they may maintain ejectment against a tenant coming in under them, *Doe d. Bailey v. Foster*, 3 C. B. 215. 226; but then the demise must be laid in their individual names, if the ejectment is brought after they are out of office, S. C.; and the notice to quit must also be given in those names, S. C.; *et vid.* 12 A. & E. 444. Generally they cannot take a term, *Finch, Law*, 197; *Fawkner's case*, *Hetl.* 74; nor can a grant of a term to J. S., with remainder to the churchwardens of Dale, be available for them, S. C.

The stat. 7 & 8 Vict. c. 37, s. 4, empowers the rector, vicar, or perpetual curate, together with the churchwardens, to hold in succession lands for sites for schools to the extent of one acre.

By the custom of London the parson and churchwardens are a corporation to hold and demise, &c., lands to the use of the parish, *Warner's case*, *Cro. Jac.* 532; *Humphrys v. Knight*, *Cro. Car.* 455; *Com. Dig. Esglise*, F. 3; *vid.* 4 Rep. 110. 116, cases cited; *Co. Entr.* 198; *Doe d. Brooks v. Fairclough*, 6 M. & Selw. 40; *Prid. Churchw.* 141; *Bohun's Privil. Lond.* 99; *Gibs. Cod.* 241; *Anon., Noy, R.* 139; *Cox v. Copping*, 5 Mod. R. 395; *Harg. Co. Litt.* 3 a, note (13); *Rogers v. Eccles. Law*, 225; *Steer, Parish Law*, 89; and the parson might lease for years to the churchwardens lands, &c., held by him in right of his rectory; *Parson v. St. Dunstan's case*, Yearb. 15 Hen. 7, fol. 8.

The same custom holds in some other places; *Harg. note* (13) to *Co. Litt.* 3 a. In *Evelin's case*, W. Jo. 439, the court said, by the custom of London the churchwardens were a corporation. So *Anon.*, March, 67, pl. 104.

(*n*) *Mayor of Reading v. Lane*, *Toth.* 69; Yearb. 13 Hen. 7, fol. 9, pl. 5.

(*o*) *Per Fineux, C. J.*, 12 Hen. 7, fol. 29, A.; *Keilw.* 32, A. pl. 4; *Finch, Law*, 179; *Com. Dig. Esglise*, F. 3; *Co. Litt.* 3 a; *Presgrave v. Churchwardens of Shrewsbury*, *Salk.* 167; 1 Bla. Com. 394, 395; 4 A. & E. 281; 7 B. & C. 433.

(*p*) *Per Fineux, C. J.*, 12 Hen. 7, fol. 29, A.; *Com. Dig. Esglise*, F. 3; *vid. sup. note (m)*. But payment and acceptance of rent, &c., under a lease for years by them, might have sufficed for the court to construe the holding as a tenancy from year to year; *Doe d. Higgs v. Terry*, 4 A. & E. 273; *vid. now* 59 Geo. 3, c. 12, inf. p. 608.

ers ;(*q*) for, in fact, they are in all respects merely bailiffs, (*r*) and bailiffs cannot lease. However, though they are incapable, as churchwardens, of holding real property, and therefore the property in the church cannot belong to them, and is perfectly well recognised to be in the parson, (*s*) yet where a local act of parliament for paving, lighting, &c., a district, enacts that the rates and assessments to be levied or assessed upon, or in respect of, any church in the district, "shall be paid by the churchwardens," they are personally liable for the rates, and the want of parochial funds does not exempt them from that liability ;(*s*) but although neither the local act expressly, nor the common law in general, give them power to compel their parish to make a rate to reimburse themselves, yet it is said that by necessary implication they must have the power. (*t*) This decision is important as affecting large districts in London, Westminster, Southwark and elsewhere, which have similar acts for paving, &c.

[*607] *CHURCHWARDENS AND OVERSEERS.

CHURCHWARDENS, of themselves, being unable to take or hold lands or other real property, and therefore to let to lease lands, &c., it had been usual for persons making grants, gifts, or devises of lands, &c., for the benefit of the poor of a parish, to vest the property in feoffees, to the use of the poor of the parish, with provisions and regulations for supplying the vacancies made by death or removal in the number of the feoffees, so as to keep up something like a perpetual succession, and give to the body a character analogous in some respects to that of a corporation. But this having been found, in practice, but a defective contrivance, it was enacted, "for the greater ease of parishes in the relief of the poor," that the churchwardens and overseers of the poor in any parish, with the consent of the major part of the parishioners in vestry, or other public or parish meeting, for that purpose assembled, or of so many of them as shall be so assembled, upon usual notice thereof first given, shall be empowered to purchase or hire houses in the same parish, or contract with any person or persons, for the lodging, keeping, maintaining, and employing all or any such poor in their respective parishes, as shall desire to receive relief, &c., from the same parish, &c.; and they were further empowered to contract with the churchwardens and overseers of any other parish, with the same consent as aforesaid, for the lodging, &c., of any poor person or persons of such other parish as to them shall seem meet ;(*u*) and it had been held by the courts, in exposition of this enact-

(*q*) Yearb. 13 Hen. 7, fol. 9, pl. 5 ; Com. Dig. Esglise, F. 3.

(*r*) Bishop v. Eagle, 10 Mod. 23.

(*s*) Com. Dig. Cemetery, A. 2 ; Beckwith v. Harding, 1 B. & A. 517.

(*t*) Hopkinson v. Puncher, 3 Exch. 95, 100, 102, 103. A mandamus would go to enforce a church rate if the parish refused, S. C. ; vid. 4 Vin. Abr. Churchwardens, C. pl. 4. 9 ; 2 H. Lds. R. 108 ; Cas. Temp. Hardw. 381 ; 12 A. & E. 246.

(*u*) 9 Geo. 1, c. 7, s. 4. As to the latter part of this section, vid. 45 Geo. 3, c.

ment, that this body of churchwardens and overseers of a parish partook so far of the corporate character that the whole was bound by the decision of the majority of the entire body; and though not a corporation technically, they were declared to stand in *pari ratione*, so far as concerns the regulation of the poor of the parish under this statute; (v) although it is true that the decision principally proceeded on the ground that the stat. 43 Eliz. c. 2, directed that the general acts to be done by the churchwardens and overseers respecting the poor shall be done by a majority, and that the spirit of that act must be considered as pervading all the subsequent acts respecting the government of the poor. (v)

*Succeeding churchwardens and overseers are specially empowered to repay money expended by preceding churchwardens and overseers for the maintenance of the poor, where such expenditure was made while there was no rate, or pending an appeal; and in default of such repayment the quarter sessions shall make order for payment. (x) [*608]

But the powers above given not being found sufficient, it was further enacted, (y) "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, *in the nature of a body corporate*, for and on behalf of the parish, all such buildings, lands and hereditaments, and *also all other buildings, lands and hereditaments belonging to such parish*; and in all actions, suits, indictments, and other proceedings for or in relation to any such buildings, lands, or hereditaments, or the rent thereof, or for or in relation to any other buildings, lands, or hereditaments *belonging to such parish*, (z) or the rent thereof,

54. s. 1. Where there are only two overseers, who are also churchwardens, *vid.* 51 Geo. 3, c. 80, s. 1; *R. v. St. Margaret's Leicester*, 2 B. & A. 200; *Reg. v. Leominster*, 5 Q. B. 640.

(v) *R. v. Beeston*, 3 T. R. 592. 594; per Bayley, J., in *Blacket v. Blizard*, 9 B. & C. 851. 857; *vid.* *Reg. v. Justices of Surrey*, 3 D. & L. 573; *R. v. Justices of Derbyshire*, 6 A. & E. 885.

They are not partners so as to bind each other personally in contracts; *Marsh v. Davies*, 1 Exch. 668; *vid.* 5 B. & Ad. 1069. But service of notice, &c., on one is good; *R. v. Justices of Warwickshire*, 9 A. & E. 877. Whether the rest are cognizant of what passes between one of the body and a third party is a question for the jury in civil actions; *Malkin v. Vickerstaff*, 3 B. & A. 89.

(x) 41 Geo. 3, c. 23, s. 9.

(y) 59 Geo. 3, c. 12, s. 17. Power to corporations to convey and lease lands, &c., s. 18.

It has been held that to constitute the body in whom the lands, &c., vest, there must be two overseers and a churchwarden or churchwardens; *Woodcock v. Gibson*, 4 B. & C. 465; *vid.* 3 T. R. 594.

(z) *Vid.* 5 & 6 Will. 4, c. 69, s. 3, which, notwithstanding the strong words used, does not transfer the legal estate in a parish workhouse from the churchwardens and overseers to the guardians of the union of which the parish is a member; *Doe v. Webster*, 12 A. & E. 442; *vid.* now 5 Vict. sess. 2, c. 18, s. 2; *vid.* 8 Q. B. 405, 406.

and in all actions and proceedings upon, or in relation to, any bond to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, indictment or other proceeding, shall cease, abate or be discontinued, quashed, defeated, or impeded by the death of the churchwardens and overseers named in such proceeding, or the deaths or death of any of them, or by their removal, or the removal of any of them, from, or the expiration of, their respective offices." Now it will be observed, that the former part of this clause is entirely prospective; it regards future purchases and leases; it is addressed to the conveying party as well as to the grantees; and these last it not merely empowers to take, but throws upon them the obligation of taking in a certain capacity, and with certain trusts; and it is confined to buildings, &c., taken under the authority and for the purposes of the act. The latter part of [609] *the clause, on the other hand, is merely retrospective; it is confined to property already, in some sense, belonging to the parish; much of the preceding part of the clause—to which it is grammatically appended—is therefore inapplicable to it. So much of that part as is applicable will, if it be separated from the rest, run thus:—"The churchwardens and overseers shall and may, and they are hereby empowered to, take and hold, in the nature of a body corporate, on behalf of the parish, all buildings, lands, and hereditaments belonging to the parish." However we limit the meaning of the words "all buildings, &c., belonging to the parish," within those limits, it cannot be contended that, the statute is *merely* enabling; besides the obvious inconvenience of leaving to the parish officers an option to take or not that which the statute intended them to take, the words will not bear that meaning. The parish officers "shall take;" this casts the duty on them, and they, "are empowered to take;" this gives them the legal capacity for performing it.^(a)

Now, in the first place, we, find, with respect to the nature of the subjects on which the above enactment^(b) operates, there are three cases exempted—

1. It does not operate upon copyhold lands.^(c)
2. It does not pass to the churchwardens and overseers the legal estate in lands charged with specific trusts, to which the poor rates are not applicable,^(d) or only partially applicable,^(e) where there are feoffees in existence.

A lease made before the statute to a committee of parishioners on behalf of the parish vests in the churchwardens and overseers, under 17th section; *Alderman v. Neate*, 4 M. & W. 704. Before the statute churchwardens could not take a lease; *Finch*, Law, 197; *Fawkner's case*, *Hetley*, 74.

(a) Churchwardens, &c., of Deptford v. Sketchley, 8 Q. B. 406. As to promissory note for repayment of principal, &c., borrowed for public almshouses, *Jones v. Evans*, 19 L. J. (N. S.) Exch. 200. (b) 59 Geo. 3. c. 12, s. 17.

(c) *In re Paddington Charities*, 8 Sim. 629; S. C. 7 L. J. (N. S.) Chanc. 44; *Doe d. Bailey v. Foster*, 3 C. B. 215.

(d) 8 Sim. 629, where the specific trust was to buy bread and cheese to be given to the poor at Christmas; *vid. Att.-Gen. v. Lewin*, 8 Sim. 366, explained 8 Q. B. 404, 405.

(e) *Allason v. Starke*, 9 A. & E. 255; *vid. tam. Churchwardens of Deptford v.*

3. It does not pass such estate where there are existing trustees discharging the trusts, *(f)* even though there are no specific objects; for in such cases it may well be said that the property does not belong to the parish, *(f)* in the popular sense in which those words in the statute must undoubtedly be construed. *(f)*

These points being premised, it will be the more easy to ascertain the nature of the body constituted by the above recited enactment, and the powers and obligations conferred and imposed upon it. Now this is a corporation, it has been stated, of a peculiar kind, differing from all ordinary corporations, *(g)* not having a common seal nor a corporate name, but nevertheless bound by the decisions and acts of the majority of the whole body, it not being necessary to have a [*610] majority of each branch of the body, but a simple majority of the entire number only, to make valid any act done under the statute; even in cases where such majority is requisite at all for that purpose, to which there are exceptions, founded on the consideration of the objects for which parochial officers were invested with this quasi corporate character, viz. the care and proper management of the parish lands, &c.; ex. gra. it is competent, according to one case, for any one of the body to make, or to order to be made, a distress for rent of lands leased by the body for the purposes of the statute, or of such lands as were leased originally by trustees, but have since become vested in the body; *(h)* and he need not previously call a meeting of the body and obtain authority there for such act. *(h)* At first sight it would seem as if this decision were opposed to the doctrine above laid down, and which was adopted by the Court of Queen's Bench upon a question of the construction of the former statute of 9 Geo. 1, c. 7, to the effect that the spirit of the statute 43 Eliz. c. 2, ran through all the subsequent acts respecting the government of the poor, and that that statute having directed that the general acts to be done by churchwardens and overseers respecting the poor shall be done by a majority of them, the direction must be considered as applying to acts done under the statute of Geo. 1 also. *(i)* It is true that this decision was made previous to the passing of the 59 Geo. 3, c. 12, and that the point on which the decision was made was

Sketchley, 8 Q. B. 404, that under a trust "for the use and benefit of the poor of the parish," whether all the poor receiving relief from the poor rates be proper objects of the charity or not, in either case the statute vests the legal estate in the churchwardens and overseers.

(f) Churchwardens of Deptford v. Sketchley, Q. B. Mich. T. 1847; 8 Q. B. 394, 405; Doe d. Edney v. Billett, 7 Q. B. 983; et vid. 8 Q. B. 392, note (c); per Patten-son, J., 4 A. & E. 281.

What is evidence of property belonging to the parish, Doe d. Higgs v. Terry, 4 A. & E. 280, 281.

(g) Gouldsworth v. Knights, 11 M. & W. 342. The succession by which they take has been called "a species of parliamentary succession;" per Lord Ellenborough, C. J., in Johnson v. Hodgson, 8 East, 38.

(h) Gouldsworth v. Knights, 11 M. & W. 342. Perhaps this decision may be rested on the principle of cases in which it has been decided that an act done by one of several joint tenants is good if subsequently recognised by them, ex. gra. a notice to quit; vid. 3 B. & Ald. 689; 10 B. & C. 626; 3 C. B. 218; 2 Q. B. 143; et vid. 5 Q. B. 653.

(i) R. v. Beeston, 3 T. R. 594, 595, decided East. T. 30 Geo. 3.

whether one member of the body of churchwardens and overseers could obstruct or defeat an act done by the majority, and not "whether an act done by one or a minority was good as against third persons, though not previously sanctioned by a majority of the body, it not appearing that the majority repudiated or dissented from the act after it was done : " which last was the question decided on the *latter* statute; but still it seems somewhat singular, that, if the law is correctly declared, that the principle of corporate bodies, in pursuance of which acts should be done or authorized by a majority, pervades the whole current of the poor laws down to 1790, and relates to acts of churchwardens and overseers while not incorporated, the same rule should not apply to a statute in *pari materia* passed in 1819, which to some purposes does incorporate the same body. Then, with respect to third parties, acts by the unincorporated body of churchwardens and overseers, done under the authority of statutes passed before they were made a quasi corporation, to be binding on such third parties, have always been required to be shown [*611] *to have been done by the body or a minority of them; (*k*) and, therefore, it perhaps may be considered somewhat difficult to understand why such acts should not, in like manner, be required to be done by a majority, when done within the scope of their corporate powers, and with respect to matters for the management of which they are in a certain degree a corporation, especially as the old rule appears to have been adhered to in construing the late act of Will. 4 for the amendment and better administration of the poor laws; (*l*) and though in the old cases on corporations it had been held that a corporation might authorize an agent to distrain for rent in arrears without their common seal, yet perhaps that proceeded on the ground that the thing distrained, being at that time only in the nature of a pledge, the taking it did not vest any interest in the corporation, and there appears now to be a difference in this respect, as the distress may be converted into money, and therefore the taking does vest an interest and ought to be under seal; so that if this surmise be correct, this quasi corporation is in fact, in this respect, placed by the decision we have been attempting to discuss, in a better position than an actual corporation.

They cannot take in mortmain, nor without the formalities of 9 Geo. 2, c. 46, (*m*) for the benefit of the poor of the parish : therefore, where a bequest of 2000*l.* was made to the churchwardens and overseers of a certain parish, to apply 800*l.* in building six almshouses, and to pay the income of the residue to the six almsmen, who were to reside therein, the whole bequest was held to be void, and the money went to the residuary legatee. (*m*)

The legal estate in all parish property vesting in this body, therefore where the churchwardens alone, previously to the statute, had demised parish property for an unexpired term (which demise, as we have seen,

(*k*) Reg. v. Justices of Surrey, 3 D. & L. 573 ; S. C. 9 Q. B. 38 ; Reg. v. Justices of W. R. of Yorkshire, 3 D. & L. 152 ; R. v. Justices of Lancashire, 5 B. & A. 755.

(*l*) 4 & 5 Will. 4, c. 76, s. 81 ; vid. R. v. Justices of Warwickshire, 9 A. & E. 873, 877 ; Reg. v. Justices of Cambridgeshire, 7 A. & E. 480 ; Reg. v. Westbury, 5 Q. B. 500.

(*m*) Smith v. Oliver, 11 Beav. 481.

conveyed no legal interest,) the churchwardens and overseers may treat the lessee as tenant from year to year, and recover the premises on notice to quit accordingly ;(n) and it makes no difference that the lessees have paid rent to successive churchwardens both before and since the statute.(o)

By 59 Geo. 3, c. 12, s. 7, the churchwardens and overseers are directed to take security by bond from assistant overseers for the due performance of their duties, and they are still the proper parties to sue on these bonds, although 7 & 8 Vict. c. 101, s. 61, has transferred [*612] the *power of directing them to be sued on from the vestry to [the guardians of the union.(p)]

Further questions have arisen on other parts of the stat. 56 Geo. 3, c. 12, elucidating the position in which this body is placed as regards corporate powers.

The 12th section runs thus :—"Whereas by an act passed in the forty-third year of the reign of Queen Elizabeth the churchwardens and overseers of the poor are directed to set to work certain persons therein described; and whereas by the laws now in force sufficient powers are not given to the churchwardens and overseers to enable them to keep such persons fully and constantly employed; be it further enacted that it shall be lawful for the churchwardens and overseers of the poor of any parish, with the consent of the inhabitants thereof in vestry assembled, to take into their hands any land or ground which shall belong to such parish, or to the churchwardens and overseers of such parish, or to the poor thereof, or to purchase or to hire and take on lease,(q) for and on

(n) Doe d. Higgs v. Terry, 4 A. & E. 274; Doe d. Hobbs v. Cockell, 4 A. & E. 478.

(o) 4 A. & E. 478. A parishioner liable to the poor's rate was held to be a competent witness at common law for the plaintiff in the action, it not being shown that the premises were not let at their full annual value, and therefore there being no proof that the amount of the divisible funds of the parish would be affected by the result of the action; S. C. 4 A. & E. 478; vid. Doe d. Norton v. Webster, 12 A. & E. 442, 443.

(p) Skelton v. Rushby, 19 Law J. (N. S.) Mag. Cas. 29.

(q) They are thus enabled to execute a lease binding themselves and their successors for the statutory purposes, although they have not a common seal, and also under the next section to demise by force of the statute solely; and therefore it is not necessary in pleading a demise to them to state their acceptance of it by an instrument under seal, Smith v. Adkins, 8 M. & W. 362; nor is it necessary to mention the names of the persons who were in office at the time of the demise, as a grant by the name of office would be good, S. C. Plea, justifying entry, &c., as servant of churchwardens and overseers, S. C.

When they sue in respect of lands vested in them by the statute, they *must* use their natural names, and describe themselves as churchwardens and overseers; Ward v. Clarke, 12 M. & W. 747; vid. s. 17; sup. p. 608; 8 M. & W. 370. So they must demise in ejectment; Doe d. Llandysilio v. Roe, Tyrw. & Gra. 1084; S. C. 4 Dowl. 222; and so in suits, &c., against them, vid. s. 17.

In ejectment the declaration ought not to contain a count laying a demise by them in their natural names, and also another in their natural names, with the description of their offices; for the last only is necessary, and the former will be struck out on motion, &c.; Doe v. Roe, 4 Dowl. 222.

Proof that the lessors of the plaintiff have acted as such churchwardens, &c., is sufficient, without proof of their appointment; Doe d. Bowley v. Barnes, 15 Law J. (N. S.) Q. B. 293; vid. 2 Dowl. & R. 708; 8 Q. B. 1037.

In ejectment against them the declaration must be served on each; 5 Dowl. 405; vid. Tupper v. Doe, Barnes, 181.

account of the parish, any suitable portion or portions of land within or near to such parish, not exceeding *twenty* acres in the whole,^(r) and to employ and set to work in the cultivation of such land, on account of the parish, any such persons as by law they are directed to set to work, and to pay to such of the persons so employed, as shall not be supported by the parish, reasonable wages for their work; and the poor persons so employed shall have such and the like remedies for the recovery of their wages, and shall be subject to such and the like punishment for misbehaviour in their employment as other labourers in husbandry are by law entitled and subject to." The legal estate in all the real property belonging to the parish is still in this body, notwithstanding the Poor Laws Amendment Acts;^(s) for neither of these enactments operate to transfer it to the board of guardians of the union in which the parish is comprised, [*613] or otherwise *to divest it out of the churchwardens and overseers, although the guardians are empowered thereby to sell and dispose of the property, their powers in that respect being held to be consistent with the continuance of the legal estate in the body of which we are treating.^(t) The legislature only gives the guardians the management of the property for and on behalf of the churchwardens and overseers; and there is nothing in the statutes to show that they have ceased to be a corporation capable of acquiring land.^(u) Still they are not constituted a proper body corporate, with all the legal incidents and restrictions belonging to such a body by the common law; and therefore a demise to them suffices, upon their acceptance and entry, to vest the property under it in them on behalf of the parish, without any acceptance under common seal, as might have been necessary in the case of a proper corporation, according to the rules of the common law above stated; and the grant will be good by the name of office, although the statute renders it necessary that when they sue or are sued their individual names must be used.^(x)

Then the 13th section provides and enacts, "that, for the promotion of industry among the poor, it shall be lawful for the churchwardens and overseers of the poor of any parish, with the consent of the inhabitants in vestry assembled, to let any portion or portions of such parish lands as aforesaid, or of the land to be so purchased or taken on account of the poor, to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, at such reasonable rent and for such term as shall by the inhabitants in vestry be fixed and determined."^(y)

(r) Extended to fifty by 1 & 2 Will. 4, c. 42, s. 1; et vid. id. c. 59.

(s) 4 & 5 Will. 4, c. 76, s. 21; 5 & 6 Will. 4, c. 69, s. 3.

(t) Doe d. Norton v. Webster, 12 A. & E. 442; 5 Vict. sess. 2, c. 18, s. 2; 8 Q. B. 405, 406.

(u) Worge v. Relfe, 11 Law J. (N. S.) Mag. Cas. 125.

(x) Smith v. Adkins, 8 M. & W. 362.

(y) As to form of notice to quit by churchwardens and overseers, Doe d. Bailey v. Foster, 3 C. B. 215; et vid. 4 A. & E. 274. 478.

As to summary jurisdiction of justices to give them possession of parish houses from persons intruding therein, 59 Geo. 3, c. 12, s. 24. Same of parish lands, id. s. 25. Reg. v. Justices of Middlesex, 7 Dowl. 767; and Reg. v. Bolton, 1 Q. B. 66,

Before the statute, as we have seen, churchwardens could not lease parish property, much less can they since the statute; the lease must be by the then churchwardens and overseers, or a majority of the entire body,^(z) and therefore in like manner a lease by the overseers alone is void.^(a)

On these words it has been held, that the power given to this body, **“not as a general, but as a special corporation,”* applies to those cases only where the rents are applicable solely to such parochial [*614] purposes as are under the control of the parochial officers. Therefore this body cannot take lands, on hire or lease, jointly with other persons; for if they were allowed to do so, the statute would not be complied with, as the land in such case could not be managed by the body of churchwardens and overseers exclusively for the use of the poor, because the other lessees, having the legal estate jointly with them, might apply part of the land to other purposes. Accordingly, where a lease had been made to the churchwardens and overseers of a parish, *and* the surveyors of highways, their executors, administrators and assigns, and successors in office, and the question was whether the persons who were churchwardens, &c., when the lease was executed, were liable for the rent personally, after the determination of their offices, it was held, that the lease was a personal undertaking of their own, for which they were individually responsible on the above ground.^(b) Perhaps such leases might also be held to be somewhat objectionable on the ground of the inconvenience of a corporation and an individual or individuals taking a lease together; at any rate they could not by law *join* in making an underlease of such lands.^(c) and therefore difficulties would arise when they came to act upon the 13th section, by letting out the lands to the poor, with respect to the manner in which the demise was to be made. We may observe, the power of taking a lease of lands, &c., expressly given to this body by the statute, shows that they are not a complete body corporate, because every regular and full corporation has, as incident, the power of taking leases, if such power be compatible with their constitution and objects for which they are incorporated, and the only restriction is, that they must not contravene the

show that the house must be one provided for the habitation of the *poor* (qu. tam.), and not one for which rent was paid to the churchwardens, &c., in the usual way, and also that the party must have included, and not have been permitted to occupy (qu. tam.), for in the latter case they must determine the tenancy in the usual way; but that where the order of justices is correct in form and regularly made, as regards information, summons, &c., the court on certiorari will not inquire into the reasonableness of their decision.

With reference to this, it is material that where the jurisdiction of a borough, &c., does not extend over the whole of the parish in which it stands, every building erected, purchased or hired as and for a workhouse, with the appurtenances and land occupied therewith, is brought within the jurisdiction of the borough, &c., though situate in a part of the parish locally beyond the chartered jurisdiction, by 4 & 5 Will. 4, c. 76, s. 44. ^(z) *Phillips v. Pearce*, 5 B. & C. 433.

(a) *Doe d. Grundy v. Clarke*, 14 East, 488.

(b) *Uthwatt v. Elkins*, 13 M. & W. 772.

(c) *Vid.* 2 Wms. Saund. 319, note (4), and note (6), per Keble, J.; *Yearb.* 16 Hen. 7, fol. 15, pl. 12. They would be tenants in common, and such cannot make a joint demise; *Heatherley v. Weston*, 2 Wils. 232.

Statutes of Mortmain,^(d) if, indeed, any grant or lease to a corporation for a less period than perpetuity can be considered mortmain.^(e)

As the body has no common seal, it seems very doubtful whether they can execute a mortgage of lauds held by them under the statute. This was left a question in a case where the object was to reimburse the rector for money he had laid out in the repairs of the parish church, at the request of the parishioners.^(f) However, the want of a common seal is not an objection to bonds given, or demises in ejectment, or leases, made by them.

On an information filed against them as trustees of a charity, by parishioners, they will be ordered to produce the parish books.^(g)

We have seen that a quo warranto information does not lie to try the right to the office of churchwarden, and the same is true of the office of overseers.^(h)

Whether this body falls within the statutes 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 3, so as to be entitled to plead the general issue, and give the special matter in evidence, does not appear to have been settled; but as the latter statute expressly empowers churchwardens when sued to do so, and also overseers separately, it would seem that the conjoint body may. Of course it may do so when sued as landlord under 11 Geo. 2, c. 19, s. 21.⁽ⁱ⁾

[*616] *GUARDIANS OF THE POOR.

ANOTHER form of quasi corporation is that of guardians of the poor of unions.

By an act to facilitate the conveyance of workhouses, &c., in England and Wales,^(k) it was enacted "for the more easy execution of the

(d) Vid. Vin. Abr. Mortmain, B. 21; 1 Platt, Leases, 541; Jesus College v. Gibbs, 1 Y. & Col. 145.

(e) Vid. the doctrine to this effect in Vigers v. Dean, &c., of St. Paul's, 18 Law J. (N. S.) Q. B. 97; qu. tam. for a grant of a rent-charge to an abbot and his successors for eighty years was held to be mortmain; Abbot of Boxeley's case, Yearb. 4 Hen. 6, fol. 9, pl. 1, as being equivalent to a term for life, and therefore to a freehold, and as there cannot be an entry into a rent-charge, the crown shall have it; per Paston, J., 19 Hen. 6, fol. 63; et vid. 3 Edw. 4, fol. 12, pl. 8; Rowles v. Mason, 2 Brownl. 197; et vid. sup. pp. 115. 127.

(f) Wrench v. Lord, 4 Scott, 381.

Semb. the usual objections to a retrospective church rate do not apply to such a case, and a rate, therefore, might have been made to reimburse the rector; vid. Harrison v. Stickney, 2 H. Lds. 103; et vid. 3 Exch. 95. Formerly he perhaps might have had a remedy in equity; 4 Vin. Abr. Churchwardens, C. pl. 4. 9; 5 Madd. 4; 2 Vern. 262; French v. Dear, 5 Ves. 547.

(g) Att.-Gen. v. Berry, 2 Colly. Chanc. 33. As to power of justices to enforce production of documents, 7 & 8 Vict. c. 101, s. 70; and 7 Q. B. 120. 134.

(h) Vid. R. v. Daubney, 1 Bott, 347, pl. 358, 6th edit.; per Patteson, J., 6 A. & E. 785.

(i) As to costs, vid. 5 & 6 Vict. c. 97, s. 2.

(k) 5 & 6 Will. 4, c. 69, s. 7. (Royal assent, 9th Sept. 1835.) For appointment, election, and duties of guardians, vid. 4 & 5 Will. 4, c. 76, ss. 38. 41. 15, and 5 & 6 Vict. c. 57, s. 11; 7 & 8 Vict. c. 101; 10 & 11 Vict. c. 109, ss. 24, 25; Reg. v.

purposes of this act, and of the laws relating to the poor, that the guardians of the poor of every union already formed, or which hereafter shall be formed, by virtue of the aforesaid act, passed in the fourth and fifth year of the reign of his present majesty (i. e. 4 & 5 Will. 4, c. 76,) and of every parish placed under the control of a board of guardians by virtue of the said act, shall respectively, from the day of their first meeting as a board, become or be deemed to have become, and they and their successors in office shall for ever continue to be, *for all the purposes of this act*, a corporation by the name of "the guardians of the poor of the — union [*or of the parish of —*], in the county of —;" and, as such corporation, the said guardians are hereby empowered to accept, take, and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal, and they are further empowered by that name to bring actions, to prefer indictments, and to sue and *be sued, and take, or resist, all other proceedings for, or in relation to any such property, or any bonds, contracts, securities, or [*617] instruments given or to be given to them, in virtue of their office. And in every such action and indictment, relating to any such property, it shall be sufficient to lay, or state, the property to be that of the guardians of the — union, or of the guardians of the parish of —; and in case of any addition to, or separation of any parishes from, any such union, under the authority of the said act, passed in the fourth and fifth years of the reign of his present majesty, the board of guardians for the time

Todmorden, 1 Q. B. 185; affirmed in err., 3 Q. B. 675; et vid. Reg. v. Hunt, 12 A. & E. 130.

Power is given by sect. 3 of stat. 5 & 6 Will. 4, c. 69, for the guardians of any parish or union, *and* for the overseers of any parish not under the management of a board of guardians, *and* for the guardians or trustees, guardian or trustee of any dissolved union, or the person or persons who were the guardians or trustees, guardian or trustee of any dissolved union at the time of its dissolution, or a majority of such guardians, &c., to sell, exchange, let or otherwise dispose of any workhouses, tenements, buildings, land, effects or other property belonging to any such parish or union, &c., but this does not divest out of the churchwardens and overseers the legal estate in the parish realty; Doe d. Norton v. Webster, 12 A. & E. 442; vid. 5 Vict. sess. 2, c. 18, s. 2, explaining the above enactment. That the legislature meant the guardians to be a body capable of taking lands in succession is plain from the next section (s. 8), "that all buildings, lands or hereditaments, goods, effects or other property which, before the passing of this act, may have been conveyed with the consent, or under the directions of the Poor Law Commissioners, to any person in trust for and for the use of any union or parishes shall, without any further act, vest in the guardians thereof as such corporation, in the same manner as if the same respectively had been conveyed to or vested in them under the provisions of this act." In these lands, &c., therefore it should seem the legal estate is vested in the board of guardians; though the legal estate in the lands vested in the churchwardens and overseers by 59 Geo. 3, c. 12, remains where it was, and the legal estate in property vested in existing feoffees for the use of the parish remains there also, notwithstanding the above ss. 3 and 8; vid. 5 Vict. sess. 2, c. 18, s. 2. They are now fully empowered "*to accept, take and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects or other property as a corporation, and in all cases to sue and be sued in their corporate capacity;*" 5 & 6 Vict. c. 57, s. 16; vid. per Rolfe, B., 6 M. & W. 819. All corporations are empowered to convey lands, &c., to them for the purposes of 5 & 6 Will. 4, c. 69, subject to the approval of the Poor Law Commission, by sect. 1 of that act.

being, shall, notwithstanding such alteration, have and enjoy the same corporate existence, property, and privileges, as the board of guardians of the original union would have had and enjoyed, had it remained unaltered."

Many remarks have already been made in the course of this work, with respect to the nature of contracts not under seal, upon which corporations may be made liable like individuals; but as the decisions respecting guardians of the poor are somewhat peculiar, and as questions of this kind may probably often arise, we shall state here some of the principal points which have been determined with respect to them, though at the risk of some objection on the ground of repetition.

Corporations, we have seen, are enabled to do acts either necessary for or incident to the purposes of their institution, or acts of a trivial nature, without being obliged to resort to the use of their common seal, and the expense of a deed, &c.; especially where such acts must necessarily be of frequent occurrence. On this ground, as it seems, is to be rested the decision that a board of guardians was liable, *on a verbal order* given to one of their officers, who gave it to the plaintiff, for some iron gates for the workhouse, which had been supplied accordingly by the plaintiff. (l) On the other hand, where the order given by the guardians was for work, &c., *not* of the above character, that is, where the order, in its nature, was not of an every-day description, nor essential or incident to the purposes for which the board was instituted, there the common seal is necessary; and although the work, &c., be done by the party, and be accepted by the board, yet they are not liable for it, if there be no contract under their seal. The following is a remarkable instance. The stat. 6 & 7 Will. 4, c. 96, s. 3, gave power to the Poor Law Commissioners, in certain circumstances, to order new valuations of premises, &c., in parishes, for the purposes of the poor rate, and also to order a survey, with or without a map or plan, to be made and taken of the messuages, &c., liable to poor rates, and to direct the guardians to appoint a fit person, or persons, to make and take such survey, map or plan, and valuation, and to make provision for paying the charge thereof, either by a separate rate, or by a charge on *the poor rates, &c. A board [*618] of guardians entered into an agreement for such survey, map, &c., of *one* of the parishes of their union, under an order of the Poor Law Commissioners, with the plaintiff, such agreement being under seal. The survey, map, &c., were executed; but the commissioners suggesting the propriety of having an additional map, the board gave a verbal order for *this* to the plaintiff, and he prepared it accordingly, having no written agreement with the board under their seal respecting the second map; and it was held that for it he could not recover. (m) "The plan was wanted in order to enable a fair and correct estimate to be made of the net value of the hereditaments rated in that parish; the other parishes

(l) *Sanders v. Guardians of St. Neot's Union* 8 Q. B. 810, as explained in *Lamprell v. Guardians of Billericay Union*, 3 Exch. 307.

(m) *Paine v. Guardians of the Strand Union*, 8 Q. B. 326. *Semb.* they cannot contract to remunerate a witness for attending on an appeal against a parochial assessment within the union; at least, when the witness was liable to be compelled to attend by process, independently of the contract, S. C.

in the union had nothing to do with it, nor were in any way benefited; so that the making the plan cannot have been in any way incident to the purposes for which the defendants were incorporated."⁽ⁿ⁾ This was the principal ground of the decision; but it was also held, that the section of the statute of Will. 4, above referred to, showed the legislature did not intend the guardians should make themselves liable for the amount of the costs and expenses of making such surveys, &c.; and it follows, as appears, that the contract, though under seal, would not have bound the guardians in their corporate capacity, though perhaps the individuals composing the majority who ordered the common seal to be put to it might have been so bound, on the ground that having entered into a contract beyond the power of the corporation to enter into, they were not protected by the shield of the corporate character beyond which they had stepped.

So where the board of guardians contracted under their common seal with a builder for the building of certain premises, &c., under the direction of certain architects, for a certain sum, with a provision that, if any additional works beyond those specified and agreed to be completed for that sum, were required, the architects were to give the builder written instructions, without which he should not have authority to do such additional works. The builder made some additional works without the previous authority of the architects, who however subsequently approved of them, and the board accepted and entered upon the whole; and it was contended that though, for want of written instructions, the builder might have no remedy for the price of these additional works, under the deed, yet that the board of guardians, having accepted the additional works, and so had the full benefit of them, just as much as if they had been done under the deed, the plaintiff had a right to be paid on a quantum meruit, independently of the deed; but it was decided that the principle stated above, which form *the doctrine of various former cases,^(o) clearly exempted the defendants from all liability as to the mat- [*619] ters in question, although in the case of a building contract entered into with an individual it would be otherwise; for the employer might in that case be taken to have entered into a new parol contract—he being competent to do so—with respect to the additional works, independently of his liability on the deed (*p*). A board of guardians refuse to pay for certain works done for them by a builder, on the ground that no written order had been given by them for the performance thereof, it having been expressly provided in a contract, under which he had performed for them certain other works, to which these were supplemental, that no additional works should be allowed for, unless the same should be ordered in writing; in such circumstances there is no ground for the interference of equity.^(q)

(*n*) Per cur. 8 Q. B. 341.

(*o*) Vid. sup. pp. 178, 62; *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor, &c., of Poole*, 4 M. & Gra. 860; *Paine v. Guardians of Strand Union*, 8 Q. B. 338.

(*p*) *Lamprell v. Guardians of Bilericay Union*, 3 Exch. 283.

(*q*) *Kirk v. Guardians of Bromley Union*, 2 Phill. 640; et vid. *Ambrose v. Guardians of Dunmow Union*, 9 Beav. 508.

Still a board of guardians may be liable, though there was no contract under seal, in certain cases; ex. gra., a servant of theirs pays over to them, by their order, money which had come into his hands in virtue of an order of the Court of Chancery, they having in truth no right to the sum; he is afterwards obliged, under another order of the court, to pay the same sum to another party, which he does out of his own pocket; he may recover this sum from them as money paid to their use, in action of indebitatus assumpsit as for money paid for their use.^(r)

The acts of this body are to be done by the majority of the members present at corporate meetings, which, it seems, can only take place in the board room, or regular place of meeting, upon the principles already laid down with respect to municipal and other corporations; but there is this additional statutory provision made, with respect to all questions coming for decision before meetings of the board, that, in case of an equality of votes, the presiding chairman shall have a second casting vote;^(s) thus introducing a principle unknown to the common law as regards the composition of corporate majorities.^(t)

With respect to the name of incorporation, the same principles are applicable to this body that prevail with respect to the name of complete corporations; grants, deeds, &c., made by, or to, the body must be made in its correct name; but a merely literal or syllabic deviation from the name will not be considered a breach of the rule, so long as the substance of the name is preserved. A substantial variance will in general [*620] be fatal to the validity of a deed made to them;^(u) though it *would be otherwise in a devise to them, when it will suffice if it can be perceived what body the testator had in view.

Guardians of a poor law union comprising twenty-nine parishes, in one of which the workhouse stands, are rateable to the poor in that parish as occupiers of the workhouse, although it was built on land which, from the nature of the previous occupation, had not been rated before.^(x)

A somewhat new principle with respect to the dissolution of corporations seems to have been engrafted upon the old law of dissolution by the poor law legislation as to these bodies. This appears in the course of a case which arose respecting an union dissolved by an order of the poor law commissioners under the provisions of the Poor Laws Amendment Act,^(y) where it was thrown out that some boards of guardians may be dissolved for some purposes, but not for all purposes^(z) by such order;

^(r) *Jeffreys v. Gurr*, 2 B. & Ad. 833. ^(s) 12 & 13 Vict. c. 103, s. 19.

^(t) The board of guardians of a parish are to act by a majority; *Reg. v. Poor Law Commissioners*, 9 Q. B. 291. Distinctions between guardians of a parish and of an union, 5 Q. B. 506, 513.

^(u) *Per Parke, J.*, in *R. v. Haughley*, 4 B. & Ad. 655, relying on *Mayor, &c., of Lynn's case*, 10 Rep. 124; *Croydon Hospital v. Farley*, 6 Taunt. 467; et vid. *Ex parte Harnley*, 1 D. & L. 673.

^(x) *Reg. v. Guardians of Wallingford*, 10 A. & E. 259. As to rateability of visitor and guardians constituted under *Gilbert's Act*, 22 Geo. 3, c. 83, that is provided for by s. 19 of that statute. ^(y) 4 & 5 Will. 4, c. 76.

^(z) It had been suggested in *R. v. Pasmore*, 3 T. R. 245, per Lord Kenyon, C. J., that "possibly a corporation might be said not to be dissolved quoad the individuals for particular purposes, though it is so quoad the corporate body," which is the converse of the idea in the text.

and where it was held that in an action of replevin the plaintiffs were not estopped, by having sued the defendants as a corporation, from giving in evidence the previous dissolving order; that without deciding whether the dissolution operated to divest the property in certain premises, viz. the workhouse, &c., out of the body, but that assuming that it did, still if the plaintiffs had contracted with the body as owners, either expressly or impliedly, and had had the benefit of the contract by entering upon and occupying the premises, the mere absence of the legal ownership would not take away the right of the body alleged to be dissolved to distrain; (a) the rent having been always paid by the one party, and accepted by the other, as rent. The order of the commissioners was held to have been rightly admitted in evidence, if the dissolution of the corporation was not the necessary effect of the order, assuming it to be valid, and if it might be material evidence for the plaintiffs, without proving such dissolution. (b) We have cited this case among other reasons, for the sake of observing, that upon the construction of 5 & 6 Will. 4, c. 69, s. 3, it was considered to be manifest, that the guardians of a dissolved union may remain a corporation for some purposes only, though not for others; (c) though it was certainly not necessary for the plaintiffs, in the particular circumstances, to contend that the defendants were not an existing corporation, nor even that they were not the legal owners of the premises in question; for both these points might be conceded, and yet the relation between the parties might not be that of landlord and tenant, but referable solely to the order of the commissioners. More- [*621] over, it was held that 4 & 5 Will. 4, c. 76, s. 32, under which the order was made, did not give it the effect of ipso facto dissolving *for all purposes* the board of guardians to which it referred, viz., the defendants who had been incorporated by a local act, making them a body corporate *to all intents and purposes*; which terms, it will be observed, are much larger than those cited above from 5 & 6 Will. 4, c. 69, s. 7, which incorporate boards of guardians of unions throughout the country generally; for the latter enactment (d) obviously has the effect, and has been so held, (e) to incorporate *for certain purposes only*, and constitute quasi corporations merely, and not corporations with full corporate powers. Therefore, the decision must perhaps be regarded as strictly applicable *only* to boards of guardians originally constituted under local acts, with the same extent of powers as had been given to the board in question by its local act; and therefore it would be necessary before applying the judgment to the case of any board of guardians formed under local act, that might in future be dissolved by virtue of the Poor Laws Amendment Act, to scrutinize narrowly the terms of the statute under which it was established.

However, the enactment just mentioned (f) contemplates the future dissolution of boards of guardians incorporated both before and after the

(a) Guardians of Woodbridge Union v. Guardians of Colneis, 18 Law J. (N. S.) Q. B. 126. (b) Per Cur. 18 L. J. (N. S.) Q. B. 134.

(c) Per Coleridge, J., 18 Law J. (N. S.) Q. B. 133. (d) Vid. sup. p. 616.

(e) Per Rolfe, B., 6 M. & W. 819. Per cur. Smith v. Adkins, 8 M. & W. 362 vid. 8 Q. B. 394; sup. p. 616.

(f) 4 & 5 Will. 4, c. 76, s. 32.

passing of it, and is applicable therefore to all boards, whether formed before or since 13 Aug. 1834, and provides with reference to both species of corporations, that no such dissolution shall in any manner prejudice, vary, or affect the rights or interests of third persons, unless they shall by themselves or their agents consent in writing to such dissolution; and such dissolution must have the concurrence^(g) of a majority of not less than two-thirds of the guardians of the union which it is proposed to dissolve. Hence creditors of the corporation having security under their common seal, and not consenting to the dissolution, would still have a right, after the dissolution, to all their remedies at common law; and for this purpose the corporation must remain answerable; and as the only remedy could be on the corporate funds, these must still exist in order to be answerable.^(h) This is the effect of a dissolving order by itself; whatever may be the powers which the poor law commission may have of subsequently providing for this and similar cases; it dissolves for the purposes of the care and management of the poor, but leaves standing the corporation for the purpose of answering outstanding [*622] claims against it in the hands of creditors not consenting to the dissolution, and leaves it clothed with all *its former rights and interests in its corporate property, so far as is necessary to make such property available for the liquidation of its corporate debts.

The proper mode of trying the right to the office of guardian is not by information in the nature of *quo warranto*;⁽ⁱ⁾ this is now settled after some hesitation on the part of some members of the Court of Queen's Bench, in different cases which have come before them;^(k) and in answer to the objection that was urged, in argument, of the absence of any other remedy, it was observed that was a good argument on an application for a *mandamus*, but not on one for a *quo warranto*.^(l)

It was doubtful whether a *mandamus* will go to the board to admit a clerk to the board, as the office is not mentioned in stat. 4 & 5 Will. 4, c. 76, and is not perhaps within the range of the decisions in which the writ has gone, in cases of clerks to trustees of roads, &c., and which have proceeded partly on the ground, that the office was shown to be valuable, and of a permanent character, and partly that it was of a public character; but it seems that where two persons are elected, the court would perhaps direct a feigned issue, upon terms, to try the right.^(m) The writ will certainly not be granted for the purpose of inquiring into the right to their offices of the guardians who had voted at the election of the clerk;^(m) but as the office is now recognised by statute, perhaps

(g) Which need not be in writing, not being the act of the body, but of the individual members; per cur. 18 Law J. (N. S.) Q. B. 134.

(h) Per cur. 18 Law J. (N. S.) Q. B. 134. What is a valid order in such case, id. 134; form, id. 128.

(i) In re Aston Union, 6 A. & E. 784; vid. 5 & 6 Vict. c. 57, s. 8, vesting in the poor law commission the power of determining disputes relative to elections.

(k) R. v. Ramsden, 3 A. & E. 456; et vid. 3 A. & E. 476. (l) 6 A. & E. 785.

(m) Reg. v. Guardians of Dolgelly Union, 8 A. E. 561. Semb. the proper mode of trying the right is an action for the fees if any be attached to the office. The office is now recognised by 5 & 6 Vict. c. 57, s. 17.

there would no longer be much difficulty in granting a mandamus to admit, if a case were to arise in which it became necessary.

Where the officers of a parish, included in a poor law union, have been required by a precept of the guardians of the union, duly issued according to the rules and regulations of the poor law commission, to pay a certain sum to the treasurer of the union, out of the poor rates of the parish, and have refused, it is no return to a mandamus reciting the due appointment of the guardians, and their having taken upon themselves the maintaining, providing for, regulation and employment of the poor of the union, to state that the said supposed guardians were not, nor were any of them, duly appointed, &c.; for it was held that the case was distinguishable from those of writs of mandamus to admit and swear in, directed to corporate officers bound to admit persons elected, where "not duly elected," had often been held a good return, because there the person elected has no right to compel admission, without showing a good title in omnibus, and must be prepared to prove it. But in this case the poor law commission had power to form *unions; [*623] elections of boards were to be made as the Poor Law Amend- ment Act directed; this board was in the full exercise of its authority; moneys collected for the use of the poor were to be paid according to the orders from the commission, which orders have the force of law, unless and until set aside by the Court of Queen's Bench; and that if any defect existed in point of fact, showing that the election of the guardians was bad, it ought to have been distinctly stated on the return, that the court might have exercised its judgment, whether, if established, it would have defeated the order of the commission. But the statement that, for some undisclosed reason, the parties charged with a plain duty refused to perform it, because they choose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient.(n)

From what has been said respecting churchwardens and overseers, it will be seen that the legal estate in *parish* property is not vested in the board of guardians of the union, nor in the guardians of the parishes respectively comprised in it, (for *these* parochial guardians are not incorporated in each parish), but remains in the churchwardens and overseers, for such property therefore the board cannot bring ejectment; but they have the remedy which was given to churchwardens, &c., for the summary removal of persons intruding into the houses and lands of the parish, &c., by application to two justices,(o) extended to them by a subsequent statute, with respect to any houses and lands vested in their management;(p) and it seems, therefore, that either body may apply to the justices for a summary removal in the cases contemplated by the statute of Geo. 3.

Another body of this description is the district board, formed under

(n) Reg. v. Governors, &c. of St. Andrew, &c., Holborn, 10 A. & E. 736.

(o) 59 Geo. 3, c. 12, ss. 24, 25; et vid. Reg v. Justices of Middlesex, 7 Dowl. 767; Reg. v. Bolton, 1 Q. B. 66; sup. p. 616, note (k).

(p) 5 & 6 Will. 4, c. 69, s. 5.

7 & 8 Vict. c. 101, An Act for the further Amendment of the Laws relating to the Poor.

To the body established by this statute, s. 44, gives the power, subject to the order of the poor law commission, to exercise the powers given by stat. 4 & 5 Will. 4, c. 76, or any other act or acts, (without the consent of any rate-payers or owners of property, &c., of any parish, to any sale or other disposal of any workhouse, tenement, building or land,) to boards of guardians of the poor for the purchase and hire of lands and buildings for the schools and asylums mentioned in the act, and for borrowing money (to be repaid, with interest, in twenty years) for purchasing sites, or for purchasing, hiring, or building, or fitting, &c.; and to charge the future poor rates of the unions or parishes [*624] combined under the act, with certain restrictions. Then s. 45 enables *them "to accept, take, and hold, on behalf of the district for which they act, any lands, buildings, goods, effects, or other property, as a corporation, and in all cases to sue and be sued as a corporation, by the name of 'The Board of Management of the ——— District School or Asylum,' as the case may be."

But they have no common seal; although the words in which they are enabled to sue "as a corporation" seem to go far to make them a corporation, and at least to invest them with a larger portion of corporate powers than churchwardens and overseers, who are only described in the statutes as taking *in the nature* of a corporation.

If there were a school and an asylum in the same district, it would seem that there would be two corporations, the board for the management of the school, and that for the management of the asylum; though each might be composed of the same individuals; of which double kind of incorporation we have before seen instances.

There is still another body of this kind, namely, the Visitor and Guardians of the poor, under 22 Geo. 3, c. 83, who by s. 21 of that statute) are constituted one body politic and corporate, and may accept, take, and hold, by purchase or lease, any lands, tenements, or hereditaments of inheritance, or for life or years, &c., not exceeding in a city or town one acre, and not exceeding in the open country twenty acres, for the site of a house or houses to be built, and for lands to be occupied, for the purposes of the act, &c. This body seems to be a more nearly complete corporation than the board of guardians under the later poor laws; but as no decisions of importance occur respecting them, and they are not very numerous, it may suffice to refer to the statute for the details of their constitutions.

Another instance of a quasi corporation aggregate is found in the officers of the board of ordnance, who, by virtue of the statutes 1 & 2 Geo. 4, c. 69, 3 Geo. 4, c. 108, and 2 Will. 4, c. 25, are in the nature of a corporation, so far as to have vested in them certain manors, mesuages, lands, &c., which have been, at various times, purchased for the use of the ordnance, for the purposes of the general defence of the realm. They are, in respect of such lands, &c., trustees for the crown for that purpose, so as to prevent the necessity of the property being transferred from one set of officers to another. But it does not appear that they are

so seized as to be enabled to defend an ejectment.(q) The proper mode of proceeding to recover such lands, &c., appears to be by a petition of right.(r)

Also since the stat. 1 & 2 Vict. c. 96, certain banking copartnerships and other companies have been allowed by the legislation (which has provided by that and other statutes for those purposes) to be erected *with constitutions, partaking to some extent of the corporate character, but in others being no more than partnerships.(s) [*625]

Commissioners of sewers, for the time being, in each commission, have been considered to be in the nature of a body corporate to hold lands, &c., under their survey, by the operation of 3 & 4 Will. 4, c. 22, s. 47.(t)

To a limited extent the body of directors of a corporation has sometimes been considered to have itself a quasi corporate character; so that a subsequent board has been considered to be necessarily affected with knowledge of all circumstances communicated or known to a previous board just as if they had had a continuous identity; vid. *Mechanics' Bank of Alexandria v. Seton*, 1 Peters's Rep. Sup. Court, United States of North America, 309. However, covenant cannot be maintained against the chairman of a board of directors upon a deed under seal of a former chairman, though sealed by him for and on behalf of the company; *Hall v. Bainbridge*, 1 M. & Gra. 42; vid. inf. p. 196; 8 Vict. c. 16, s. 97.

*CORPORATIONS SOLE.

[*626]

A CORPORATION sole is a body politic, having perpetual succession, and being constituted in a single person, who, in right of some office, or function, has a capacity to take, purchase, hold, and demise (and in some

(q) *Doe d. Legh v. Roe*, 8 M. & W. 579.

(r) 8 M. & W. 582, 583; 15 M. & W. 109.

(s) Vid. 7 Geo. 4, c. 46; *Steward v. Dunn*, 12 M. & W. 655; et vid. 3 C. B. 25; sup. p. 275, n.(r); 7 & 8 Vict. c. 113; vid. for joint stock corporations, 7 & 8 Vict. c. 110, erecting bodies partaking of corporate powers, but with several incidents of partnerships: they have been called quasi corporations. per Parke, B., *Ridley v. Plymouth, &c., Company*, 2 Exch. 711. But they cannot enjoy any of the corporate privileges conferred by the statute until complete registration; and if they have registered as a company, they cannot afterwards register so as to lead the world to suppose them a corporation; *Reg. v. Whitmarsh*, 19 L. J. (N. S.) Q. B. 185. Sect. 44 prescribes the requisites of contracts entered into by these bodies, among other things providing that they shall, with certain exceptions, be in writing, signed by two at least of the directors, and sealed with the common seal, or signed by some officer expressly authorized by the directors; but it nevertheless has been held to be clear that these bodies are bound by their contracts, though not under seal, and though they have not complied with the requisites of the above section; *Ridley v. Plymouth, &c., Company*, 2 Exch. 711, 716; but such contracts cannot be enforced by the companies, id. These bodies cannot change their name after complete registration any more than an ordinary corporation can alter the name given it by charter or statute; *Reg. v. Registrar of Joint Stock Companies*, 10 Q. B. 839. To what companies the act relates, vid. per Lord Cottenham, C., *In re London and Independent Railway Company*, 18 Law J. (N. S.) Chanc. 242; *Lawton v. Hickman*, 9 Q. B. 563. (t) Per Parke, B., 12 M. & W. 544.

particular instances, under qualifications and restrictions introduced by statute, power to alien) lands, tenements, and hereditaments, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be, and mostly are, periods in the duration of a corporation sole, occurring irregularly, in which there is a vacancy, or no one in existence in whom the corporation resides, and is visibly represented.

Generally speaking, and indeed in all cases, except one or two (to be presently noticed), in which either at common law, or by custom, a different rule obtains, corporations sole cannot take goods, chattels, choses in action, or any personality, in succession.

This description of corporation may be established either by prescription, or letters-patent, or, it is said, at common law, or by act of parliament, or by custom; of all of which we shall notice instances in their proper places. Corporations sole are chiefly ecclesiastical; one or two instances only of lay corporations sole occurring in the books.

Not many instances are on record of the creation of those bodies by charter, but one is the following:

The master of Pembroke College, Oxford, was made a corporation sole by letters-patent of Charles 1, which also annexed to the office a canonry in Gloucester Cathedral, and the letters-patent were confirmed by stat. 12 Ann. stat. 2, c. 6, s. 7.

The most important corporation of this nature, that claims attention, is the king.

We have seen that a corporation aggregate has only a corporate capacity of taking lands, that is to say, though the metaphysical entity, the corporation, can have lands vested in it, which may so remain vested in it, during the whole period of its duration, which is in contemplation of law for ever, yet the aggregate of its members cannot take lands *by their corporate name* as an aggregate body, to them and the heirs of each of them, but only to them and their successors in the corporation. But it has been said that a corporation sole has two capacities, and may take either to him and his successors, or to him and his heirs. The observation, however, seems only to amount to this,—that the parson of such a place may take to him and his successors, or the same person may take, not quā parson of that place, but as an individual, to him and his heirs;

[*627] *but we shall hereafter see how far it is law that he may take by the name of parson of that place to him and his heirs. Passing this however (at present), we have here to observe, with respect to the king, that though he has both a natural and a political capacity of taking lands, yet for the most part the political capacity prevails; for, as applied to the king, “heirs” includes “successors,” and therefore land given to the king and his heirs, descends to the persons who shall after him come into possession of the crown; although by the course of the common law, in the case of subjects, it would have vested otherwise. Thus, if the king die without issue male, but leaving two daughters, the lands held to him and his heirs shall go to the eldest daughter, because she succeeds to the crown; though in the case of common persons, the lands, by the course of the common law, would have devolved upon both the

daughters, who would have taken as co-parceners. So if the reigning dynasty were changed, and another family placed upon the throne, lands given to the dethroned monarch before his expulsion, and held to him and his heirs, would go at common law to the successor, and descend in the new line of succession as before.^(t) And so it was if the newly created king should have purchased, or in any other way become seised of lands to him and his heirs before his accession, these, in like manner, by his accession, became descendible to his successors on the throne, and not otherwise.^(u)

The king, being a body politic, cannot command, except by matter of record;^(x) and in general cannot grant or take anything otherwise.^(x) He cannot take a surrender but by matter of record.^(y)

A queen regnant is precisely in the same way, and to all intents a corporation; and indeed there is nothing inconsistent with the principles of the old law in this; it was everyday's experience before the Reformation, to find female subjects corporations sole,^(z) as lady abbesses, &c.; but since that era, it is superfluous to observe, females cannot be invested with this description of incorporation,^(a) though, as we have seen, they may be corporators of hospitals; and though they frequently are corporators in railway and other trading bodies.

*The king, as a body politic, cannot divest an interest but by [^{*628}] deed; though he may give a license that has not the effect of divesting an interest, as a license to an officer to absent himself for a time from his office, by word of mouth;^(b) for the incorporation in right of the crown, does not deprive the person wearing it of all the rights and powers of the natural person; but he may both retain, and dispense with, the services of officers and servants by the same means that any other individual may.^(c)

^(t) It is as a body corporate that the king is said to be invisible and immortal; 2 Howell, Sta. Trials, 598; 24 id. 246; 2 id. 624; Plowd. C. 213. 217. 234.

^(u) Plowd. C. 212; Co. Litt. 15 b; Dyer, 209, A. pl. 22; et vid. Co. Litt. 190 a; Plowd. C. 234; 11 Rep. 70 a. Now, however, vid. 1 Geo. 3, c. 1, and 39 & 40 Geo. 3, c. 88, giving the king power to acquire and bequeath lands in his natural capacity.

^(x) 2 Inst. 186; 2 Bla. Com. 346; Com. Dig. Patent, A.; Prærog. D. 89; Nicholls v. Nicholls, Plowd. C. 484. But the king may present by parol on an avoidance of a benefice, for no interest passes; Anon., Cro. Jac. 247, 248; Com. Dig. Patent, C. 5, C. 4. And it is only a recommendation of the clerk; Co. Litt. 120 a; Com. Dig. Esglise, H. 8. Or the presentation may be under any seal; Stephens v. Potter, Cro. Car. 100; Com. Dig. Patent, C. 4. Mostly a presentation to a church or perpetual curacy may be by parol; Co. Litt. 120 a; Att.-Gen. v. Brereton, 2 Ves. sen. 425; vid. tam. 17 Vin. Abr. 342, pl. 7.

^(y) Per Whiddon and Portman, JJ., Plowd. C. 105; vid. per Kelynge, C. J., in Lee v. Boothby, 1 Keb. 720; Butler v. Palmer, Salk. 191; vid. 3 T. R. 197; Dyer, 355, A. marg.; Cro. Eliz. 24; Com. Dig. Patent, G. 3; 17 Vin. Abr. 171, pl. 7; Hutt. R. 1; 4 East, 327; per Altham, B., Lane, R. 61.

^(z) Abbess of Brinham's case, Yearb. 18 Edw. 3, fol. 23.

^(a) 2 Rol. Abr. 348, l. 33; Colt v. Bishop of Coventry, Hob. 148, 149.

^(b) Reynel's case, 9 Rep. 99 a. As to evidence in ejectment on demise by the crown, Doe d. King William the Fourth v. Roberts, 13 M. & W. 520; vid. 12 East, 96.

^(c) Whetstone v. Higford, Cro. Eliz. 424. But he must retain a chaplain within stat. 21 Hen. 8, under seal; Brown v. Mugg, Salk. 162.

The king cannot be a copyholder either in his corporate or natural capacity.^(d)

By the common law the king could not make any grant of land but under the great seal of England, but by custom of the Court of Exchequer, leases of crown lands, made under the Exchequer seal, are good, and in pleading, it is not necessary to state that the common course of that court is to make leases for years under their seal;^(e) for the customs and courses of every of the king's courts are as a law, and the common law for the universality thereof doth take notice of them, and it needeth not to allege, or plead, any usage or prescription to warrant the same.^(f) It is to be observed that since the Union with Ireland, the great seal is, properly speaking, the great seal of the United Kingdom of Great Britain and Ireland, and though, by the common law, no grant of any land by the king is available in general or pleadable but under the great seal,^(g) yet, if it be alleged in pleading, that an instrument is under the great seal of Great Britain, and evidence be given of an instrument under the great seal of the United Kingdom, this is no variance.^(h) But now the crown is entitled by stat. 59 Geo. 3, c. 94, to grant, by warrant under the sign manual, lands, &c., coming to the crown by escheat or forfeiture; and hence it has been held that a grant under the sign manual is sufficient to pass the property in a promissory note, which had become forfeited as the goods and chattels of a *felo de se*.⁽ⁱ⁾ But with this exception of lands escheated or forfeited, the crown must have granted all inheritances [*629] and *chattels real under the great seal.^(k) So it was said all offices in fee or for life must be granted.^(l)

As to chattels in general, the king may dispose of a chattel under the privy seal; and a warrant to issue treasure, though not good by word of mouth, will be good if under either the great or privy seal.^(m)

The king forms an exception to the general rule, that chattels will not go in succession in case of a corporation sole; and therefore they belong to his successors and not to his executors;⁽ⁿ⁾ and indeed it must be care-

(d) 1 Scriv. Copyh. 108, 4th edit.

(e) Lane's case, 2 Rep. 16 b; *Predyman v. Wodry*, Cro. Jac. 109; *Mounson v. Brown*, Cro. Car. 52. So of a lease for life; *Kemp v. Barnard*, Cro. Car. 513; Com. Dig. Patent, C. 3; vid. tam. 48 Geo. 3, c. 73, s. 3.

(f) 2 Rep. 16 b; so *Spike v. Tennent*, 1 Rol. Rep. 105; 19 Vin. Abr. 36, F. pl. 7; *Worlich v. Massey*, Cro. Jac. 68; *Mounson v. Brown*, Cro. Car. 528; *Kemp v. Barnard*, Cro. Car. 513; *The Case of Mines*, Plowd. C. 320, B.; — v. *Chittenden*, Hardr. 98; *Hayward v. Kinsey*, 12 Mod. 573, 578; *Odes v. Clark*, 1 Ld. Raym. 397; *Shelton v. Cross*, 1 Ford's MS. 466; contra, *Hayward v. Bennett*, 5 D. & L. 483, 484. There is a difference of opinion whether a court of error can take notice of the practice of the ordinary courts of Westminster Hall. Yearb. 2 Ric. 3, fol. 9, pl. 21, is an authority that it is bound to do so; so per *Alderson, B.*, *Gosset v. Howard*, Exch. Ch. 10 Q. B. 425; cont. *Hayward v. Bennett*, 4 D. & L. 236; per *Holroyd, J.*, *Sandon v. Procter*, 7 B. & C. 806.

(g) Lane's case, 2 Rep. 16; vid. 4 B. & C. 145; Com. Dig. Patent, C. 2.

(h) *R. v. Bullock*, 1 Taunt. 71. As to seal of Great Britain, vid. 5 Ann. c. 8.

(i) *Lambert v. Taylor*, 4 B. & C. 138.

(k) *Moór*, 476; *Plowd. C.* 213 b; Com. Dig. Prærog. D. 88; vid. now 1 Ann. st. 1, c. 7.

(l) Com. Dig. Patent, C. 2.

(m) *Earl of Devonshire's case*, 11 Rep. 92 a; 4 Inst. 116; 2 Inst. 555; *Moor*, 476.

(n) *Earl of Devonshire's case*, 11 Rep. 92 a; Com. Dig. Prærogative, D. 87; Co. Litt. 90 a; 17 Vin. Abr. 200.

fully borne in mind, that the king is altogether upon a different footing from other corporations sole,^(o) and therefore no argument to other corporations can be drawn from what is laid down with respect to the king.

It is otherwise in the case of almost all other descriptions of corporations sole; for with them neither chattels real or personal, choses in action, terms for years, nor any other species of personalty, can go in succession; ^(p) and a bond, though taken expressly to a corporation sole and its successors, would nevertheless go to the executors of the individual.^(q)

However, there is again an exception in the case of the Chamberlain of London, who, by the custom of orphanage money in the city of London, is a corporation sole, to take recognizances, obligations, &c., in trust for the portions of orphans of the city.^(r)

Also by ancient usage the ornaments of a bishop's chapel go to the successor, and not to the executors.^(s) But if a lease for years be made to a bishop or other corporation sole, the lease goes to his executors, and not to his successors: ^(t) on the other hand, if a lease for years be made by a bishop, or any other corporation sole, of the lands that he holds in right of his corporation, the successors shall have the covenants upon it; for that the lands descend to the successors, and therefore the covenants in the leases respecting them. But in general all chattels, whether real or personal, in action, or possession, go to executors and not to the successor.^(u) The executors of the deceased would have the right of action for covenants broken in the lifetime of ^{*}the testator; ^(x) and the successor would, in no case, be bound by any other covenants [^{*630}] than such as had been usually inserted in former leases.^(y)

The best reason that can be given why chattels should not go in succession as well in the case of a corporation sole as of a corporation aggregate, seems to be the application of this, which is an unquestionable rule of law, viz., that the title to, or property in, chattels, can never be in abeyance: ^(z) but if the goods of a corporation sole were allowed to go in succession, there would be an interval, viz., the time between the death or removal of each predecessor and the appointment of his successor,

(o) Per Littledale, J., 7 B. & C. 167. The ancient jewels of the crown descend to the successor as heir looms, and not as an instance of a sole corporation taking in succession; Harg. Co. Litt. 9 a, note (47); Co. Litt. 18 b; vid. Cro. Car. 344, that the king may grant them by letters-patent.

(p) 1 Bla. Com. 477; Co. Litt. 46 b; Fulwood's case, 4 Rep. 64 b; Howley v. Knight, 19 L. J. (N. S.) Q. B. 3; Arundel's case, Hob. 64. As to lease for years, Co. Litt. 9 a.

(q) Howley v. Knight, 19 L. J. (N. S.) Q. B. 7. So of a lease for years to a bishop and his successors, Co. Litt. 46 b; vid. Vin. Abr. Corporations, G. 6, pl. 7. So of a bond to a chantry priest and his successors, per Choke, J., 20 Edw. 4, fol. 2, pl. 7; per Bosanquet, J., in Dom. Proc. 1 Cl. & F. 542.

(r) 4 Rep. 64 b; Bird v. Wilford, Cro. Eliz. 464. 682.

(s) Corven's case, 12 Rep. 105, 106; Case of Bishop of Carlisle, Yearb. 21 Edw. 3, fol. 48, pl. 73; Bro. Abr. Chattles, pl. 4.

(t) Co. Litt. 46 b.

(u) Com. Dig. Biens, C.; vid. 7 B. & C. 177. The successor does not take any such rights or interests as are less than freehold; Rennell v. Bishop of Lincoln, 1 Cl. & F. 542.

(x) Morley v. Polhill, 2 Ventr. 56.

(y) Com. Dig. Covenant, C. 3.

(z) Hellam v. Ley, Brownl. 132; 2 Inst. 167; Haynes's case, 12 Rep. 113; 2 Bla. Com. 431, 432.

during which there would be no visible owner of the goods. It will be observed, that in the case of the crown such interval does not exist, because ipso facto upon the natural decease of the person holding the crown, his successor is seised; *(a)* and if the cases of bishops and the Chamberlain of London cannot be explained in this way, as they certainly cannot, they must be referred in the latter case solely to custom and necessity, and in the other to usage and convenience. *(b)*

The preponderance of opinion seems to be, that a corporation sole cannot hold lands by copy of court roll. *(c)* It is material to observe, that in strictness a parson, bishop, or any other corporation sole, except the king, must have a license in mortmain before he can hold lands or hereditaments, granted, &c., to him and his successors; and accordingly by statute, *(d)* now repealed, *(e)* the legislature permitted parsons, &c., the yearly income of whose parsonages, &c., did not amount to the clear yearly value of 100*l.*, to take, receive, and purchase, to them and their successors respectively, lands, tenements, rents, tithes, or other hereditaments, without any license in mortmain; and *(f)* all owners of tithes in any parish, or chapelry, were also enabled at the same time, to give and annex the same, or any part thereof, to the parsonage, or vicarage, of the said parish church or chapel, where the same lay or arose, &c., without any license in mortmain. The license in mortmain to a corporation sole ought to be made to him and his successors by his name of office, not mentioning his personal names. *(g)*

There is a difference between the case of lands granted to the king and an individual, and to J. S., Bishop of Dale, or any other corporation sole, by his christain and surname, and addition of his corporate name, and an individual and their heirs; for in the first case, the king would take [*631] as tenant in common with the subject, and not jointly; for *he would take as a corporation sole and in jure coronæ, and therefore his successors would be tenants in common successively with the individual and his heirs respectively; for as we have seen, there cannot be a joint tenancy between a corporation and an individual; *(h)* but in case of a grant of lands made as above stated, &c., to a bishop or other corporation sole and a layman or other individual, and their heirs, they would take as joint tenants, for each would take equally in his individual capacity. *(i)* So if a lease for years be made, or given, to a bishop and an individual, they are joint tenants. *(i)*

Again, if a bishop have an advowson in right of his fee, and the church have become void in the lifetime of the bishop, neither his successor nor

(a) 2 Howell, Sta. Tr. 626; Foster, Cro. L. 402.

(b) Howley v. Knight, 19 L. J. (N. S.) Q. B. 7.

(c) Vid. 1 Scriv. Copyh. 108, 4th edit.

In Jersey the Norman law is, that when a corporation becomes possessed of lands by conveyance from a tenant liable to pay fines on death or forfeiture for crime, the corporation must indemnify the lord for the loss of his seigniorial rights; Thornton v. Robin, 1 Moo. P. C. Cas. 439.

(e) 1 & 2 Vict. c. 106.

(d) 17 Car. 2, c. 3, s. 8.

(f) 17 Car. 2, c. 3, s. 7.

(g) Bro. Abr. Tender, pl. 15; Yearb. 14 Hen. 7, fol. 31; 15 Hen. 7, fol. 1.

(h) 2 Wms. Saund. 319, note (4).

(i) Co. Litt. 190 a. The words "bishop of, &c.," are merely words of description in such case.

executor shall have the presentation; for the executor shall not have it, because nothing can be taken for a presentation in such circumstances, and therefore it is not assets; and secondly, being a chose in action of a peculiar character, it goes to the king in preference to the successor, because the king has the custody of the temporalities of the see in the interval between the death, and the appointment of the successor: *(k)* and so it is if the bishop be deprived, the king shall have the presentation to a church devolved to the bishop by lapse before his deprivation, but not filled up by him; *(l)* nor would the lapsed turn have gone to his executors at his death, for the reason given above. *(l)* But if the bishop were outlawed during a vacancy of a church of which he was patron, without having collated, it seems that a grantee of "outlaw's goods and chattels" would have the presentation. *(m)*

Where an office was granted by the crown to A. B., bishop of Salisbury, for his life, and that all his successors, bishops of Salisbury, should hold the office in future, and A. B. died bishop of Salisbury and holding the office, but none of his successors for many years (from Edw. 4 to James I) held it after him; it was determined, upon the claim of a subsequent bishop, that the grant was void as to making the successors such officers; for that A. B. took an estate in the office for his life, and in his natural capacity, and if he had been removed from his see would have remained officer, and his successor in that case could not have taken the office, because of the limitation to A. B. for his life; and the consequence is, he did not take an inheritance, nor was it possible for him to take both in his natural and in his political capacity at the same time; and therefore for these reasons, and because there had been no use of the office by the successors, the grant was held void. *(n)*

*On the other hand, the options granted to the Archbishop of Canterbury, by bishops on their consecration, went to the exe- [*632]
cutors, *(o)* before the late act 3 & 4 Vict. c. 113, which, by sect. 42, enacts, "that it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him, by virtue of any dignity, or spiritual office, held by him, and that every such sale or assignment shall be null and void to all intents and purposes," which, in future, *(p)* places options in the position of being no longer available as assets, and it seems they will therefore devolve upon the crown for the reason before stated, in the circumstances mentioned. In the case of a

(k) Co. Litt. 388 a, 90 a, and Harg. note (85); Fitz. N. B. 33, P.; Potter v. Chapman, Ambler, 98; Vin. Abr. Presentation, C. a, E. a; R. v. Bishop of St. David's, Yearb. 5 Edw. 3, fol. 26, vid. 24 Edw. 3, fol. 26, pl. 19. The king's right is as founder; semb. Fitz. N. B. 34, O.; Poyner v. Chorlton, Dyer, 135, A.; vid. inf. 632, n. *(g)*. *(l)* Colt v. Bishop of Coventry, Hob. 154.

(m) Hlland v. Shelley, Hob. 302; S. C. Winch, 692; S. C. Owen, 155; 1 Leon. 201; 4 Leon. 107. *(n)* Bishop of Sarum's case, Moor. 809.

(o) 1 Burn's Eccles. L. 239; per Alderson, B., 2 Exch. 40; per Littledale, J., 7 B. & C. 167; vid. cases relative to grants of presentations by corporations sole, 7 B. & C. 123; Hob. 304. The grant of an option by a bishop is not binding on his successors; 1 Bla. Com. 381.

(p) Exch. 40; vid. legality of devising options disputed, per Lord Wynford, in Dom. Proc. Mirehouse v. Rennell, 1 Cl. & F. 609; et vid. pp. 560, 561, 575, 576, 600.

corporation sole however, whose temporalities were not taken into the hands of the crown upon a death, if, having the advowson of a rectory in right of his corporation he died during a vacancy, the presentation went to the administrators or executors; (q) though with respect to a parson, there is authority to show that in case of his death, in such circumstances, the patron of the parsonage presented. (r)

Lands must be granted to a corporation sole and *his successors*, or they will not in general go in succession; (s) there is an exception in the case of the king; (t) and the grant must not be made in time of a vacancy or it will be void, unless by way of remainder, and the vacancy be filled during the continuance of the particular estate. (u)

A grant to a bishop to hold in frankalmoign, passed the fee to his successors, without adding the word successors, from the peculiar nature of frankalmoign; (x) but the rule with respect to modern grants for lay purposes is as stated. On the other hand, the introduction of the word successors into a royal grant of a rent, will serve to create a corporation sole by implication, in the grantee. (y)

There is a difference when the grant is made to the corporation by the politic name only, for then it shall be intended to be made to the body politic, and not to the individual, and to descend to the successors accordingly; but if the grant describes the grantee as J. S., bishop of, &c., the words following his christian and surname are taken for words of description, *unless the word successors be added, to show how the descent is to take place; and therefore J. S. would only take for life. (z) If the lands be granted to John, bishop of, &c., whereas the name of the bishop is George, this will not avoid the grant, for there can be but one of that dignity, and therefore the grantee is sufficiently ascertained. (a)

All corporations sole are within the statutes of mortmain, whether they be ecclesiastical or temporal bodies, (b) and therefore, though they can take, they cannot retain lands, if the lord or the king chooses to enter under those statutes, except when they have a license to hold in mortmain. (c) But the stat. 29 Car. 2, c. 8, s. 2, empowers all ecclesias-

(q) *Rennell v. Bishop of Lincoln*, 7 B. & C. 113; *vid.* 1 Cl. & F. 538. Quære the operation of the stat. 3 & 4 Vict. c. 113, s. 42, in such case, which may still arise in the case of corporations sole; for if it be true that executors, and therefore administrators, can only take what would be assets, it would seem to follow from that principle and the statute, that such presentations cannot devolve upon them any longer. But it has been declared to be a fallacy to say that executors take nothing but what is valuable; per Parke, B., in *Dom. Proc.* 1 Cl. & F. 536.

(r) 2 Rol. Abr. 346, F. pl. 4; *vid.* per Danby, C. J., 7 Edw. 4, fol. 12, B. If however the vicarage be void, and the parson, before he present, be made a bishop, he shall nevertheless present, because it was a chattel vested in him; *Fitz. I. B.* 34, N.; *et vid.* per Bayley, J., 7 B. & C. 186, 187.

(s) Per Choke, J., in *Robinson v. Lewis*, Yearb. 20 Edw. 4, fol. 2, pl. 7.

(t) Co. Litt. 9 b.

(u) Vaugh. 199.

(x) Co. Litt. 94. A corporation sole might be enfeoffed in free alms without deed; Co. Litt. 94 b; per Newton, C. J., 20 Hen. 6, fol. 36, B.

(y) *Buckland v. Foucher*, 10 Rep. 27 a.

(z) Co. Litt. 94 b, 8 a; *Bentley v. Bishop of Ely*, Stra. 913; S. C. 1 Barnard. 453; *Fitzg.* 308, 312.

(a) Co. Litt. 3 b.

(b) Co. Litt. 2 b; 2 Inst. 7.

(c) Co. Litt. 2 b.

tical persons and bodies corporate, whether aggregate or sole, to augment poor vicarages and curacies, and enables such vicars and curates to take, hold, and enjoy, to themselves and their successors, such augmentations, without license in mortmain; and stat. 2 & 3 Ann. c. 11, empowers persons to give, grant, or devise, to the corporation of the governors of Queen Anne's Bounty, any lands for the augmentation, to be applied according to the will of the donor, &c., of curates, &c., without license in mortmain; and by 1 Geo. 1, stat. 2, c. 10, s. 4, such augmented curates, &c., are made bodies politic, to take, &c., such lands in succession, any statute to the contrary notwithstanding.(d)

Strictly, every corporation sole ought to have and use a corporate seal, by which he must grant, demise, &c., lands, tenements, and hereditaments held in right of his corporation.

Thus a bishop must seal deeds, &c., of grants, leases, &c., respecting the lands, &c., of his see, with his episcopal seal.(e) However, the successor, it would seem, would be liable on the contract of his predecessor, though not under this seal, if the contract was executed, and the thing done, or goods delivered, &c., had come to the use of the see, and had not been done or delivered to the bishop in his private capacity.(f) So he must probably accept rent under such seal, and there might be convenience in doing so, as since the late statute, 8 & 9 Vict. c. 113, it would, like other corporate seals, prove itself.

Before the late stat. 3 & 4 Vict. c. 113, s. 50(g) (The Ecclesiastical *Duties and Revenues Act,) the dean in every cathedral, and some or all the prebendaries (or canons as they are now styled,) [*634] were corporations sole respectively. That enactment vested, with some exceptions, the separate estates which each of these corporations sole, with some exceptions, held in its corporate capacity, distinct from its corporate share of the revenues of the aggregate corporation—the dean and chapter—in the Ecclesiastical Commissioners for England, for the purposes of the act; but as the act preserves, to the corporations sole affected by it, all other rights and privileges whatsoever, and as a corporation sole may exist with or without revenues as such,(h) they may, it seems, still take lands, &c., in succession.

In general a corporation sole can only divest an interest in anything

(d) Vid. 9 Geo. 2, c. 36; sup. p. 548.

(e) Vid. *Heath v. Prynn*, Ventr. 16; *Cort v. Bishop of St. David's*, Cro. Car. 342. The same observations regarding authentication of documents apply as in case of a corporation aggregate (vid. sup. p. 59), and they are confirmed by the judgment of the court (2 B. & Ad. 648), in which seals of corporations are said to be of a permanent character. The objection is to be taken on non est factum as it seems; 5 Rep. 119 b; 2 Dowl. N. S. 570; *Vulgar v. Higgins*, Palm. 173; *Shep. Touch.* 74; 2 Bulstr. 247; *Freston's case*, 11 Edw. 4, fol. 4, pl. 1; *Com. Dig. Pleader*, 2 W. 18.

But his seal to a certificate, or letters of ordination, is not to be regarded as a corporate seal; *R. v. Inhabitants of Bathwick*, 2 B. & Ad. 648; such documents being executed by the bishop in his ecclesiastical or spiritual capacity, and not as a corporation, and even if they were deeds, the episcopal seal would not be indispensable; vid. 21 Edw. 4, fol. 81, pl. 30; vid. form, *Dyer*, 386, B. pl. 48.

(f) Vid. 21 Edw. 4, fol. 19, pl. 21; S. C. fol. 80, pl. 28; *Bro. Abr. Chattles*, pl. 25.

(g) Vid. sup. p. 66, note (b).

(h) *Case of Dean, &c., of Norwich*, 3 Rep. 75; 15 Assis. fol. 43, pl. 8, there cited.

which he has in right of his corporation, that is, in other wards, belonging to his politic capacity, by deed;(*i*) but a parson may, by custom, nominate a parish clerk by parol, for there no interest passes out of the body politic, and besides the custom that gives the right to the parson to nominate, and is good for that purpose, is also good to enable him to do so without writing, although it is an office for life with fees, and in general such an office cannot pass without deed.(*k*) It is further said, that a corporation sole may command his servant to demand a rent, and make an entry, by parol; and the reason given is, that, as a sole corporation, he is capable of the same acts as all natural persons are;(*l*) but this seems only to be said obiter, and the principle laid down was not necessary to the decision of the question before the court, nor has it been confirmed by subsequent decisions. The correctness of it therefore ought not to be lightly assumed.

A parson may assume, i. e. promise, by parol to a parishioner, for a valuable consideration, that he shall be discharged of tithes for his lands, and if the parson sue for them in the spiritual court, that is a breach of the agreement;(*m*) but if made for more than one year's tithes, the contract was void;(*n*) for the parishioner had them not by way of grant, but of retainer or sale, and they are growing all through the year.(*n*) A parol contract with a stranger, by way of grant or lease of the tithes, would be bad altogether, for they lie in grant, and therefore only pass by deed.(*n*) But this result depends partly on other principles than that which requires a corporation to bind itself by deed. Now all leases of tithes by corporations sole are established by 5 Geo. 3, c. 17.

[*635] *According to a principle that has been repeatedly referred to in this work, a corporation sole cannot grant, lease, demise, &c., as a corporation, to himself as a private individual; because in every grant there must be a donor and donee, and in every lease a lessor and lessee, and one man cannot be both at once; and because, in general, a man cannot do an act to himself.(*o*) Therefore a bishop cannot make a lease for years, as he is bishop, to himself, as he is J. S., nor vice versa.

With respect to the mode of trying the right to the appointment, or to the franchise itself, of a corporation sole, it is to be observed that, in case of spiritual corporations sole, not being dignities, if the patron is disturbed in his presentation, the remedy is by *quare impedit*; if the

(*i*) All grants, &c., of lands and other hereditaments belonging to the body politic must be made by deed, confirmed by the patron and ordinary, in the case of parsons, and by the dean and chapter, in case of bishops.

(*k*) *Garton v. Milwich*, Salk. 536; vid. 11 Mod. 261; *R. v. Bobbing*, 5 A. & E. 682.

(*l*) *Wood v. Chivers*, 4 Leon. 181; *S. C. Dalis*. 86, pl. 1.

(*m*) *Brown v. Kinman*, 1 Rol. Abr. 430; vid. *Gardiner v. Williamson*, 2 B. & Ad. 336.

(*n*) *Hawks v. Brayfield*, Cro. Jac. 137; *S. C.* 2 Rol. Abr. 63; vid. *Owen*, 103; Cro. Eliz. 249; *Godb.* 374; 2 Keb. 376; per *Newton*, C. J., Yearb. 21 Hen. 6, fol. 43; et vid. 15 M. & W. 110; 7 Q. B. 858; *Hewit v. Adams*, 7 Bro. P. C. 64; inf. p. 649.

(*o*) Vid. sup. p. 576; *Salter v. Grosvenor*, 8 Mod. 303; *Wood v. Mayor, &c.*, of London, Salk. 398; per *Brown, J.*, in *Throgmorton v. Tracy*, Plowd. C. 154; per *cur. Wrotesly v. Adams*, C. 197.

bishop have filled up the church by a wrongful collation, the patron must present, and on refusal by the ordinary of the clerk, the two clerks in trespass, ejectment, or formerly in assize, must try the title. (p)

A parson may resign, but not upon condition, for it is a judicial act, to which a condition cannot be annexed; no more can any ordinary admit upon condition. (q) Certain corporations sole may also exchange advowsons under statutory regulations. (r)

With respect to the rules to be observed by corporations sole in suing, it appears that if the suit be respecting a matter that the person is entitled to sue for by reason of his corporate capacity, and not a matter of merely individual and private interest, according to the old rule he ought to sue in his corporate name. (s) This is still true of a bishop, dean, or archdeacon, (as it seems, for he too is a dignitary) who must sue by his corporate name, but not because it is his corporate name, but as it is a name of dignity; (t) but it is not now indispensable that a parson, or other corporation sole, should sue in his corporate name, but he must be named by his Christian and surname; (u) and it will be sufficient if it appear on the whole of the declaration in what capacity he sues; but he must show *that*; for having two capacities, it is necessary, for the sake of certainty, that he should show the court and the defendant in which of them he is proceeding, and he must always have shown, in suing respecting land, *quo jure* he was seized; (x) and it is laid down *that [636] a corporation sole, who has a name of dignity, as a dean, suing as sole seized, must call himself by his Christian name, that it may appear whether the cause of action commenced in his time, or the time of his predecessor. (y) But an archdeacon, though a corporation sole, has no name of dignity, and therefore, it has been said, needs not name himself archdeacon; (z) but this seems doubtful; at any rate he has a dignity because he has spiritual jurisdiction.

(p) *Grendon v. Bishop of Lincoln*, Plowd. C. 500; 1 Wats. Compl. Incumbent, 425.

(q) *Gayton's case*, Owen, 12, 13; *vid. INDEX*.

(r) 4 & 5 Vict. c. 39, ss. 21, 22.

(s) Com. Dig. Abatement, E. 20. In equity a sole corporation suing must show in what right he sues; therefore, a bishop, parson, &c., if suing for anything in right of his corporation, ought to describe himself as bishop, parson, &c.; *Headl. Dan. Pract.* 24. A suit by a corporation sole, though instituted in his corporate name, abates by his death, but his successor may revive it; *Headl. Dan. Pract.* 24.

(t) The form is, *John, Bishop of, &c., by J. S. his attorney, complains, &c., the name of dignity being in the place of a surname*; *vid. 2 Inst.* 666. A spiritual dignity is where there is jurisdiction, as bishops, archdeacons, &c.; *Latch*, 236. The form would be good without the Christian name; *Abbot of Fountain's case*, *Yearb.* 7 Hen. 6, fol. 27.

(u) 2 Inst. 666; *Newton v. Travers*, 3 Salk. 103. It has been sometimes held that a corporation sole may be sued by the name of his corporation only for any thing connected with the corporation; *Gilb. Hist. C. B.* 188.

(x) Com. Dig. Pleader, 2 B. 1; *per Danby, J.*, 49 Hen. 6, fol. 17, B.; *Davenant v. Bishop of Salisbury*, 1 Ventr. 223.

(y) *Dyer*, 86, B.; Com. Digest, Pleader, 2, B. 1. If a bishop claim as parson *imparsonne*, he sues as J., Bishop of A., &c., parson of B., &c.; *Fitz. N. B.* 49, note (a), 50; *Latch*, 235; *Abbot of Colchester's case*, *Yearb.* 49, Hen. 6, fol. 16. If, as commendatory, he ought to sue in that name, *Latch*, 235; *Yearb.* 27 Hen. 8, fol. 15.

(z) *Thel. Dig. Lib. iii. c. 3, s. 17*. If the name is used, it must be stated correctly; it does not follow that what will amount to a description *personæ* to enable

Whether a corporation sole can appear in person appears not to have been any more distinctly laid down after discussion of the question ;(a) but according to the principle on which is founded the rule that corporations aggregate must appear by attorney, viz., that the existing body of corporators, at any given time, are not the corporation, which is a metaphysical entity, composed of them, their predecessors, and their successors for ever, which therefore cannot appear, and only speaks and acts by its common seal, it would seem as though, in strictness, corporations sole must also appear by attorney, when suing, or being sued, for any thing respecting their corporate rights.

For any thing done by reason of his office an archbishop, bishop, dean, and archdeacon, is to be sued by his Christian name, with the addition of his name of office ; inferior corporations sole by their Christian and surnames, with the same addition.(b)

A corporation sole may prescribe in him and his predecessors in the office, calling them by the name of the office,(c) as well as take lands to him and his successors ;(c) but although the object of creating a corporation sole seems almost exclusively to provide for the transmission of real property in succession, yet it has been said that a corporation sole may exist, though deprived of its landed estate, as in the instance of a prebend.(d)

A parson is incorporate *at common law*.(e) He has not the fee simple in the lands belonging to his corporation, for the fee is in abeyance.(f) On the other hand, in respect of waste, he is not considered as merely in the position of a lessee for years, or of a tenant for life under a will or a settlement ; and therefore ploughing up ancient pasture is not, in his [*637] *case, always and necessarily waste ; and the courts of equity will not restrain from ploughing up meadow land, infested with moss and weeds, for the purpose of laying it down again in grass, when properly cleaned ;(g) although, in order to prevent his doing any thing to the prejudice of his successor, he is, in many cases, looked upon, at common law, to have, in effect, but an estate for life ;(h) in other respects he is considered as having a fee simple qualified.(h) However, there is considerable difference of opinion as to the doctrine of

to take, will be sufficient to sue in ; Cambridge University v. Crofts, 10 Mod. 208. So Gilb. Hist. C. B. 189 ; Yearb. 22 Edw. 4, fol. 34, pl. 13.

(a) There is an instance of a corporation sole appearing in person to a *quo warranto*, R. v. Archbishop of York, Yearb. 6 Edw. 3, fol. 51 ; vid. per Shard, 10 Edw. 3, fol. 24, A.

(b) Yearb. Abr. Additions, E. pl. 3 ; F. pl. 4 ; G. pl. 7 ; vid. 2 Inst. 669.

(c) Bro. Abr. Dean and Chapter, pl. 19 ; Encumbent, pl. 14 ; Napper v. Jasper, Hob. 117 ; Dean and Chapter of Stoke v. Master of Hospital of St. Mary Overeis, Yearb. 39 Hen. 6, fol. 14. So a parson may be charged with an annuity by prescription ; 17 Vin Abr. 262. (d) 3 Rep. 75 b, citing 15 Assis. fol. 43, pl. 8.

(e) Yearb. 40 Edw. 3, fol. 27, pl. 5.

(f) Com. Dig. Abeyance, A. 2 ; Hob. 338 ; Fitz. N. B. 49, K. L. ; Co. Litt. 300 b, 341 a. In case of a bishop, the fee simple is said to be in him and his chapter ; Litt. s. 645 ; vid. tam. Co. Litt. 67 a.

(g) Duke of St. Alban's v. Skipwith, 8 Beav. 354 ; vid. Bird v. Ralph, 4 B. & Ad. 826.

(h) Co. Litt. 341 b ; vid. Ambl. 176 ; Co. Litt. 67 a ; 3 B. & P. 328.

the fee being in abeyance, and the question cannot be stated to be yet settled.(i)

Where a bill is filed in equity by a corporation sole, *having a personal interest*, the suit necessarily abates by his death, so far as it affects his personal interest, and to that extent may be revived by his personal representative: and if the suit affects the rights of his successor, such successor may obtain the benefit of it in another form.(k)

Where a corporation sole brings an action at common law respecting rights, &c., connected with his corporation, it will be presumed that he has been properly qualified for holding the office, &c., by taking the oaths, &c., or whatever else may be necessary, as the preliminary steps to enable him legally to hold it, until something to the contrary is made to appear to the court. Thus where a prebendary brought ejectment for a house belonging to his prebend, and was required by the defendant to show that he had performed the requisites necessary by law to constitute him prebendary, it was held that it ought to be presumed he had performed them, until something appeared to the contrary;(l) for the presumption is, that every man conforms to the law, and that presumption shall stand till something occurs to shake it. And the same has been decided with respect to parsons.(m) So, where a corporation sole is excommunicated, he cannot sue; that is, the fact of his excommunication forms the ground of a good plea in abatement;(n) for, though in an action by an aggregate corporation having a head, or consisting of integral parts, the excommunication of the head, or of one of the integral parts, forms no objection to their suing; for it would be unjust to disable the whole body for the vice or incapacity of the part; yet the law is different in the case of a corporation sole, where the natural body cannot so easily be distinguished from the politic body;(n) but, as might be expected, it has been held that a plea of excommunication pleaded by a bishop, does not avail to disable the plaintiff where the excommunication was put on by the bishop himself, unless it be shown that the excommunication was for another cause than that of the action in which the plea is pleaded.(o) We refer to this subject, because, though [638] excommunication be often looked upon as obsolete, a hint has lately been thrown out that its efficiency as a remedy, or perhaps it is more correct to say, as a preliminary, to an effectual and full remedy, in certain cases, is greater than has been supposed.(p)

Where a corporation sole sues in respect of his office for the recovery of lands, &c., belonging to it, and recovers judgment, but dies before execution, it is in general the successor, and not the executors, who are entitled to bring *sci. fa.* to revive the judgment; thus, if the predecessor had recovered in ejectment for lands belonging to the sec, parsonage,

(i) 2 Bla. Com. 107, note (z), per Coleridge, J.; Fearn, Conting. Rem. cap. 6, s. 3; Doe d. Richardson v. Thomas, 9 A. & E. 556; Vid. Cro. Car. 582.

(k) Mitf. Plead. 72, note (d), 5th edit.

(l) Sherard's case, cited 2 W. Bla. 853; vid. 1 M. & Gra. 625; Monk v. Butler, 1 Rol. R. 83. (m) Powel v. Milbank, 2 W. Bla. 851.

(n) Co. Litt. 134 a; Com. Dig. Abatement, E. 7; forms of pleas, 1 Went. Prec. 15; 1 Lutw. 17; Clift. Entr. 12, 13; 3 Lev. 240. (o) Co. Litt. 134 a.

(p) Per Wilde, C. J., in Gosling v. Velej, 19 L. J. (N. S.) Q. B. 141.

vicarage, &c., but had died before the writ of possession had been executed, the successor must bring *sci. fa.*(*q*) On the other hand, if one have judgment against a vicar, and before execution the vicarage is united to the parsonage, yet the plaintiff has his execution against the parson.(*r*)

It seems that an information in the nature of a *quo warranto* may issue against a corporation sole, and that judgment of *quod capiatur* may be had against him for an abuse of such liberties, and a fine set, and the liberties be seized into the hands of the crown for his time.(*s*) If the corporation sole disclaim the franchises or liberties in *quo warranto*, this disclaimer will bind the successors; principally, as it seems, because *expedit reipublicæ ut sit finis litium*:(*t*) levying a fine, however, or confessing or admitting a claim in any other proceeding, had not in general the same effect,(*u*) but the successor could have the right, &c., restored by means of a writ of right, or other proper form of action.

With respect to the limitations under which the corporations sole may dispose of the corporate estate so as to bind their successors:—

If a corporation sole make a feoffment of the lands he holds in right of his corporation, or otherwise dispose of them, or any part of them, without being duly authorized to do so by the parties who have authority *in that behalf, or by statute, &c., the successor may enter [⁶³⁹] at once, and is not left to his action to recover.(*x*) The parson must have the confirmation of the patron and ordinary in order to make valid leases, grants, &c., by him of the corporation lands as against the successor; but a patron's mere acceptance of a lease of such lands from the parson is not equivalent to a confirmation by him of the lease for this purpose,(*y*) though if he warrant over the lease, that is a good confirmation;(z) and being confirmed also by the ordinary, the lease will

(*q*) *Vid. Atkins v. Gardiner*, Noy, R. 121; *Perk.*'sect. 499. But it seems that the executor would have the action for the mesne profits; 19 Hen. 7, fol. 44, pl. 94.

(*r*) *Dean and Chapter of Lichfield's case*, 20 Edw. 4, fol. 6, pl. 7.

(*s*) *Vid. precedents cited by Noy, Att.-Gen. in Tyndale's case*, Cro. Car. 253; *vid. 4 Inst.* 216, 218; 1 B. & P. 109, 110; *R. v. Archbishop of York*, Yearb. 6 Edw. 3 fol. 50. Perhaps this would be the proper mode of trying the right, if a bishop did acts as a corporation before he was completely seised of his office. A bishop is not able to grant, lease, &c., before consecration; *Bac. Abr. Leases*, F.; *vid. Carth.* 314, 315; *Vaugh.* 20. The successor is not perfect successor until he has restitution of his temporalities from the crown; *Bishop of Oxford's case*, Palm. 517, which come to the king as founder, 1 Cl. & F. 586.

(*t*) *Co. Litt.* 103 a; *R. v. Archbishop of York*, 6 Edw. 3, fol. 51, where it appears that at that time an ecclesiastical corporation sole could divest a right of his church, so as to bind his successors, in this mode only. *Quære*, whether the crown as founder, could not defeat an alienation by a bishop previous to 1 Eliz. c. 19; *vid. Dyer*, 109, B. pl. 38; *Bro. Abr. Forfeiture*, 18; Yearb. 40 Edw. 3, fol. 27, B.; 45 Edw. 3, fol. 18, pl. 14; 13 Hen. 7, fol. 5, B.; *semb.* that it could; *Glanvil. Lib. vii. c. 1*; *Fitz. N. B.* 210, F, 211 G.; Yearb. 33 Hen. 6, fol. 6, pl. 21. That the king was considered as founder, *vid. Co. Litt.* 134 a, 344 a; *stat. 1 Jac. 1*, c. 3, s. 1.

(*u*) *Co. Litt.* 103 a; Yearb. 6 Edw. 3, fol. 51; 38 Edw. 3, fol. 33, *Prior of New-place's case*; *vid. Abbot of St. Mary Dirland v. Prior of Achassels*, 34 Ass. pl. 7.

(*x*) *Per Broke, C. J.*, Yearb. 12 Hen. 8, fol. 7, B.; *Co. Litt.* 103 a.

(*y*) 1 Rol. Abr. 480, O. l. 6.

(*z*) 1 Rol. R. 361; *Maund v. French*, 1 Rol. Abr. 481; *Hodges v. Newcomen*, cited 5 Rep. 15 a.

stand against the successor. If the patron have granted away the next avoidance, before he confirms, his confirmation, it has been intimated, will not suffice, without that of his grantee also.(a) A bishop must, as we shall see, have the confirmation of his dean and chapter, under their corporate seal, to bind his successor.

At common law, if a corporation sole had judgment against him for a matter connected with his corporation, and not belonging to his private capacity, and died before execution, the plaintiff must have had a *sci. fa.* against the successor; he could not proceed to execution without a *scire facias*;(b) but it seems it would perhaps be a good defence for the successor to show that the predecessor had allowed judgment to go by default.(c) An instance of this might occur where a parson was bound to pay a rent-charge, or other annual payment in right of his parsonage, and charged upon it, and had had judgment against him and died before execution. It would be otherwise if the payment were a mere personal annuity, for then the executors of the predecessor would be liable. The impoverishment which was likely to be caused to the successors was a sufficient reason why the first case just mentioned should not continue to be law; but it was not until the 1 Eliz. c. 19, that to charge the estates held in right of the corporation was prevented as regards the successor.(d) On the other hand, if a corporation sole be entitled to an annuity in right of his corporation, and he dies, leaving arrears due, his executors, and not his successors, shall have the arrears; for the sum due for arrears is a chattel which never vested in the successor.(e)

At common law, if a parson had made a lease for years of his corporation *lands, to begin after his death, or had granted a rent-charge [**640*] *in the same way*, and had obtained the confirmation of the patron and ordinary, that would have bound the successor; but now no confirmation would make them good against the successor.(f)

If the patron and ordinary give license to the parson to lease, &c., and the parson leases, &c., accordingly, this is good to bind the successor; for a license precedent, if by deed, is all one with a subsequent

(a) Per Brown, J., Dyer, 133, A.; 2 Wats. Compl. Incumb. 864.

(b) Vid. Prior of Bath v. Percechay, Yearb. 8 Edw. 3, fol. 27; Prior of St. Oswald v. Parson of Langley, Yearb. 29 Edw. 3, fol. 34; Abbot of Colchester's case, 49 Hen. 6, fol. 16, pl. 20; Bishop of Rochester's case, Owen, 73; Yearb. 9 Edw. 4, fol. 49, pl. 7; 48 Edw. 3, fol. 26, pl. 11. It would be a good defence for the successor to say that, having resigned, he was not parson at the day of suing out the *scire facias*; 9 Edw. 4, fol. 49, pl. 7.

(c) 8 Edw. 3, fol. 27, 28, 29; Yearb. 8 Hen. 6, fol. 24, pl. 10; 4 Hen. 7, fol. 2, pl. 4, (vid. Prior of Huntingdon v. Parson of Clington, Yearb. 12 Hen. 8, fol. 7, cont.); 10 Rep. 61 a; Com. Dig. Estates, G. 5; Fitz. N. B. 49. Otherwise, if predecessor had had verdict against him, Fitz. N. B. 50, D.

(d) 1 Eliz. c. 19; Bac. Abr. Leases, E.; Sheph. Touch. 282. The statute, being a private act, must be pleaded; vid. 1 Burr. 219, 220. Still, arrears of a pension, payable by prescription out of the church, both accruing in his own and the predecessor's time, are recoverable from the successor; Trinity College v. Tunstall, Cro. Eliz. 810.

(e) Per Newton, C. J., Yearb. 19 Hen. 6, fol. 44, pl. 94; Bro. Abr. Arrearages, pl. 143; Fitzh. Abr. Scire Facias, 153; Ognel's case, 4 Rep. 48 b; vid. further as to charging livings, 7 Dowl. 753, 763; 3 B. & Ad. 915.

(f) Bac. Abr. Leases, E.; vid. Dyer, 69, A. pl. 30; Yearb. 21 Hen. 7, fol. 1, pl. 1. The guardian of the spiritualties cannot confirm; Latch. 237.

confirmation;(g) and the confirmation may be made at any time during the incumbency, but not after it is determined whether by death or otherwise.(g)

Where the bishop confirms as ordinary merely, he may agree either by license or confirmation under seal; but if he be patron as well as ordinary, the dean and chapter must confirm as well as the bishop, in order to bind the successor beyond the continuance in office of that bishop.(h)

If A., being parson of the church of B., is also parson of the church of C., as belonging to the church of B., and presents D., who, by his consent, grants a rent-charge out of the glebe of C., with the ordinary's confirmation, this is not good to make the rent-charge perpetual, without the assent also of the patron of A.(i) This is an illustration of the rule that, wherever there is patron paramount, his confirmation, as well as that of the patron immediate, is indispensable to charge the successor; and in fact, without such confirmation of the patron paramount, the lease is wholly void, at least as against the successor, and the acceptance of rent under it by the successor only operates to create a tenancy from year to year.(k)

If a parson de facto only make a lease, and get it duly confirmed, still it does not bind the successor;(l) at least, this seems to be the better opinion, and moreover is conformable to the doctrine laid down in respect of a bishop de facto. The reason also that is given for the latter decision, viz., that voluntary acts tending to the depauperation of the successor are void, though judicial acts may be valid, applies equally [*641] to a parson de facto; and it seems to confirm this view, that *the legislature has felt it necessary expressly to make good, the leases of simoniacal ecclesiastical corporations sole, by 1 W. & Ma. stat. 1, c. 16, s. 3.

The leases of an usurper are void;(m) and leases made in the interval between presentation and induction are also void to bind the

(g) Co. Litt. 300 b; Cro. Car. 38; Cro. Eliz. 18.

(h) Co. Litt. 300 b; Dyer, 356, B. pl. 42; 3 Bac. Abr. 376.

(i) Co. Litt. 300 b; vid. Herbert v. Munday, Cro. Eliz. 587. If there be two patrons, confirmation by one of them and the ordinary is enough; Lancaster v. Lucas, 1 Lean. 233. The successor becomes full or perfect successor upon induction, however the predecessor's term may have determined; Downes v. Craig, 9 M. & W. 166; Evans v. Kiffin, Latch, 233; S. C. Palm. 457. What evidence of induction, Chapman v. Beard, 3 Anstr. 942.

(k) Doe d. Brammal v. Collinge, 18 Law J. (N. S.) C. B. 305. Vid. as to difference between acceptance of rent by successor of bishop and of parson on a lease for years, 3 Rep. 65. The successor has no right to arrears of rent or profits due before the resignation, death, &c., of the predecessor; per Parke, B., 1 Cl. & F. 553, 554; Yearb. 19 Hen. 6, fol. 44, pl. 94.

(l) Anon., Dyer, 133, A.; Abbot of Fountain's case, Yearb. 9 Hen. 6, fol. 32, cont.; Costard v. Winder, Cro. Eliz. 775; S. C. Moor. 606, cont.; but Doddridge, J., acc.; vid. 4 Rep. 24; 1 Platt, Leases, 290, acc. If he who makes the lease be but a supposed incumbent, or be in by a super institution or the like seeming title, and so be reputed the legal incumbent, he cannot make a lease to bind after his death or the death of the true incumbent, Bac. Abr. Leases, F.; Cro. Jac. 552; S. C. Palm. 22.

(m) 1 Rol. Abr. Confirmation, F. l. 4; Bac. Abr. Leases, G. 3.

successor, because, till induction, the parson has nothing in the temporalities.⁽ⁿ⁾

All spiritual corporations sole may grant leases of houses, lands, &c., in cities and towns, and the suburbs thereof, for forty years or under, obtaining the proper confirmation of their leases; the houses leased not being their capital or dwelling-houses used for their habitation, nor having ground to the same belonging above the quantity of ten acres.^(o)

A concurrent lease, granted where there were ten years of a former lease unexpired, is void;^(p) for it is a lease in reversion, which is excepted out of the stat. 14 Eliz. c. 11; and so it would have been if two years only of the former lease were to run, as it has been held^(q); but the law was settled that a lease for twenty-one years from the date, granted whilst a former lease for forty years was in existence, but had less than two years to run, is valid and binding on the successor;^(r) and now it seems a second lease may be granted at any time after fourteen years of a former forty years building lease has run.^(s)

All spiritual corporations sole may now, with consent of the patron and ordinary, lease lands on farming leases for any term not exceeding fourteen years, to take effect in possession, without fine, &c.;^(t) the parsonage houses, &c., with their offices and land adjacent, to the extent of ten acres, not being allowed to be leased; and surrenders of such leases are only to be made with consent of ordinary, patron, and incumbent.^(t)

All parsons may lease lands allotted to them under inclosure acts^(u) for terms not exceeding twenty-one years, so that the best and most improved rent be reserved, without taking any fine, &c.

At common law all grants made, by archbishops or bishops, of lands, tenements, and hereditaments held in right of their corporations, if confirmed by the dean and chapter in each case, were good and valid against the successor, however long or unreasonable they might be;^(x) but no *sole corporation was trusted by the common law with the absolute disposition of the possessions of the corporation so as to bind his [*642] successors, but in all cases was obliged to have the consent of others, as

(n) 2 Bla. Com. 312; Dyer, 221, B. pl. 18; 1 Platt, Leases, 291; Hare v. Buckley, Plowd. C. 528; Digbie's case, 4 Rep. 79. But semb. a contract in respect of the possessions of the parsonage, &c., made in such interval would be carried into effect against the parson afterwards, if he has the full benefit of the contract; Edwards v. Great Western Railway Company, 1 My. & C. 650.

(o) 14 Eliz. c. 11, s. 17; Hunt v. Singleton, Cro. Eliz. 564; Wyn v. Wild, 1 Vent. 246; S. C. Carter, 9; O. Bridgm. 144; vid. 1 Ld. Raym. 269; 2 Leon. 188.

(p) Cro. Eliz. 564.

(q) Bayley v. Murin, 1 Vent. 244; S. C. 2 Lev. 61.

(r) Vivian v. Blomberg, 3 Bing. N. C. 311; S. C. 7 Sim. 548; vid. Poph. 8.

(s) 5 & 6 Will. 4, c. 20; vid. inf. p. 652.

(t) 5 Vict. sess. 2, c. 27.

(u) 41 Geo. 3, c. 109, s. 38; 6 & 7 Will. 4, c. 115, s. 31; 1 & 2 Geo. 4, c. 23; 6 & 7 Will. 4, c. 20, s. 7.

(x) 2 Bla. Com. 320; Bishop of Salisbury's case, 10 Rep. 60; Sheph. Touchst. 281; Com. Dig. Estates, G. 3; Spendlowes v. Burkit, Hob. 7; Trelawney v. Bishop of Winchester, 1 Burr. 221. There is no rule of public policy which prevents them from dealing with the temporalities independent of the restraining statutes; Metcalfe v. Archbishop of York, 1 My. & Cra. 547; nor any instance previous to stat. 1 Eliz. c. 19, of a lease of an ecclesiastic being set aside in equity on account of the length of the term granted; Att.-Gen. v. Morris, 2 Madd. 303.

the bishop, of the dean and chapter, the parson, of the patron and ordinary, before he could make any grant to bind the successors.

The stat. 32 Hen. 8, c. 38, allowed bishops, without the dean and chapter, to lease for twenty-one years, or three lives, by deed indented, lands usually demised to farm by the space of twenty years, &c.

Then the statute 1 Eliz. c. 19, enacted that all grants by episcopal corporations sole, even though confirmed by the dean and chapter, other than for the term of one-and-twenty years, or three lives from the making, *or* without reserving the usual rent, shall be void. This statute relates to and includes any estate or interest in any lands, tenements, or hereditaments, parcel of the possessions of the see, and any charge or incumbrance upon it, or any other thing in their disposition, to bind the successor;^(y) but, observing the limitations of the stat. 32 Hen. 8, bishops may make leases for twenty-one years, or three lives, to bind their successors. However, though the lease be of lands usually demised, and the usual rent be reserved according to stat. 1 Eliz., yet, if all the limitations of the stat. 32 Hen. 8 be not observed, the lease will not bind the successor without it be confirmed by the dean and chapter.^(y)

Concurrent leases, if confirmed by the dean and chapter, were held to be valid as regarded the statutes, 1 Eliz. c. 19; 13 Eliz. c. 10; provided that, together with the lease in being, they did not exceed the term permitted by the acts.^(z) Subsequent legislation^(a) established further restrictions. By 6 & 7 Will. 4, c. 20, s. 1, it is provided, that [^{*643}] *where any lease shall have been granted by an archbishop or bishop for twenty-one years, no concurrent lease shall be granted until seven years shall have expired of the former; also that when a lease has been granted for years, there cannot be another granted, by way of

(y) Bishop of Salisbury's case, 10 Rep. 60 b; *vid.* J. Bridgm. 29, 30. If the lands have not been let before, they cannot be leased, though previously waste; *Doe d. Tennyson v. Lord Yarborough*, 1 Bing. 24; *Goodtitle v. Funucan*, Dougl. 552. The leases, &c., were to be avoided by the successor by entry, and were set up for his time by acceptance of rent; *vid.* Sheph. Touchst. 284; Harg. note (266) on Co. Litt. 45 a; Moor. 875; O. Bridgm. 146, 147; *Lyn v. Wyn*; *Owen v. Ap Rees Cro. Car.* 96. But now it is held that the lease is wholly void, and acceptance of rent only operates to create a tenancy from year to year; *Doe d. Brammall v. Collinge*, 18 Law J. (N. S.) C. B. 305; Com. Dig. Estates, G. 5; *Dyer*, 239, A. There must be a rent reserved; a lease cannot be made without, even to try a title; for the statute being express, no construction or pretence can be urged to avoid it; *Carter v. Claypoole*, Moor. 593; 1 Leon. 306; Savil. 128. Where a lease is voidable by the successor, and the bishop who made it dies, the crown may avoid it in right of the vacancy; *Earl of Bedford's case*, 7 Rep. 7 b; but its acceptance of rent in the vacancy does not bind the successor, S. C.

(z) Co. Litt. 45 a; *Bishop of Hereford v. Scory*, Cro. Eliz. 874; Moor. 108; *Carter*, 14; *Fox v. Collier*, Moor. 107; S. C. 1 Anders. 65; *vid.* O. Bridgm. 101. Concurrent lease for life void, though confirmed; because the first would be dispunishable of waste; Com. Dig. Estates, G. 5; *Sheere v. Pentor*, 1 Leon. 4; S. C. 4 Leon. 117; Litt. R. 304.

(a) *Id.* 2 Bla. Com. 320, 321; Bac. Abr. tit. Leases; 13 Eliz. c. 10, which extends 1 Eliz. c. 19 to all ecclesiastical corporations sole below the dignity of bishop. The recitals in 13 Eliz. do not limit the force of that enactment to cases where the mischief by the alienation is done to the personal interest of the successor, but it extends and applies to persons who were seized as mere trustees; *Dean and Chapter of York v. Middleborough*, 2 Y. & Jerv. 196.

renewal or otherwise, *for lives*. Here we may observe, that a lease to one person for three lives, or to three for their three lives, is all one within the intent of the statute of Eliz.(b)

The law at present with respect to parsons, vicars, &c., being corporations sole, is, that they cannot make leases of the lands held in right of the corporation so as to bind the successor for any term whatever, without the consent of the patron and ordinary, nor with such consent, for any longer term than three lives, or twenty-one years, except building leases in certain cases mentioned below; also no lease shall be made without impeachment of waste;(c) also no concurrent lease can be made unless where the old one will expire within three years, or unless in the case of a forty years' building lease. But in the case of a parsonage or vicarage donative, the confirmation of the patron alone is sufficient to all leases, &c., made by the parson or vicar, and requiring confirmation, and will bind the successor without confirmation of any other person.(d)

In all cases, though leases made by the above corporations sole contrary to the acts of parliament regulating them are thereby declared to be void, yet they are good as against the grantor during his incumbency,(e) but not against the successors; and although such grants may have been acquiesced in by various successors, yet that does not set them up against another successor; for he is not bound by them if they are void against successors, although the former made no objection.(f) On the other hand, once avoided, a lease, grant, &c., is avoided for ever, and cannot revive again against a subsequent successor.(g)

The successor, so far as we have seen hitherto, is uniformly regarded at common law; and perhaps the only cases in which the strict rules of the common law have been departed from, as against him, are in the instance of a lease, made by a parson for years, rendering rent, &c., yearly; and the tenant having paid to the successor the entire rent for the year in which the predecessor died, it was held that the executors *were entitled to an apportionment;(h) and in those which have occurred, to a similar effect, respecting composition for tithes.(i) [*644]

It is held, that though the presentation to a vicarage belongs of common right to the parson, he may, with consent of the patron and ordinary, grant the presentation to another.(j)

(b) *Baugh v. Haynes*, Cro. Jac. 77.

(c) Ploughing up ancient pasture land not always waste; *Duke of St. Alban's v. Skipwith*, 8 Beav. 354; sup. pp. 636, 637.

(d) *Bac. Abr. Leases, F.*; 1 *Roll. Abr.* 481; *Dyer*, 273 B. pl. 38; *Co. Litt.* 344 a; 1 *Platt, Leases*, 303.

(e) 2 *Bla. Com.* 321; *Co. Litt.* 329 a, 45 a; *Roe d. Earl of Berkley v. Archbishop of York*, 6 East, 86; *Com. Dig. Estates, G. 5*.

(f) *Trelawney v. Bishop of Winchester*, 1 *Burr.* 219.

(g) *Plowden v. Oldford*, Cro. Car. 582; *S. C. W. Jones*, 454; *vid. 7 Rep.* 8 a; *Co. Litt.* 46 a; *Dyer*, 72 B. pl. 5; *Com. Dig. Estates, G. 3*. *Polydore Vergil's case*, cited from *Hale, MSS.*, *Co. Litt. Harg.* 46 a, *contra*.

(h) *Hawkins v. Kelly*, 8 *Ves.* 303; *vid. 4 & 5 Will. 4, c. 22*; *Oldershaw v. Holt*, 12 *A. & E.* 590; *Fordyce v. Bridges*, 1 *H. Lds.* 1.

(i) *Ainsley v. Wadsworth*, 2 *V. & Bea.* 331; *Williams v. Powell*, 10 *East*, 269.

(j) *Per Bayley, B.*, in *Dom. Proc.*, 1 *C. & F.* 585; *Fitz. N. B.* 34, *A.*; *Holdsworth v. Fairfax*, 3 *Cla. & F.* 115.

The successor of an ecclesiastical corporation sole has, as is well known (by what is called, though erroneously, the custom of England, for a general custom extending throughout the country is in fact the common law,) the power of recovering against his predecessor in case of the cession, resignation, or deprivation of such predecessor, or against his personal representatives in case of his death,^(k) for dilapidations to the residence house, or glebe, &c., held in right of the corporation;^(k) and if A. dies, leaving the premises out of repair, B. succeeds and dies, leaving them still dilapidated, and C. succeeds and recovers from B.'s executor, such executor may recover over from A.'s executor.^(l)

But, besides, the common law courts have sometimes issued writs of prohibition to corporations sole to prevent them committing irreparable waste on the possessions of the church; ex. gra. to a parson *ne prosterнат arbores in cæmeterio*,^(m) and generally, whether at the instance of the patron, or a stranger, according to Coke, C. J., a writ of prohibition of waste lay against a parson;⁽ⁿ⁾ and dilapidation of ecclesiastical palaces, houses, and livings, is even held to be good cause of deprivation.^(o)

Subsequently, however, the courts of common law have proceeded some way in retracing their steps in this respect, and it has been held that the Court of Common Pleas has no power to issue an original writ of prohibition, to prevent a bishop from committing waste, at any rate at the suit of an uninterested person. An intimation was also made, that no court of common law had the power in such case, and it was left a question whether, in those circumstances, the Court of Chancery had it.^(p)

But there is no doubt that in general the Court of Chancery will issue an injunction to prevent waste, when it is satisfied that the thing to be enjoined against is really waste, in the proper sense of that term, [*645] *as applied to a parson or bishop;^(q) and even yet this offence is held to be a cause of deprivation or deposition,^(r) whether of bishops, archdeacons, or parsons.

Proceedings for punishment, short of deprivation, lie also in the spiritual courts: and there, of course, corporations sole might be deprived for canonical offences.^(s)

(k) *Vid. Wise v. Metcalfe*, 10 B. & C. 299; and as to pleading, *Warren v. Lugg*, 3 Exch. 579. *Semb.* in case of conviction for felony of the predecessor and his consequent attainer, the law affords no direct remedy for dilapidations to the successor.

(l) *Bunbury v. Hewson*, 3 Exch. 558.

(m) *Thompson's Entries*, 240; *vid. 35 Edw. 1 stat. 2*; *Costard's case*, 2 Rol. R. 111; *Lord Rutland's case*, 1 Keb. 557; *S. C. 1 Siderf. 152*.

(n) *Knowle v. Harvey*, 1 Rol. R. 335; *S. C. 3 Bulstr. 158*; so *Sacker's case*, 3 Bulstr. 91; *Drury v. Kent*, Hob. 36; *vid. 1 Rol. R. 86*.

(o) 3 Inst. 204; *Stockman v. Wither*, 1 Rol. R. 86; *Yearb. 29 Edw. 3, 16 A.*; *per Moile, J.*, 9 Edw. 4, fol. 34; *Abbot of Peterborough's case*, 20 Hen. 6, fol. 46; *Wood's case*, 12 Mod. 237; *Bishop of Sarum's case*, Godb. 259; *Bro. Abr. Deposition, pl. 1*; 1 B. & P. 128.

(p) *Jefferson v. Bishop of Durham*, 1 B. & P. 105; *vid. sup. p. 637*; *Duke of St. Alban's v. Skipwith*, 8 Beav. 354.

(q) *Vid. 8 Beav. 354*; *Ackland v. Atwell*, 2 Rol. Abr. 813; *Strachy v. Francis*, 2 Atk. 217.

(r) *Per Eyre, C. J.*, 1 B. & P. 128.

(s) *Bishop of St. David's v. Lucy*, 1 Salk. 134; *vid. Specot's case*, 5 Rep. 58 a;

The grant by a bishop of the next presentation to a church, of which he has the advowson in right of his corporation, is good against the grantor, but void against his successor.(t)

Still less is the grant of an advowson for twenty-one years good against the successor, though it was good against the grantor;(u) but these grants are void against the successor only by the stat. 1 Eliz. c. 19, in both cases.(x)

The lease of a bishop *de facto*, though duly confirmed by dean and chapter is void; for though his judicial acts shall be good, it is otherwise of his voluntary acts, tending to the depauperation of the successor.(y)

The principle upon which all the cases proceed is, that a corporation sole shall not of himself, without the concurrence of those who are interested in the office or franchise, which he holds in right of his corporation, and to whom the law commits the duty of watching over the rights of the successor, and preventing the dilapidation of the estate attached to the corporation, do any act to deteriorate the estate in such a way as to be binding beyond his own time. In this respect it is obvious that deprivation, translation, or resignation must each have the same effect as removal by death, and so it is laid down.(z) The principle may be thus presented. If a corporation sole make an estate, lease, grant of rent-charge, &c., or to do any other act which may operate to the diminution of the revenues of the corporation, the estate, &c., or act, not being made or done with the concurrence of those whose concurrence can alone authenticate, ratify, and give it posthumous validity, such estate, &c., or act, is of force only during the time of the grantor, and upon his removal, by whatever means, will not bind the *suc- [646]cessor; but it is otherwise of an act which has not the effect of encroaching on the permanent revenue appropriated by foundation, or otherwise, to the corporation sole.(z) Accordingly, equity will relieve against a fraud upon the successors; as where a corporation sole had taken a fine for granting a lease for a long term, contrary to the interest of the successor, the executors of the predecessor were decreed to repay the fine with in-

17 Vin. Abr. 346, 347. In pleading sentence of deprivation, not necessary to show before what judge it was given; *Bedinfield v. Archbishop of Canterbury*, Dyer, 293, A.

(t) *Smallwood v. Bishop of Coventry*, Cro. Eliz. 207; S. C. 4 Leon. 15; vid. 1 Cl. & F. 542, 543. Where, before the stat. 1 Eliz., the crown granted an advowson to a bishop, after the death of the then incumbent, the bishop could not grant a lease of the advowson to commence when it falls in, though confirmed by dean and chapter, because he had nothing in the church during the life of the incumbent who survived him, so as to bind the successor; *Montgomery's case*, Dyer, 244, A.

(u) *Armiger v. Bishop of Norwich*, Cro. Eliz. 690, where no rent was reserved, nor did the advowson appear to have been usually let or demised, Bac. Abr. Leases, E.

(x) Vid. 7 B. & C. 174.

(y) *O'Brien v. Knivan*, Cro. Jac. 552.

(z) Co. Litt. 329 a; vid. Dyer, 356, B. pl. 42. Resignation is breach of a contract to demise for a term of years; *Rudge v. Thomas*, 3 Bulstr. 202; *Price v. Williams*, 1 M. & W. 6. In pleading a resignation, not necessary to state Christian name of ordinary to whom made, 38 Hen. 6, fol. 33, cited 9 Rep. 48 a.

terest, and the amount of the whole was ordered to be laid out in land for the benefit of the successors.(a)

If a lease be granted in consideration of a surrender of a former lease made by deed-poll, but, the substituted lease, being voidable, is avoided by the successor, that does not revive the surrendered lease.(b)

Another example of the principle above stated is found in the following case. A bishop, with the dean and chapter's confirmation, grants an annuity or annual rent out of lands of the bishopric, with clause of distress and dies. The grantee brought debt against the executors of the bishop, and the sole question was, whether, since stat. 1 Eliz. c. 19, the grant was void against the successor, so that the grantee could not maintain a writ of annuity against him, but only an action of debt against the executors; and though the question does not appear to have been determined by the court, the case in which it arose has been often cited as an authority that the annuity determined with the life of the grantor, on the ground that it went to the impoverishment of the successor.(c) It is to be observed, however, that the action was for arrears incurred in the life of the grantor, and therefore, it would seem, was correctly brought against the executors.(d)

If a bishop makes a lease for three lives, reserving the ancient rent, and then makes a lease for 100 years, if three men so long live, this, though duly confirmed, is void; for though not within the words, it is within the spirit of the statute.(e)

It even seems to have been decided that a grant of a personal annuity by a parson, confirmed by the patron and ordinary, is bad within the equity of stat. 13 Eliz. c. 10, s. 2, as tending to dilapidations, impoverishment of the successor, and decay of the living.(f) So if an archdeacon make a lease for three lives, according to the statute, and the lessees make a lease for 100 years, confirmed by the archbishop, bishop, and dean and chapter, yet it shall not bind the successor; for to allow [*647] such a proceeding would obviously make the statute of no avail.(g) So the grant of a next avoidance of a benefice of which a bishop is patron *jure episcopatus*, though confirmed by the dean and chapter, has been often adjudged to be invalid to bind the successor.(h)

So a corporation sole cannot permit of an usurpation, on a church which belongs to him in right of his corporation, so as to bind the suc-

(a) *Galley v. Baker*, Cas. Temp. Talbot, 199.

(b) *Doe d. Bishop of Rochester v. Bridges*, 1 B. & D. 847.

(c) *Vid. Bac. Abr. Leases, E.*; *Com. Dig. Estates, G. 5*; *Cro. Car.* 49; 11 *Rep.* 69; 10 *Rep.* 60 b; *J. Bridgm.* 30; *Eitruce's case*, 5 *Rep.* 15; 1 *Roll.* 1. 171. So covenants in leases do not bind the successor, unless they have been usually inserted in previous leases; *Davenant v. Bishop of Sarum*, 2 *Lev.* 68; *S. C.* 1 *Ventr.* 223; 3 *Keb.* 69. What are usual covenants, *Doe d. Earl of Egremont v. Stephens*, 6 *Q. B.* 208.

(d) *Dale's case*, *Dyer*, 370, B.; *vid. Boulton's case*, *J. Bridg.* 31.

(e) *Bishop of Hereford v. Stacy*, cited *Ley*, R. 74; *vid.* 5 *Rep.* 15 a; *Bac. Abr. Leases, E.*

(f) *Eitruce's case*, 5 *Rep.* 14 b, cited. So of a bishop, *Com. Dig. Estates, G. 5.*

(g) *Case of Ecclesiastical Persons*, 5 *Rep.* 15; *vid. Cro. Car.* 49; *Ley*, R. 74.

(h) 10 *Rep.* 60 b; *vid.* 3 & 4 *Vict. c.* 113, s. 42; *Cro. Eliz.* 440; 5 *Rep.* 15 a; *Com. Dig. Estates, G. 5*; *J. Bridgm.* 30; *Sheph. Touchst.* 282; *Bac. Abr. Leases, H.*

cessor,(i) who will be entitled to present at the next avoidance as though no usurpation had taken place, and will not be put to an action to recover the right;(i) for the surference is void by stat. 1 Eliz. c. 19.(i) Nor can a bishop make a grant of a new office, not being of necessity, so as to bind the successors;(k) nor an ancient office with a new fee,(l) or with the ancient fee, and so much added; but there is some difference of opinion whether the whole grant is void in such case against the successor, or only void for the surplus over the ancient fee;(m) nor can he grant an ancient office to two persons, when it has been usually granted to one;(n) nor can he grant in reversion an ancient office formerly only granted in possession.(n) But ancient offices, with the ancient fees, he may grant in the same manner as they were usually granted before stat. 1 Eliz. c. 19.(o) whether they are necessary or useless,(o) which is a wholly immaterial question as regards offices granted before that statute. In one case it was held that the grant of a new office, being one of necessity, is good against the successor, if it be confirmed by the dean and chapter, and if the fee attached be a reasonable fee, which last point is a question for the court,(p) but it has been observed, that there never has been a decision since the case on which this doctrine was grounded, in which a grant of a new office with a new fee was solemnly determined to be good against the successor,(p) and the balance of authority seems to be decidedly against the notion that a bishop, or other corporation sole, *can [*648] bind his successor by the grant of a new office, imposing a new charge on him.(q) Therefore none of these grants which have just been enumerated as void would be set up by the confirmation of the dean and chapter, so as to bind the successor,(r) though they would be valid against the grantor during his incumbency.(s)

(i) *Dalton v. Bishop of Ely*, W. Jones, 46; S. C. Cro. Jac. 673; Com. Dig. Estates, G. 5; vid. *Stowel's case*, Plowd. C. 376; *Howel's case*, Plowd. C. 538; 11 Rep. 71 a. As to pleading in such case, W. Jones, 47. So a recovery had against a bishop by default in quare impedit is aided by the statute in favour of the successor, *Dalton v. Bishop of Ely*, W. Jones, 47.

(k) Com. Dig. Estates, G. 5; 10 Rep. 61; 1 Burr. 220, 221.

(l) *Bishop of Chichester v. Freedland*, Cro. Car. 49. In pleading, the office will be intended to be ancient, if no averment be made to the contrary; per Hutton, J., Cro. Car. 48.

(m) Com. Dig. Estates, G. 5; vid. J. Bridgm. 32; Cro. Car. 48. 557; Ley, 75; 1 Burr. 222; Sheph. Touchst. 282.

(n) *Bishop of Salisbury's case*, 10 Rep. 61; *Walker v. Lamb*, Cro. Car. 259; *Bishop of Chichester v. Freedland*, Cro. Car. 49; *Young v. Fowler*, Cro. Car. 555; *Scambler v. Walter*, Cro. Eliz. 637; Sheph. Touchst. 282, 283. So if the office, being usually granted for one life, is granted for two lives, the grant is invalid against the successor; Cro. Car. 49, and that for both lives. So if two offices were usually granted to one person and are granted to two; Cro. Car. 259.

(o) *Trelawney v. Bishop of Winchester*, 1 Burr. 219—226; *Ridley v. Pownall*, 2 Lev. 136; *Jones v. Beau*, 4 Mod. 16; S. C. Carth. 213; Salk. 465; 1 Show. 288; *Humphry v. Parsol*, 1 Brownl. 182. Usage since the statute is evidence of what was the usage before it; *Jones v. Beau*, 4 Mod. 17; Com. Dig. Estates, G. 5; vid. Dyer, 109, B. pl. 38.

(p) 10 Rep. 61 b; *Boulton v. Bishop of Chester*, cited J. Bridgm. 31; case of *Bishop of Ely*, cited Cro. Car. 48; vid. Pollexf. R. 136; 1 Burr. 220, 221, 222; Com. Dig. Estates, G. 5.

(q) Per cur. 1 Burr. 223; vid. Sheph. Touchst. 282, acc.

(r) Sheph. Touchst. 283. The grant of an ancient office with the ancient fee must be confirmed in order to bind the successor; 10 Rep. 62 a; 1 Burr. 225.

(s) See note (s) on next page.

A bishop may grant in reversion an office which has usually been so granted,^(t) and so may an archdeacon,^(u) and any other corporation sole. The grant of offices must like the grant of any other thing, parcel of the possessions held in right of the corporation, be made by deed indented, in order to bind the successor under the statutes; and, indeed, if a corporation sole appoint to an office, and there is nothing to prevent him so appointing to an ancient office, to hold at will only, it must still be by deed, for a man cannot have an office at will but by deed:^(x) and besides, if the appointment divests an interest out of the corporation, it must be made by a deed. Where an appointment to an office is to be made by a corporation sole, by virtue of a custom, attaching such appointment to the corporation, he may appoint to such office, ex. gra. the clerkship of a parish, by parol, for no interest is divested, the fees of the office not being payable out of the possessions of the corporation.^(x)

In suing for arrears of annuity charged on the lands of a bishopric as salary for an office, the officer ought to show that he performed the duties of the office, or that the bishop exonerated, discharged, and prohibited him from executing the office, and if the action is against the successor, he ought also to show a tender of his services to such successor.^(y)

The rules above stated, which result from the restraining statutes, do not in general relate to estates granted to charitable uses, and held by corporations sole in trust for such uses. Thus, if a gift of lands be made to a parson and his successors for ever, to the use of the poor of the parish, and the parson make a lease of the lands for thirty years, the gift is good, and the lease is valid also, notwithstanding stat. 13 Eliz. c. 10; for the lease does not fall within the restrictions of the statute, for two reasons—1. Because it was not made of ancient glebe of the church; and, 2. Because the length of the term granted could not tend to the impoverishment of the successor, inasmuch as it was given to a charitable use.^(z)

With respect to the subjects of demise under the statutes, it is to be [*649] observed, that at common law, leases to bind the successors must have been of lands, or tenements corporeal and manurable, whereto resort might be had, for the rent reserved thereon, by way of distress,^(a) and, therefore, valid leases could not have been made of things which lie in grant, as advowsons, fairs, markets, franchises, &c.;^(a) but now leases of tithes and other incorporeal hereditaments, for one, two, or three lives, or twenty-one years, are made valid, and the action

(s) Per Brudnell, C. J., in *Hecker v. Provost de Cambridge*, Yearb. 14 Hen. 8, fols. 30, 31.

(t) *Young v. Fowler*, Cro. Car. 555; 16 Vin. Abr. 111, pl. 5; Com. Dig. Estates. G. 5.

(u) *Woodward v. Fox*, 2 Ventr. 188.

(x) Per Powell, J., in *Gatton v. Milwich*, Salk. 536; per Holt, C. J., in *Reg. v. Wall*, 11 Mod. 261. (y) *Lucas v. Bp. of Ely*, Dyer, 156, B.; vid. 1 Leon. 209.

(z) *Banister's case*, Duke, 139. A parson may take lands (but not goods), and hold them in succession, to the use of the parish; *Att.-Gen. v. Ruper*, 2 P. Wms. 125.

(a) Co. Litt. 44 b; 7 Rep. 51; 5 Rep. 3; *Dean and Capter of Windsor v. Gover*, 2 Saund. 303; vid. 2 Rol. Abr. 451; 2 B. & Ad. 336; 3 Wils. 25; Cro. Eliz. 690. As to tithes of lay impropiators, vid. 32 Hen. 8, c. 7, s. 7; 8 Ann. c. 14.

of debt is given to recover arrears of rent on such reserved leases, as well as on leases made, under the previous statutes, of corporeal hereditaments.(b) Therefore, for rent reserved on a lease for years or for lives, a corporation sole may distrain, if the lease be of corporeal hereditaments, or may have an action of debt, provided the rent be in arrears twenty-eight days before the commencement of the suit,(c) and an action of debt, under the same restriction, for rent due on a lease of incorporeal hereditaments.(c) The same rights in either case belong to the successors.(c) A lease or agreement to let for three years (not being under seal) of a rectory and tithes, and also a messuage used as a homestead, at an entire rent of 200*l.*, is bad and void, both as a sale of the tithes for three years, and a demise of them; because the tithes being incorporeal cannot pass by parol, and as no distinct rent was reserved in respect of the homestead, a distress for arrears of the entire rent could not be maintained.(d) If the demise had been under seal, it seems the rent would have been held to issue wholly out of the homestead, and to be distrainable for *there*.(e) and the lease would have been good against the successor if demised at the usual rent.(e) But where a corporation sole demises his tithes in a regular manner under seal, a covenant by the lessee, for himself, his executors, administrators, and assigns, that the farmers of the parish shall not be allowed to take any part of the tithes, runs with the tithes, and binds the lessee's assignee, against whom the lessor may maintain covenant for a breach of such arrangement.(f) It seems, however, that the court laid some stress upon the circumstance of the word assigns being expressly mentioned in the covenant, and therefore it is not quite clear that the same conclusion would have been come to against an unnamed assignee.(g)

*A corporation sole may be lord of a manor in respect of his corporation, and may as such grant copyholds so as to bind his [*650] successor; but then such grants must conform to the custom of the manor in every way;(h) and, therefore, though ecclesiastical corporations sole are empowered by stat. 39 & 40 Geo. 3, c. 41, to grant several leases of parcels of lands, &c., formerly granted in a single lease, or to

(b) 5 Geo. 3, c. 17. (c) 5 Geo. 3, c. 17, s. 3; *Bally v. Wells*, 3 Wils. 25.

(d) *Gardiner v. Williamson*, 2 B. & Ad. 336; *vid. Bird v. Higginson*, 2 A. & E. 556. The demise of the rectory would have passed the tithes without express mention of them; *Vaugh.* 197; *vid. Vaugh.* 202; *Co. Litt.* 142. 144 a.

(e) *Holden v. Smallbrook*, *Vaugh.* 203; 13 Eliz. c. 10, s. 3; 2 Rol. Abr. 451.

(f) *Bally v. Wells*, 3 Wils. 25; S. C. *Wilm. Notes*, 344; *vid. 10 East*, 136; *Brewer v. Hill*, 2 Anstr. 413. But see as to demising tithes for more years than one, *Angel v. Rolf*, 2 Keb. 376; *Hawkes v. Brayfield*, Cro. Jac. 137; *Owen*, 103; 2 Rol. Abr. 63; *Petch v. Tutin*, 15 M. & W. 110; *Gale v. Burnett*, 7 Q. B. 858, sup. p. 634.

(g) *Vid. Collins v. Plumb*, 16 Ves. 454; *Gray v. Cuthbertson*, 2 Chit. R. 482; S. C. 4 Dougl. 351. Parson rateable to the poor in respect of corn rent, instead of tithes, reserved on allotment of inclosed lands made to him in lieu of rights of common and belonging to the rectory; *R. v. Inhabitants of Wistow*, 5 A. & E. 250; *Lowndes v. Horne*, 2 W. Bla. 1252. Must not take fine or gratuity for letting tithes of common field lands, under 13 Geo. 3, c. 81, s. 23. After publication of sequestration cannot bring ejectment; the ordinary is the proper lessor of the plaintiff in such case; *Harding v. Hall*, 10 M. & W. 54, 55; *Doe d. Morgan v. Bluck*, 3 Campb. 447.

(h) *Doe d. Rayer v. Strickland*, 2 Q. B. 792; *Bac. Abr. Leases*, F.

demise a part for less than the ancient rent, retaining the residue in their own hands, provided, in the first case, that the aggregate of the several rents be not less than the ancient single rent; and, in the second case, that the real value of the part reserved should be equivalent to the difference between the rent of the other part and the old rent of the whole; and provided also, that where any specific thing which cannot be divided shall have been reserved in any entire lease, it may be reserved and made payable wholly out of any competent part of the lands demised by such several leases; yet where a person, lord of a manor, had granted lands, (until that time held at a certain money rent and two hens for three lives, at the will, &c., according to the custom, &c.,) at the same rent, reserving, however, to the lord for the time being a garden, parcel of the lands: and his successor, during the continuance of the life estates, granted to other persons for three lives, at the will, &c. &c., the said garden at a rent of two shillings, *this* grant was held to be void against the successor, in the absence of the proof of any custom in the manor to parcel copyholds and apportion rents.⁽ⁱ⁾ There is ground for considering, that formerly when a corporation sole was lord of a manor in right of his corporation, the character of the lord of the manor prevailed over that of the ecclesiastical corporation, and he was considered by the law to act in the former character in almost all respects in dealing with the land; for it has been several times decided that no confirmation was necessary to make good grants of copyhold lands in fee, in tail, or for lives, or for any number of years, provided they were made according to the custom of the manor,^(k) but that the successor was bound by the custom.^(l) It had, however been held that lands which had been accustomedly used to be demised at will, by those who had the inheritance of the lands, rendering rent, were lands accustomedly letten to farm within stat. 13 Eliz. c. 10, s. 3.^(l)

[*651] *If a manor have been usually leased at a certain rent, and on renewing, the incumbent accepts the demesne lands, reserving

(i) 2 Q. B. 792; vid. 5 & 6 Vict. c. 108, s. 20; Cro. Jac. 76; vid. 5 Rep. 5 b, 3d Resolution; 2 Sugd. Pow. 409, 7th edit.

(k) Bac. Abr. Leases, E.; Clark v. Pennifather, 4 Rep. 24; vid. tam. Long v. Baker, 1 Rol. R. 202; Sheere v. Pentor, Litt. R. 304; S. C. 1 Leon. 4; 4 Leon. 117; vid. per Manwood, C. B., in Heydon v. Ware, Savil. 66, that a copyhold interest is within general statutes where there is no prejudice to the custom. Successor bound by the custom of the manor; Brown's case, 4 Rep. 23 b, 24. If the successor accepted rent reserved on a void demise of a copyhold, &c., the demise was set up against him; Bp. of Gloucester v. Wood, Harg. note 263, on Co. Litt. 44 b. During a vacancy, whilst the temporalities are in the hands of the crown, the tenants of the manor are tenants at will of the crown according to the custom, &c.; per Paston, J., Yearb. 21 Hen. 6, fol. 37, B.; vid. Yearb. 15 Hen. 7, fol. 10, pl. 13; Doe d. Burgess v. Thompson, 5 A. & E. 532; vid. 4 Rep. 21 b, 22 a.

(l) Dean and Chapter of Worcester's case, 6 Rep. 37; Heydon's case, cited 6 Rep. 37 b; Baugh v. Haynes, Cro. Jac. 76; Banks v. Bronan, Moor, 759. As to the reservation of the accustomed rent generally, 6 Rep. 37 b; 12 M. & W. 361, 362, 379, 397; Campbell v. Leach, Ambl. 740; Doe d. Earl of Shrewsbury v. Wilson, 5 B. & Ald. 375; Co. Litt. 44 b; 5 Rep. 5 b; 3 Com. Dig. 253, 254. Ancient rent, what, 1 Platt, Leases, 79—83; Willes, 176. Land tax to be reserved in addition to the ancient rent, if not, the lease may be avoided by the successor; 42 Geo. 3, c. 116, ss. 69, 88; Doe d. Bishop of Rochester v. Bridges, 1 B. & Ad. 847; vid. Warner v. Potchett, 3 B. & Ad. 921.

however the entire old rent upon the other part so leased, but, in fact, accepts as rent the difference between the value of the whole and the value of the part newly demised; that the acceptance does not bind his successors.^(m) If, however, two manors have been usually letten for 60*l.* a year rent, and a bishop grant a lease of one of them only, reserving thereon the whole rent, this is a good lease within stat. 1 Eliz. c. 19, for it does not tend to the impoverishment of the successor.⁽ⁿ⁾ Here less than the ancient quantity of the subject of demise was let in the new lease, and the ancient rent payable out of the whole was made payable out of the part, and the lease was good; but, on the other hand, when more than the ancient quantity is demised by the new lease, and the ancient rent reserved, that is a bad lease against the successor. Hence, where lands of a corporation sole had been usually letten with an exception of all crab trees and such like trees, rendering so much rent, and a new lease was granted of the same lands, *but without the exception*, at the same rent, the court decided this to be a void lease as against the successor, for there being more let than was anciently (the trees and the profits of the trees, and the soil itself, is excepted by this exception), so as every successor cannot have the benefit of the boughs and fruits yearly renewing, and it is not the ancient rent where more is let than was before.^(o)

Where a parson had entered into an agreement with parishioners, by which, in lieu of the ancient glebe, they allotted to him and his successors a quantity of land, exceeding by twenty-nine acres the ancient glebe, and, in lieu of tithes, provided for a fixed and annual payment as compensation, but the patron was not a party to the transaction in any way, it was decided in equity, and ultimately in the House of Lords, that the agreement should be set aside as to the compensation for the tithes, that part of the agreement being distinct from the other, though contained in the same deed, and it was set aside on the ground that the compensation had been calculated only on the value of the past tithes, without any regard to the future increase of their value, and so the successor's interests had not been properly *provided for. Here, although the [*652] arrangement had been in operation eighty years, forty of which had elapsed since the death of the parson who had made it, and it had been acquiesced in during the whole of that period, there was no doubt felt that the part of it which was injurious, or might become so, to the successor's interests, must be annulled, and the maxim is relied on, *ecclesia meliorari non deteriorari potest.*^(p) So no real composition for tithe made since stat. 13 Eliz. c. 10, is valid against the successor.^(q)

(m) Dyke v. Bp. of Bath and Wells, 6 Bro. P. C. 365.

(n) Threadneedle v. Lynham, 1 Mod. 203; S. C. 2 Mod. 57; S. C. Pollexf. R. 176; 1 Freem. 92; 3 Keb. 192.

(o) Smith v. Bole, Cro. Jac. 458; vid. 4 Rep. 63; Pollexf. R. 180; vid. Bp. of London's case, Yearb. 14 Hen. 8, fol. 1; Sugd. Powers, 2 vol. 409, 7th edit.; 6 Q. B. 208. A heriot not part of such ancient rent, Dean and Chapter of Worcester's case, 6 Rep. 38.

(p) Att.-Gen. v. Cholmley, 7 Bro. P. C. 34; vid. Thorpe v. Mattingley, 2 You. & C. 421.

(q) Mortimer v. Winthrop, 7 Bro. P. C. 44; vid. 8 Bro. P. C. 233; 1 Y. & Col. 1.

With respect to the renewals of leases, the law has been considerably altered by some late acts of parliament.

No ecclesiastical corporation sole can, since 1st of March, 1836, grant any new lease of any house, land, tithes, or other hereditaments, parcel of the possessions he holds in right of his corporation, by way of renewal of any lease which shall have been previously granted of the same for two or more lives, until one or more of the persons for whose lives such lease shall have been so made shall die, and then only for the surviving lives or life, and for such new life or lives, as, together with the life or lives of such survivor or survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid.

Where such lease shall have been granted for forty years, no ecclesiastical corporation sole shall grant any new lease by way of renewal of the same until fourteen years of such lease shall have expired.

Where such lease shall have been made for thirty years, no ecclesiastical corporation sole shall grant any new lease, by way of renewal of the same, until ten years of such lease shall have expired.

Where such lease shall have been granted for twenty-one years, no ecclesiastical corporation sole shall grant any new lease, by way of renewal of the same, or (in the case of archbishops or bishops) concurrently therewith, until seven years of such lease shall have expired.

Where such lease shall have been granted for years, no ecclesiastical corporation sole shall grant any lease, by way of renewal of the same or otherwise, for any life or lives, any law, statute or custom to the contrary notwithstanding.^(r)

It had been held under the old law, that a conditional surrender of an existing lease for lives might be good, so as to warrant a renewal binding on the successors of the corporation sole who made it. Thus where a surrender was made, with a condition, that if the then corporation [*653] sole did not within one week after, grant a new lease for three lives, the surrender should be void, and the new lease was, in fact, made within the week, it was held that the surrender thereupon became absolute, and the new lease was valid.^(s)

Wherever any ecclesiastical corporation sole shall, after 1st of March, 1836, grant any renewed lease of, &c. (as before,) and such lease shall contain a recital or statement, *in the case of a lease for lives*, setting forth the names of the several persons named as *cestui que vie* in the then last preceding lease of the same premises, and stating which of such persons, if any, is or are then dead, or for whose life that of some other person has been exchanged by virtue of a subsequent proviso, *and in the case of a lease for years*, setting forth for what term of years the last preceding lease of the same premises was granted, and how much of

^(r) 6 & 7 Will. 4, c. 20, s. 1; (vid. 5 & 6 Vict. c. 108, s. 8). The statute includes ecclesiastical corporations aggregate as well as sole. If a lessee surrenders on the faith of a promise of renewal, he may have an action for the breach of that promise, though it were not made under the corporate seal; *Frevill v. Ewbank*, 1 Rol. R. 82; *Bac. Abr. Leases, E.* As to renewal of under-lease, 39 & 40 Geo. 3, c. 41, s. 10.

^(s) *Wilson d. Eyre, v. Carter*, Stra. 1201.

such term has then expired, and how much remains to come and unexpired, every such recital or statement shall so far as relates to the validity of the lease so to be granted as aforesaid, be deemed and taken to be conclusive evidence of the truth of the matter so recited or stated.^(t) Any person executing any such lease, or the counterpart thereof, knowing such recital or statement, or any part thereof, to be false, or wilfully introducing, or causing to be introduced, or aiding or assisting in introducing, any such recital or statement into any such lease, knowing the same, or any part thereof, to be false, or preparing or ingrossing, or causing to be prepared or ingrossed, any lease or counterpart of a lease containing any such false recital or statement as aforesaid, knowing the same, or any part thereof, to be false, shall be deemed guilty of a misdemeanor, and, in addition to any punishment to which he may be liable, forfeit and pay to any person suing for the same the full sum of 500*l.*, or, at the option of such person five years' improved annual value of the hereditaments comprised in such lease.^(u)

But it is provided, that in cases in which it shall be certified as follows, that for ten years now last past it hath been the usual practice (which must have commenced prior to the time of the person for the time being representing the corporation sole) to renew such leases for forty, thirty, or twenty-one years respectively, at shorter periods than fourteen, ten, or seven years respectively, nothing in the act shall prevent any ecclesiastical corporation sole from granting a renewed lease conformably to such usual practice; provided, that such usual practice shall be made to appear to the satisfaction of the archbishop of the province, in the case of a lease granted by such archbishop or by a bishop, and in the case of a lease granted by any other ecclesiastical corporation sole, to the satisfaction of such archbishop, and also of the bishop *having jurisdiction over such corporation sole, and shall, before the [*654] granting of such lease, be certified in writing under the hand of the archbishop in the one case, and of the archbishop and bishop in the other case; the certificate, so signed by an archbishop only, to be afterwards deposited in the registry of such archbishop, and the certificate so signed by an archbishop and also by a bishop, to be afterwards deposited in the registry of such bishop, which certificate shall be conclusive evidence of the facts thereby certified.^(x)

The statute does not prevent any ecclesiastical corporation sole from exchanging any life or lives in being, for which any lease shall have been granted as aforesaid, and accordingly granting any renewed lease, with a view to effectuate such exchange of a life or lives; provided that the same shall be approved of (in the case of an archbishop) by her majesty in council, or (in the case of a bishop) by the archbishop of the province, or (in the case of any inferior corporation sole) by the archbishop of the province and the bishop of the diocese; such approbation, when required to be given by the queen in council, to be testified by the

(t) 6 & 7 W. 4, c. 20, s. 2. The omission of the word *and* in the statute as passed, rendered it necessary to pass another act, 6 & 7 Will. 4, c. 64, in the same session, which gave to the section the sense attributed to it in the text.

(u) 6 & 7 Will. 4, c. 20, s. 3.

(x) 6 & 7 Will. 4, c. 20, s. 4.

president of the council, certifying on the renewed lease, to be granted as aforesaid, such approbation, and in all other cases to be testified by the person or persons, whose approval is hereby required, certifying on such renewed lease his or their approbation of the same.(y)

The statute does not prevent any grants or renewals of leases authorized by acts of parliament specially relating to the particular estates demised by such leases,(z) nor the granting a lease with a view to confirm any title or otherwise for the life or lives of the same person or persons, or for the life or lives of the survivor or survivors of them, or for the same term of years, and commencing at the same period as the lease last granted, for a life or lives, or a term of years respectively;(a) and no lease not authorized by the laws and statutes now in force shall be rendered valid by anything in this act contained;(b) but any lease granted since 1st day of March, 1836, contrary to this act, shall be void to all intents and purposes whatever, excepting leases granted pursuant to any covenant or agreement entered into previously to that day.(c)

The statute making the executing, &c., the lease a misdemeanor, and also subjecting it to a penalty, to be recovered by a common informer, and also making void absolutely the lease itself, it is manifest that if a person were let into or continued in possession under such a lease, he would not be bound to pay rent or execute any other covenants which might be contained in the lease.(d)

[*655] *All ecclesiastical corporations sole are now empowered to grant building leases for terms not exceeding ninety-nine years, to take effect in possession and not in reversion, or by way of future interest of all or any part of the lands, or houses of or belonging to such corporation in his corporate capacity;(e) and on such lease to reserve an increased rent;(f) and to lay out and appropriate any part of the lands demised for streets, yards, gardens, squares, avenues, &c., &c.;(g) and to grant leases of running water, waterleaves and wayleaves, &c., &c., for any term not exceeding sixty years, the best yearly rent being reserved, payable half-yearly or oftener, without fine, &c.(h); and to confirm leases voidable for informality, and to accept surrenders, and grant new leases or apportioned leases;(i) also to grant mining leases for any term not exceeding sixty years, to take effect in possession, and not in reversion, &c., under such powers, provisoes, restrictions and covenants as shall be approved of by the Ecclesiastical Commissioners for England.(k)

But the house of residence, garden and outbuildings, &c., thereto belonging, are not to be leased under this act.(l)

The improved value of episcopal sees to be paid to the Ecclesiastical Commissioners;(m) and beyond 500*l.* a year, the improved value of arch-

(y) Sect. 5.

(z) Sect. 6.

(a) Sect. 7.

(b) Sect. 8.

(c) Sect. 9.

(d) *Turner v. Gaslight Company*, 6 Bing. N. C. 324.

(e) 5 & 6 Vict. c. 108, s. 1. This act relates also to all ecclesiastical corporations aggregate, with some exceptions, s. 1. The parsons and vicars in the city of London were empowered by stat. 22 Car. 2, c. 2, s. 75, to let building leases with consent of patron and ordinary, without fine, for any terms not exceeding forty years.

(f) Sect. 2.

(g) Sect. 3.

(h) Sect. 4. Lease void if any fine exacted, s. 30.

(i) Sect. 5.

(k) Sect. 6; vid. s. 14.

(l) Sect. 9.

(m) Sect. 10.

deaconries;(*n*) and beyond certain sums in proportion to population, the improved value of benefices is also to be paid to them.(*o*)

Each lease or grant under the act is to have the consent of the Ecclesiastical Commissioners for England.

Also if made by an incumbent of a benefice, it must, besides, have the consent of the patron.

Also, by whomsoever made, a lease of any lands, houses, mines, minerals, quarries, or beds, of copyhold or customary tenure, or of any water-course, ways, or easements, &c., where the copyhold or customary tenant thereof is not authorized to grant or make leases for the term of years intended to be created by such lease, without the license of the lord of the manor, must have his consent, in addition to the former,(*p*) and execution of the lease by the consenting parties, as parties to the deed, shall be evidence that the requisites of the act have been complied with.(*q*)

There is also an enactment that corporations aggregate shall consent by affixing their common seal,(*r*) which seems to be unnecessary, as *the common law would have required the affixing of the common seal to such a consent and concurrence as the act requires, the corporation so consenting being named as a party in the deed, &c., as the act also requires; but perhaps the clause was inserted to intimate that corporations sole might execute by their private seal and signature, and not by affixing their corporate seal, though this seems difficult to suppose.

All ecclesiastical corporations sole were empowered a few years ago(*s*) to grant, convey, or enfranchise land, not exceeding one acre, belonging to their corporations, for sites for schools, provided, that every ecclesiastical corporation sole, being below the dignity of a bishop, must first obtain the consent in writing of the bishop.

It is commonly said that an archdeacon is a corporation by prescription.(*t*) His leases must be confirmed by the bishop, and the dean and chapter;(u) and if he make a lease for three lives, according to 13 Eliz. c. 10, and his lessee make a lease for 100 years, and the archbishop, bishop, dean and chapter, confirm it, still such lease will not bind the successor.(*x*)

(*n*) Sect. 12. (*o*) Sect. 13. (*p*) Sect. 20. (*q*) Sect. 7, s. 21.

(*r*) Sect. 27. With respect to building leases, &c., of bishop's lands within twenty miles of a city or town, vid. 4 & 5 Vict. c. 39, s. 26.

(*s*) 4 & 5 Vict. c. 38, s. 6; vid. 7 & 8 Vict. c. 37, s. 5. A rector is a corporation sole to take and hold lands for the benefit of his church, and for other purposes, Duke, Charit. Uses, 139, i. e. where the rector is an individual; but corporations aggregate, as colleges, are frequently rectors. Rector of a donative must resign to the donor; if there are to donors, resignation to one suffices, Fairchild v. Gayre Cro. Jac. 63.

(*t*) 1 B. & Ad. 783. A prebendary or canon is another instance of a sole corporation which may exist by prescription or by charter of the founder, per Bosanquet, J., 1 Cl. & F. 538. Before 1 Anne, c. 7, s. 5, the crown might have annexed a prebend or canonry to this corporation of archdeacon, so as to bind its royal successors, Grendon v. Bishop of Lincoln, Plowd. C. 493; King v. Baylay, 1 B. & Ad. 761.

(*u*) 1 Platt, Leases, 301; Smith v. Bowles, 1 Rol. Abr. 479. 481; Yearb. 2 Hen. 4, fol. 2, pl. 7. (*x*) 5 Rep. 14 B.

A grant of the next avoidance of an archdeaconry may be made by a bishop so as to bind himself, but not his successor, and the executors of the grantee may have *quare impedit* to compel the grantor to admit their testator's clerk. (*y*)

An archdeacon is liable to an action on the case for refusing to induct a parson, &c., though such action does not lie against the ordinary who refuses to institute, because in the latter case there is the remedy of *quare impedit* at common law, or a *duplex querela* before the metropolitan. (*z*)

By 4 & 5 Vict. c. 39, s. 9, any archdeaconry may be endowed with a benefice situate within the limits of the archdeaconry, by annexation, with consent of the bishop and of the patron, whether the archdeacon in possession consent or not. (*a*)

By 17 Car. 2, c. 3, an act for uniting churches in cities and towns corporate, if such parsonages, vicarages, churches, and chapels, so united, or if any other parsonage or vicarage with cure, in England or Wales, shall not amount to the full sum of 100*l.* per annum, clear and [*657] *above all charges and reprises, the incumbent and his successors were empowered (*b*) to take, receive, and purchase to him and his successors lands, rents, tithes, and other hereditaments, without any license in mortmain, and without any limitation as to the amount of the yearly value of such lands; but this statute was repealed by 1 & 2 Vict. c. 106; and though several of its provisions were re-enacted, this is no longer the law.

Perpetual curates are made corporations sole in certain circumstances by stat. 1 Geo. 1, st. 2, c. 10, s. 4, enacting, "that all such churches, curacies, or chapels, which shall at any time hereafter be augmented by the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, shall be and hereby are declared and established to be, from the time of such augmentations, perpetual cures and benefices, and the ministers duly nominated and licensed thereto, and their successors respectively, shall be and be esteemed in law bodies politic and corporate, and shall have perpetual succession by such name and names, as in the grant of such augmentation (*c*) shall be mentioned, and shall have a legal capacity, and are hereby enabled, to take in perpetuity to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors," &c. "And (*d*) to the end that churches and chapels may at all times be capable of receiving augmentations for the maintenance of the ministers thereof, be it enacted, &c., that if the governors, &c., shall, by deed or instrument in writing under their common seal, allot or apply to any church or chapel any lands, tithes, or hereditaments, arising from the said bounty of her said late majesty, or from any private contribution or benefaction, (*e*) or from all or any of the ways

(*y*) *Smallwood v. Bishop of Coventry*, Cro. Eliz. 141. 207; *vid.* 1 Cl. & F. 542, 543, 561; *Food's case*, 5 Rep. 81; Co. Entr. 508.

(*z*) *Pole v. Godfrey*, Moor. 836; Yearb. 26 Hen. 8, fol. 3, A.; 12 Rep. 128. When may be deprived, 10 B. & C. 305. (*a*) *Vid.* 1 B. & Ad. 761.

(*b*) Sect. 8.

(*c*) How proved, *Doe d. Graham v. Scott*, 11 East, 47.

(*d*) Sect. 21.

(*e*) Which may be by way of devise, by 43 Geo. 3, 107.

aforesaid, and shall declare that the same shall be for ever annexed to such church or chapel, then such lands, tithes, and hereditaments, shall from thenceforth be held and enjoyed, and go in succession with such church or chapel for ever; and such augmentation so made shall be good and effectual to all intents and purposes whatsoever, whether such church or chapel for which such augmentation is intended be then full or vacant of an incumbent or minister; provided such deed or instrument be inrolled in the High Court of Chancery within six months after the day of the date thereof.”(f)

The statutes of mortmain apply, as we have seen, to corporations sole in general, but no express mention of them is made in the above cited statute; and it would seem from this, and from the language used, that the legislature did not intend perpetual curates to be corporations to take and hold lands in succession *generally*, but only such lands as might be annexed to them by the governors of Queen Anne’s bounty *in [*658] the specified manner. However this may be, it has been settled, that such augmented curates cannot demise the corporate lands so as to bind the successor, if the patron only consent, and not the ordinary.(g)

A perpetual curate cannot be said to be a parson, but he appears to be a vicar;(h) and whether he has a fee simple is a very difficult and disputable point; but it is said he has whatever estate he possesses, *not* in right of his church.(i) He is neither instituted nor inducted, which are, or at least the last of them is, requisite to confer the temporalities; but, nevertheless, his successor may sue him for dilapidations done to the houses or lands.(k) However, a seisin of the church endowments in a corporate character is not a necessary condition to the maintenance of this action, and the liability of the defendant.(k) In equity it seems to be the principle of injunction to stay waste, as by cutting down trees, that the timber on the lands of ecclesiastical corporations is a fund, which is to go in succession for the benefit of the church,(l) and so it does not rest on the fact of seisin.

With respect to the mode of establishing a right to a perpetual curacy, a bill in equity, and not an information by the attorney general, is proper, except in cases of charities; and augmentations of vicarages, &c., form such exceptions; and according to the authority of Lord Hardwicke,

(f) Vid. 9 Geo. 2, c. 36.

(g) Doe d. Richardson v. Thomas, 9 A. & E. 556; where see as to operation of stat. 32 Hen. 8, c. 28, s. 1, 4; and the lease must be confirmed by the patron paramount, where there is one, as well as the patron and ordinary, or it is void and cannot be set up against the successor by his acceptance of rent, &c., Doe d. Brammall v. Collinge, 18 Law J. (N. S.) C. B. 305; vid. inf. p. 659.

(h) Per Lord Denman, C. J., 9 A. & E. 572. He is something less than vicar, per Littledale, J., id. 573; vid. 4 T. R. 665; Vicar’s corporate capacity, 7 A. & E. 798.

(i) Vid. per Coleridge, J., 9 A. & E. 575. But per cur. in Mason v. Lambert, his interest in the buildings and lands belonging to the curacy is in right of his curacy 17 Law J. (N. S.) Q. B. 371.

(k) Mason v. Lambert, 17 Law J. (N. S.) Q. B. 366; vid. Latch, 236. Where two parsons exchange benefices, each may sue as successor, the other as predecessor, for dilapidations; Downes v. Craig, 9 M. & W. 166; vid. Huntley v. Russell, 18 Law J. (N. S.) Q. B. 239.

(l) Herring v. Dean, &c., of St. Paul’s, 3 Swanst. 492; vid. 3 Meriv. 421.

JANUARY, 1854.—42

C., augmented vicarages are by 29 Car. 2, c. 8, made charities within the statute of the 43 Eliz.(*m*)

To constitute a perpetual curate, in general these things must concur; his church must have parochial rights, as clerk, wardens, &c., and all rights of performing divine service, baptism, sepulture, &c., especially sepulture: then there must also be a right in the inhabitants to have performed there divine service, baptism, &c., and the absence of right to resort to the mother church for these purposes, or to any other place but this; then if the right of the minister has always been admitted to the small tithes and surplice fees, and he has always enjoyed them, this will complete the proof of a perpetual curacy; for they show, especially the last, that the curate is not removable by the rector, and it is a contradiction to say that a perpetual curate is removable at will and pleasure.(*n*)

It is further provided by the Ecclesiastical Districts Act, 2 & 3 Vict. [*659] *c. 49, s. 2, that in case of any church or chapel, which has already been, or hereafter may be, augmented by the said governors of the bounty of Queen Anne, and for or to which any district chapelry has already been, or hereafter may be assigned, whether before or after such augmentation, under the provisions of certain acts of parliament, such church or chapel, from and after such augmentation, and the assignment of such district chapelry, shall be and is hereby declared to be a perpetual curacy and benefice, and the minister duly nominated and licensed thereto, and his successors, shall not be a stipendiary curate, but shall be and be esteemed in law to be a perpetual curate, and a body politic and corporate, with perpetual succession, and may receive and take to himself and his successors all such lands, tenements, tithes, rent-charges, and hereditaments, as shall be granted unto or purchased for him or them by the said governors of the bounty of Queen Anne, *or otherwise*, &c.(*o*) An ecclesiastical corporation sole may resign; and as every resignation must be made to a superior, a bishop must resign to the king, and so of a dean, but others, as it seems, to the immediate ordinary; and the proper words of resignation are, renuncio, cedo, dimitto; but a resignation upon condition in such case is bad, as indeed every conditional resignation is; and as in corporations aggregate we found that a resignation of a charter, until acceptance by the crown, was ineffectual, so the resignation by a corporation sole, until acceptance by the superior, to whom the resignation is made, has no force or effect.(*p*)

(*m*) Att.-Gen. v. Brereton, 2 Ves. sen. 425.

(*n*) Ibid.

(*o*) This seems to be a creation of a body corporate to take all manner of lands, and not merely those which the governors of Queen Anne's bounty convey to him; vid. sup. p. 658. Powers to sell lands, residence house, &c., in certain cases, ss. 16, 17.

(*p*) Anon., Rol. R. 137; per Coke, C. J., and Haughton, J., Bret v. Johnson, Lane, R. 4; Riley v. Adams, 11 Mod. 276; Walrond v. Pollard, Dyer, 294 a; Gaston's case, Owen, 12; Com. Dig. Eglise, N. 2; Fane's case, Cro. Jac. 197; Bro. Abr. Barr, 81; and the resignation must be so pleaded, Smith v. Fox, Noy, R. 147; Yearb. 7 Edw. 4, fol. 16; 9 Edw. 4, fol. 49. But in sci. fa., upon an annuity recovered against him as parson, it would be argumentative to plead that he has resigned into the hands of the bishop, &c.; he ought to traverse that he was parson at the day the writ was sued out; 17 Vin. Abr. 359, F. b, 2, pl. 2; Yearb. 7 Edw. 4, fol. 15, 16; 8 Edw. 4, fol. 15, pl. 17; 9 Edw. 4, fol. 49, pl. 7. Of a dona-

The resignation here spoken of, however, is unlike the resignation of the charter of an aggregate corporation in this respect, that it cannot put an end to the corporation as the latter *may* do, but merely amounts to divesting the person who makes it of the corporate character in respect of the cure which he gives up.^(q) Generally, the bishop is the immediate ordinary; but by custom, in some places, as the county of Chester, the archdeacon is immediate ordinary.^(r)

By the custom of London the Chamberlain of the city of London is a corporation sole for the special purpose of taking obligations and recognisances for orphans' portions, which obligations by the custom **go in succession.*^(s) In pleading payment of a bond given to the chamberlain and his successors, if the chamberlain, in whose [660] time it was given, is no longer in office, the obligor ought to show that the said chamberlain was deposed, or died, or the like, and then he paid it to J. S., his successor, showing how J. S. was elected, &c.; for otherwise it will be intended, according to a well known rule, that the first continues chamberlain.^(t)

*QUASI CORPORATIONS SOLE. [661]

SOME instances of quasi corporations sole remain. These are generally officers of the crown, as the Lord Chancellor, the Lord High Treasurer, or the chief justices, who, for certain purposes, are in the nature of corporations sole respectively.

A very early instance is that afforded by a grant of Hen. 3 to Philip Luvel, then Lord Treasurer, and his successors, treasurers of the Exchequer, of the guardianship of the hospital of St. James in Westminster.^(u)

The chief justices of the two branches are so far considered as quasi corporations, that they may be prescribed in, as is the case with respect to real corporations. Thus it may be pleaded by one who has a grant of an office from either, that the chief justices have been used from time whereof, &c., to grant the office.^(v)

So a sheriff, though he cannot prescribe for fees for doing his office,

tive, the resignation is to be made to the founder; and if there be two founders, resignation to one enures to both, *Fairchild v. Gayre*, Cro. Jac. 63; S. C. 1 Brownl. & G. 202; vid. 7 B. & C. 160; 8 Bing. 490; 2 C. B. 687. A prebend might have been resigned to the king as supreme head of the church, and the resignation was as good as if made to the immediate ordinary; *Walrond v. Pollard*, Dyer, 293 b.

(q) Bro. Abr. Arrearages, pl. 8; per Frowicke, C. J., *Kelw.* 64.

(r) Com. Dig. Certificate, A. H. As to name of ordinary, sup. p. 645, n. (z).

(s) *Bird v. Wilford*, Pasch. 38 Eliz., Cro. Eliz. 464; vid. *Howley v. Knight*, 19 Law J. (N. S.) Q. B. 7.

(t) Yearb. 8 Edw. 4, fol. 18, pl. 29; vid. 12 Hen. 6, fol. 3, A.

(u) *Mad. Firm. Burg.* 45.

(v) Yearb. 19 Hen. 6, fol. 8, pl. 17; *Skrogges v. Coleshill*, Dyer, 175; *Coste's case*, 21 Hen. 7, fol. 17 A.

for at common law no fees were payable to him on that account, yet he may prescribe to have a fee for a thing which is not within his office; as to take a bar fee for every prisoner acquitted, such fee not being given for doing his office.^(w)

The annual officer of a hundred, to whom has been granted a fair, may prescribe to hold it, though he is not a corporation, and though the rule is that bodies not corporations cannot prescribe,^(x) and particularly that annual officers cannot prescribe.^(y)

By the Friendly Societies Act, 33 Geo. 3, c. 54, s. 11, all the moneys, goods, chattels, stocks, annuities, and other transferable securities and effects whatsoever belonging to the said societies, are vested in the respective treasurers thereof for the time being; and by sect. 4 bonds may be given to the treasurer for the time being, and any treasurer for the time being may sue upon such bonds, an enactment which has much the same effect as making these officers corporations sole to take chattels in succession.^(z)

By a similar enactment, 27 Eliz. c. 13, the clerk of the peace, for a county at large, was invested with a quasi corporate character.

^(w) 2 Inst. 210; Com. Dig. Extortion, B; Coste's case, 21 Hen. 7, fol. 16, pl. 28.

^(x) Taylor v. Rondeau, 2 Ld. Ken. 50.

^(y) Yearb. 42 Edw. 3, fol. 4; Bro. Abr. Fees, &c., pl. 18; id. Corone, pl. 103; id. Office, &c., pl. 31; id. Prescription, pl. 9.

^(z) Vid. Cartridge v. Griffiths, 1 B. & Ald. 57; et vid. 10 Geo. 4, c. 56; 4 & 5 Will. 4, c. 40; 3 & 4 Vict. c. 73; 9 & 10 Vict. c. 27.

INDEX.

* * THE SCHEDULES OF THE MUNICIPAL CORPORATIONS REGULATION ACT, 5 & 6
WILL. 4, c. 76, WILL BE FOUND UNDER THE HEAD "SCHEDULE" BELOW.

The pages referred to are those between brackets [.].

ACCEPTANCE,

of a charter of incorporation, 18.
what is, 23.
when to be made by majority, 19.
whole body, 19 *n. c.*
clear proof of, necessary, 20.
must be whole of a charter, 19 *n. c.*,
20.
for ever, 19.
of office, how to state, in application
for quo warranto, 257 *n. a.*, 410.
mayoralty, what sufficient, 422.
whether renders valid illegal charter,
20—22.
annuity, effect of, 559.
rent by successor of corporation sole,
640 *n. k.*
a charter does not need common
seal, 23.
a grant does, 110. 542. 544.
rent, what evidence of, 149 *n. u.*, 549
n. r., 587, 588.
abrogates inconsistent usage, 19.
assignee of a term, 152.
addition to endowments of a college,
542.
resignation of an office, 225. 267 *n. n.*
incompatible office, 243 *n. c.*, 246,
437.

ACCOUNT,

action of, preferable to suit in equity,
192.
how corporation may assign audi-
tors in, 63. 192.
against dean and chapter, 595.

when equity will decree an, against
corporation, 117, 118. 138. 287.
288.
respecting charitable funds, 513,
514.
when not, 281.
decree for, of tolls, 163. 177. 181 *n. u.*
toll-thorough, 182.
land cheap, 187.
rents and profits, 145.
when owner of shares may have
bill for an, 129.
how far back will be taken against
corporations, 514.
taken in their favour, 565.
by master of school, 547.
by corporation of profits of school es-
tate, 561.
college, 547, 548.
stated, count on, in Borough Court,
465 *n. k.*

ACTION ON THE CASE,

when lies against a corporation, 154.
161 *n. p.* 168. 519.
lies against corporation for breach
of prescriptive and official
duty, 277 *n. f.*
charter duty, 277 *n. f.*, 284 *n. f.*
for negligently managing fire, 277
n. g.
neglect to repair, *id.*, 501.
negligence generally, 277 *n. g.*
refusing to pay dividends, *id.*
injuring houses near railway, *id.*
falsely certifying custom, *id.*

ACTION ON THE CASE—continued.

damages, when to be paid by guilty majority, 579.
 when against corporator refusing office, 157 *n. l.*, 221.
 president of electoral assembly, 203 *n. g.*
 disturber of such assembly, *id.*
 voters for plaintiff's disfranchisement, 267.
 a visitor, 534.
 college, 542 *n. s.*
 when does not lie against judge of Court of Record, 465 *n. e.*
 a college, 538 *n. n.*
 by corporation, for subtraction of tolls, 171, 172.
 fraud on market, 175, 176 *n. l.*
 erecting a market, 179.
 invasion of rights of corporators, 184.
 injury to head, 193.
 fraudulent breach of contract, *id.*
 breach of custom, 335.
 refusal to deliver books, &c., 242.
 false imprisonment of mayor, 429.
 entering and executing process against sheriff of county, &c., 353 *n. e.*, 468 *n. g.*
 against officers, 232 *n. a.*, 384, 385. 434.
 persons withholding tolls, 167.
 and defence to such action, 168.
 head of corporation for false return, 426 *n. n.*, 240 *n. g.*
 refusing vote, &c., 427 *n. o.*
 poll, 425.
 recorder for proceeding after certiorari, 451
 person acting under Municipal Corporations Act, 503.
 for slander of wares in Pie Poudre Court, 467 *n. d.*
 by mayor, &c., for words, &c., 425. 429.
 by schoolmaster, 558 *n. e.*
 churchwardens, 602
 pleading in, 171 *n. g.*
 in a borough court, 465 *n. k.*
 possibility of damage, when ground of, 228 *n. b.*

ACTS AND PROCEEDINGS,
 acts to be done under general authority of the corporation, 154.
 corporate, how performed, 154—157.
 when corporator responsible for, 157 *n. l.*
 must be consistent with the constitution of the body, 159.

in equity against corporations, 280, 281. 286—294.
 for discovery, 287, 288.
 by arbitration, 281.
 against persons claiming to be a corporation, 281, 282.
 to dissolve the corporation, 295—303.
 of disqualified municipal officers whilst in office, 418.
 action by municipal corporation does not abate by mayor's death, 424.
 actions, &c., against persons for things done in pursuance of Municipal Corporations Act, 503.
 acts done in the name of corporation, when renders corporators responsible, 546, 547.

ADJOURNMENT,

whether power of, belongs to corporate meetings, 157. 358.

ADMIRALTY,

all chartered admiralty jurisdictions abolished, 449 *n. r.*

AD QUOD DAMNUM,

writ of, 101, 102. 105.
 not obsolete, 102.

ADVOWSON,

grant of, 493 *n. s.*, 543.
 bad against successor of corporation sole, 645.
 devise of, 543.
 purchase of, by colleges, 546. 550.
 alienation in mortmain of, 100. 440.
 municipal corporations must sell, 492.
 how corporation grants next avoidance of, 55.
 hospital nominates, &c., 578.
 under what words in lease does not pass, 596, 597.

AFFIDAVIT,

on motion for certiorari to remove an indictment from a borough, &c., 452.
 quo warranto, 257
 to remove cause from University Court, 520 *n. e.*
 on claim of conusance by University, 526.
 in an answer to claim of privilege of University, 522 *n. d.*
 change of venue in county of city, 355.
 how to name corporations in a, 51 *n. k.*
 right of freehold not determinable on, 410.

AFFIRMATION,
 effect of, as to fining for non-acceptance of office, 224.
 at elections, &c., 414 *n. b.*

AGENT,

of corporation, when must prove appointment under their common seal, 61 *n. c.*

his seal to lease not sufficient, 546 *n. z.*

mayor, when is not the, 153.

authority of, when need not be shown, 63.

tort of, when visitable on the body, 278.

contract of, 294.

ALDERMEN,

number fixed in each borough, 355. 415.

more claiming to be, than that number, 417.

when eligible, 416, 417 *n. s.*

offices incompatible with office of, 417.

qualification of estate, 408. 417.

when competent to act as, 417.

disqualification to be elected or be, 397, 398. 416, 417.

what are not, 417 *n. s.*

acts of disqualified aldermen, 418.

exemptions from being, 401, 402. 420.

extraordinary vacancy in office of, 415, 416.

duty at elections in boroughs divided into wards, 403, 404.

punishment for refusing to revise burgess lists, 405, 406.

declarations to be made by, 407, 408.

within what time, 418. 419.

return to mandamus to administer, 417.

acts of persons not having made the, &c., 419.

fine for refusal to serve as, 362, 419, mayor, 225.

what equivalent to refusal of office of, 419 *n. z.*

penalty for acting as clerk to justices, 473.

neglecting duties, 419.

bankruptcy of, 406, 430, 417 *n. s.*

insolvency, composition with creditors, 407.

election of, how made, 415.

councillors, before, 419.

not to be previous to that of mayor, 421 *n. c.*

mandamus to proceed to, 416.

riot at, 416 *n. h.*

due, question of, how raised, 419.

re-election of, outgoing eligible for, 356, 415.

after absence, 430.

amotion of, 420.

quo warranto for the office of, 416, 252 *n. i.*

resignation, 420.

absence of, &c. 430.

fine for, 406, 407.

outgoing, may vote at election of mayor, 415.

be elected mayor, 415 *n. f.*, 421.

presiding at election of, 415 *n. f.*

indictment for libel on, 430.

information against, costs of an, 488.

when must not return jury, 420.

ALE LICENSE,

refusal of justices to grant, 449 *n. s.*, 450, 453.

fees for granting, 453, 454.

notice of appeal, &c., 453 *n. d.*

meeting for granting, 454.

transfer of, 454 *n. g.*

in the Universities, 454 *n. i.*, 527.

ALE-TASTER,

mandamus to admit an, 238 *n. r.*

swear in, 384 *n. c.*

ALIENS,

cannot generally be corporators, 6.

excluded from municipalities, *id.*

may belong to trading corporations, *id.*

effect of grant of incorporation to, 23.

cannot be churchwardens, 600 *n. m.*

ALMS,

meaning of, in Municipal Corporations Act, sect. 39, 388 *n. c.*

Reform Act, 507 *n. s.*

AMOTION,

what is, 240.

bribery good cause of, 232 *n. c.*

other causes, 240—247, 420.

when must be under common seal, 240 *n. i.*

necessity of, 243.

mode of, 245, 246.

of town clerk, 437.

clerk of the peace, 443.

treasurer, 439 *n. b.*

mayor, 426, 427.

de facto officer, 233.

by visitor, 536, 537.

mode of, 247.

of corporator of a college, 538, 539.

hospital, 572 *n. s.*

governors of a school, 554 *n. c.*

master of a school, 557.

odious in law, 240 *n. k.*, 243 *n. a.*

ANCHORAGE,

what, 163.

ANNEXATION,

deed of. *Vid. COLLEGE.*

ANNEXATION—*continued*.

construction of indenture of, 543
n. x.

of rectory &c., to a church, 549.

ANNUITY,

corporation chargeable with, when
not relieved from, 24, 559.

having accepted, cannot renounce,
559.

sole, how chargeable with, 636, n.
c.

payable by, or to corporation, 303
n. t.

how to grant an, 146 n. d.

by dean, 585 n. a.

grant of, by bishop, 646.

parson, id.

devise of a student of a college, 545,
546.

bill for recovery of, 546.

ANSWER IN CHANCERY,

how made by a corporation aggregate, 56 and n. u, 57, 287, 288.

Vid. **HEAD**.

APPEARANCE,

how to be made by a corporation aggregate, 274, 275 n. r.

by a corporation sole, 636.

compelled, 284, 496.

in equity, 286.

effect of failing to appear in quo
warranto, 298, 299.

appearing but making default,
299.

APPRENTICE,

mandamus to admit to freedom,
238 n. r.

APPRENTICESHIP,

bye-laws, respecting indentures of,
78, 79.

ARCHDEACON,

how to sue, 635.

is a corporation sole by prescription,
549, 656.

where may grant an office in rever-
sion, 648.

where he is canon in right of office,
593, 594.

mandamus to compel, to swear in
churchwardens 600, n. m.

action on the case against, 656.

leases of, 646, 656.

ARREST,

corporator when privileged from, 156,
157.

by process out of University Court,
521 and n. r.

ASSESSORS,

duties of, in election for councillors,
&c., 406, 423.

notice of vacancy by, 407.

penalty on, for acting without having
made the declaration, &c., 418.
how and from whom to be elected,
431.

duration of office of, id.

who ineligible to be, id.

are ineligible to be councillors, id.

with the mayor form the Court of
Revision, id.

appointment of deputy by, id.

omission to elect, how remedied, id.

mandamus to compel election of,
id.

declaration by, 431, 432.

penalty for acting without making,
432.

acts of de facto, good, id.

of wards, id.

councillors disqualified to be, id.

ASSIGNEE,

of lessee of corporation, how to be
accepted by them, 57.

ASSISTANT BARRISTER.

appointment of, to hold quarter ses-
sions, 449, 450.

remuneration of, 450 n. u.

ASSISTANTS,

the, of a city company, mandamus
to admit, 238 n. r.

to restore, 250.

ASSIZES,

for a county of a city where to be
held, 352.

ASSUMPSIT,

may be had on a bye-law, 88.

when not, 97.

promissory note, 276.

for duties, 159.

tolls, port dues, &c., 162—165.

market tolls, 171, 181 n. o.

stallage, 175.

fees, to try right to office, 238.

difference of tolls taken from plain-
tiff above other persons, &c.,

276 n. z.

money had, &c., by churchwar-
dens, 602.

ASSUMPSIT SOLVERE,

action of, in a Borough Court, 337.

ATTACHMENT,

in the nature of pone, 284.

for refusal to swear in officer, 214 n.
k.

for contempt, against corporators,
231 n., 285, 463, 464.

sheriff, 354.

councillors, 355 n. a.

mayor, 428 n. u.

judge of borough court, 463.

keepers of the University seal,
518.

ATTORNEY,

how retained by a corporation, 56,
60, 147 *n. k.*

to claim consuance, 526.

acts of, when bind corporation, 56
n. i.

consenting to order of reference, 281.

when to be appointed under common
seal, 190, 274, 382 *n. a.*
presumed to be so, 60 *n. u.*

corporation must appear by, 274
n. h.

when to demand rent, 150.

not necessary to accept under seal,
110.

lease by common seal, 147 *n. h.*

how authorized by churchwardens
and overseers, 280.

must deliver signed bill for business
done at borough court, 461 *n. s.*

and at quarter sessions, *id.*

when not entitled to inspect corpora-
tion books, &c., 313.

of sheriff's court, entitled to compen-
sation, 382.

privileged against University Courts,
523.

and how to plead it, 524.

remedy against, as steward of manor,
188.

when exempt from municipal office,
226.

exempt from serving sheriff, 354.

mayor, 421 *n. e.*

constable, 368 *n. g.*

may be town clerk, 433.

borough justice, 469.

as to being registrar of Borough
Court, 460.

practising there, 460, 461 *n. s.*

ATTORNEY-GENERAL,

how exercises power in *quo warranto*,
259 *n. y.*, 261, 282, 299, 300.

when may demand removal, &c., by
certiorari, 452.

AUDIT,

in municipal boroughs, &c., 440—
442.

book of a college, effect of insertion
of order in, 546.

AUDITORS,

their duties, 440, 442.

election and duration of office, 442
and *n. z.*

who eligible to be, 442.

declaration to be taken by, 442.

cannot be councillors, *id.*

mandamus to admit, 233 *n. r.*

AYLESBURY,

dissolution of corporation of, 304
n. z.

BAIL,

not taken for corporations defend-
ants, 274 *n. n.*

BAILIFF,

how commanded to enter for condi-
tion broken, 56. 151. 541.

to take distress, 60. 150, 151.

to make consuance, &c., 188, 189,
201 *n. z.*, 544. 519 *n. l.*

BALLASTAGE,

what, 163.

BALLOT,

voting by, 256

custom to elect by, 322.

BANISHMENT,

from University, nature, &c., of, 516.
518 *n. s.*, 515 *n. e.*

BANK OF ENGLAND,

how may issue bills, bonds, &c., 65.
276 *n. b.*

forgery of securities of the, 66 *n. z.*

empowered to alien lands, 139 *n. l.*

action against for refusing to pay di-
vidends, 277 *n. g.*

and evidence therein, 314.

proof of entry in books of, 317.

BANKING CO-PARTNERSHIPS,

275 *n. r.*

how to obtain charter of, 276 *n. b.*

establishment of, as quasi corpora-
tions, 624, 625.

BANKRUPTCY,

as to amotion for, 242 *n. p.*

disfranchisement for, 264.

does not disqualify to be *elected* coun-
cillor, 398.

but does to be councillor, &c., 406,
407.

BARGAIN AND SALE,

as to corporation taking by, 107 and
n. q., 111.

conveying by, 139.

hospital ought to be endowed by way
of, 576.

BEACONAGE,

what, 163.

bill in equity for, 181.

BEDFORD LEVEL,

corporation of the commissioners of
the, 139 *n. l.*

BELL,

how to recover, 242, 243.

BELLMAN,

custom respecting, at Lichfield,
331.

BERKHAMPSTEAD SCHOOL,

incorporation of, 558.

BERWICK-UPON-TWEED,

made a county of a town, 352.

sheriff of, 353.

mayor of, 427.

BERWICK-UPON-TWEED — *continued.*

corporation of, fined for contempt, 644.

BEWDLEY,

case of borough of, 20 n. n.

sci. fa. to repeal charter of, 40 n. s.

BILL OF DISCOVERY,

against clerk to corporation, 287 n. f., 293 n. z.

corporation, 287, 288.

to enable a corporation to defend action, 288 n. n.

of college statutes, 539.

to detect breaches of a charter refused, 293.

prejudicial charter, refused, 38 n. b.

answer to, how made, 56 n. u., 57.

BILL OF EXCHANGE,

by trading corporation need not be under seal, 61.

what corporations may and may not accept, 276.

BILL FOR SPECIFIC PERFORMANCE,

cannot be had in University Courts, 521 n. n.

BISHOP,

when to exercise church patronage of a municipal body, 492.

when to apply to equity as to visitation of a free grammar school, 557.

visitor of dean and chapter, 582, 583.

when fully vested in office, 638 n. s.

bond to, and his successors, 589. 629.

ornaments of chapel of a, 629

generally the immediate ordinary, 659.

lease for years to, 629 and n. q. 631. by, 629. 639.

when cannot be made, 638 n. s., 642 and n. y.

concurrent lease by, 642.

name of, how to be used in grant to, 630. 633.

in actions, &c., 635, 636.

name of dignity of, when words of description, 631 n. i.

what interests successor of, takes, 629 and n. u.

executors of, 629, 630. 638.

building leases of lands of, 655 n. r.

presentation to advowsons of, 631.

grants of lands, &c., by, 641, 642.

grant of an office to, and his successors, 631.

by, when binds them, 647, 648.

de facto, lease of, void, 645.

grant of option by, 632 n. o.

annuity, 646.

next avoidance of living by, bad, 647.

how to try right to office of, 638 n. s. successor of, when fully entitled, 638 n. s.

not bound by acts of crown on the vacancy, 642.

not bound by judgment against, 647, n. i.

effects of deprivation of, 631.

dilapidations good cause to deprive, 644, 645.

effects of outlawry of, 631.

options of, 632.

corporate seal of, 633.

proves itself, id.

BOARD OF MANAGEMENT OF DISTRICT SCHOOLS, &c.

have no common seal, 624

are to sue as a corporation, id.

BOND,

effect of, given to voluntary body afterwards incorporated, 1 n.

by all the members, but under common seal, 3.

how to sue on one given before a change of corporate name, 24 n. n.

made to a corporation and an individual, 61.

of Bank of England, 65.

not voidable by bye-law, 80:

master or head cannot take, 149 n. y.

plea of privilege, &c., 523.

against heir on bond of ancestor, 522 n. s.

for compensation, 436 n. l.

by corporation de facto, 282.

may be sued on, notwithstanding death of mayor, 430.

given to old corporation, may be sued on by the revived one, 304 n. a.

custom in London, &c., in debt on, 336 and n. a.

Bristol and Norwich, 339.

given to a college, 544.

to churchwardens, 603.

and overseers, 611.

elegit to execute judgment on, 382 n. t.

by hospital for renewal of lease, 575 n. g.

Statute of Limitations not pleadable to, 294.

by corporation to mayor, bad, 426.

pleading a, in Borough Court, 465 and n. k.

for money borrowed for building prison, &c., 484.

interest on compensation bond not

BOND—*continued*.

payable out of borough fund, 488
n. *m*.

given by corporation in an University Court, 521 n. *p*.

BOOKS,

refusal to deliver up the, 242. 383—
385. 434 n. *k*.

in boroughs, &c., 242, 243.

whether seizable under a sequestration, 289.

bill of discovery of books, &c., 293
n. *z*.

rule to inspect, 298 n. *r*., 311, 312.

how admissible in evidence, 317, 318.

rule to produce, rasure, &c., 317, n. *q*.

how to be kept, 434.

BOROUGH,

meaning of the word, 341 n. *t*.

name or style of corporation in a, 52.

common seal of a, 58 and n. *b*.

appointment of officer in, 60.

incorporated since Municipal Corporations Act, how to buy land, &c., 108 n. *z*.

effect of alteration of limits of, 185, 186.

style of a borough in the Municipal Corporations Act, not evidence of its locality, 310.

everyone of record in the Exchequer, 324 n. *c*.

what not an improvement of, within s. 92 of Municipal Corporations Act, 488 n. *o*.

name of corporation of a, 342.

liability to taxation of districts added to a, 490 n. *z*.

new boroughs not exactly same as old ones, 342 n. *z*., 346.

limits of the new boroughs, 343—
348.

site of castle of the lord of a, 344. n. *f*.

prescribing for right of common in a new borough, 346 n. *k*.

freemen of a, 504—510.

exclusive jurisdiction in a, 349 n. *g*.

court of record of a. *Vid* COURT OF RECORD.

police office in, 367.

union of churches in, 493.

division into wards, &c., 402—404.

parliamentary franchise in, 411—
413. 507 and n. *y*.

disqualification of aldermen in boroughs having wards, &c., 416.

prisoners of a, where triable, 451.

may be committed to another gaol, 456.

when exempt from county rates, 452. 456.

liable to hundred rate, 453.

jurisdiction of county justices in, when no grant of separate quarter sessions, *id*.

when such grant, how exempt from such jurisdiction, *id*.

liability to repair bridges, *id*. n. *c*. 500, 501.

costs of, for prosecuting, maintaining prisoners, &c., 454—456. 455 n. *r*. how estimated, 455.

gaol of a. *Vid* GAOL.

county gaol within a, 486.

BOROUGH COURT,

actions in, 336, 337.

if held time out of mind, &c., that ought to appear, &c., 337.

customs in, contrary to rules of practice, 337, 338.

discontinuance, miscontinuance, *id*. habeas corpus to a, *id*.

error on judgment in, *id*.

custom of taking out capias in, *id*.

trying by six jurors, 339.

allowing writ of inquiry after defendant has given a cognovit, *id*.

mayor, whose election void, sitting in, 426 n. *c*.

how may be pleaded to be held, 339. 29 Eliz. c. 4, does not extend to judgment in, 354 n. *o*.

BOROUGH FUND,

costs of opposing mandamus when not payable out of, 356 n. *d*.

salary of police magistrate payable out of, 367.

expenses of prosecutions, &c., 373, 374, 429.

payment of special constables out of, 375.

compensation of officers out of, 379—382.

not chargeable with costs of showing cause against rule for mandamus, 408, 409.

chargeable with town clerk's salary, 433.

in the case of treasurer, 439.

how payments to be made from, *id*.

what penalties not payable into the, *id*. 440.

fees and mileage to coroner payable out of, 444.

payment of expenses of prosecuting, maintaining transporting, &c., prisoners, 454—456.

where no contract, &c., 455 n. *r*.

penalties, forfeitures, &c., fees, &c., payable into, 471, 473, 474.

costs of building, &c., district pri-

BOROUGH FUND—*continued*.

son, court house, &c., and of trying prisoners, &c., payable out of the, 483.

and interest, &c., of loan for such purposes, 484.

of what consists, 487 and *n. i, k*, 489, 490, 492.

principal of moneys, &c., not part of, 487 *n. i*.

dividends of stock are, *id*.

money arising from sale of real property not part of it, *id*.

nor from sale of church patronage, &c., 492.

finer, penalties, &c., levied by the corporation payable into, 487 and *n. k*.

trust moneys, &c., payable into, 513. charges upon, 478—489.

interest of compensation bond not payable out of, 488 *n. m*.

nor costs of act of parliament, 488 *n. o*, 499.

petition to Lord Chancellor, 489.

destination of surplus of, 488—490.

jurisdiction of equity over, 489, 490.

BOROUGH JUSTICE,

quo warranto lies for, 254 *n. i*.

BOROUGH JUSTICES,

jurisdiction of, 346 *n. k*, 453, 469, 470, 475, 476.

mandamusto sign poor rate, 411 *n. k*. punishment of, for refusing spirit license, 422.

power to appoint overseers, 424.

action by, for words, 425.

power of, over borough fund, 439.

no power over county gaol, 486.

appeal from their refusal to grant ale license not triable at quarter sessions, 449 *n. s*.

where is triable, 453.

appeal from their orders of removal finally cognizable by whom, 450.

for payment of lunatic's expenses, *id*., 451.

committee of, to treat as to district prisons, &c., 483, *n. m*.

when not entitled to notice of action 453.

resignation of, 475.

information against for absence from duties, 475.

to meet for granting ale licenses, 454. spirit licenses, 454 *n. g*.

appointing of visiting, to district prisons, 483 *n. m*.

in petty sessions, 474, 475.

in quarterly gaol sessions, 474.

of whom to consist, 469.

when first created, *id. n. l*.

how constituted since Municipal Corporations Act, 469.

must reside, &c., 469, 471 *n. b*.

declarations and oaths to be taken by, 469.

power as to poor relief, 475.

who disqualified to be, 469.

when may commit to district prison, 483.

cannot delegate their duties, 469.

limitations, venue, &c., in actions against, 475.

jurisdictions of county justices, 469, 477.

concurrent jurisdiction with county justices, 471, 478.

warrants, convictions, &c. of, 469.

n. u, 470 *n. a*.

form of judicial acts of, 469 *n. u*.

may be ruled to do any act, &c., 475, 477, 478.

not corporate officers, 470.

may fine for contempt, *id*.

exempt from serving on juries, *id*. 480.

may tender oath, 471.

not disabled by being liable to borough rate, *id*.

powers of, to issue warrants for indictable offences, *id*.

commitments by, *id*. 472.

convictions by, 472.

form of, 472 and *n. h*.

appeal from them, 472 and *n. i*.

not removable by certiorari, 473 and *n. k*.

may appoint clerk, 473, 474.

information does not lie for removing him, 474.

may appoint surgeon to borough gaol, 475.

gaoler, 485, 486.

trespass against, to try validity of district rate, 490, *n. a*.

are to allow district rate, 494.

BOROUGH RATE,

mode of making a, 490 *n. y*.

levying a, 490 *n. z*.

on district added to a borough, 490 *n. z*.

parish partly within, &c., the borough, 493, 494.

publication of a, 494 *n. c*.

form of order for a, 490 *n. b*.

warrant respecting a, 490.

estimate for a, 490, 491.

destination of a, 490, 493.

mortgage of a, 484.

appeal against 490 *n. a*. 447 *n. p*. 450 *n. d*.

BOROUGH RATE—*continued*.

may be levied to pay interest, &c., 484.

customary, 490 n. c.

retrospective bad, 491, 494 n. b.

excessive, bad, 491.

special, id.

order and levy of, how far must

correspond, &c., 491, n. h.

effect of levying a, without authority, 428.

how to try validity of a, 490 n. a.

quota payable to, by a parish, 491, 494.

part of a parish, id.

equity will see to application of a, 493.

has jurisdiction over means of raising a, id.

liability to, when does not disable a justice, &c., 471.

BOSTON,

custom of foreign bought, &c., at, 322, 329.

BOUNDARIES,

of the new boroughs under the Municipal Corporations Act, &c., 344—348.

cities, &c., 348—351.

what evidence of, 345 n. h.

statutory alterations of, 349.

BRIBERY,

at corporate elections, 232—236, 266, 421 n. c.

plaintiff in action for, has right to inspect, &c., 312.

at elections for members of parliament, 413.

BRIDGE,

definition of, 500 n. g.

corporation how bound to repair a, 283, 284, 346 n. m.

indictable for non-repair, 164 n. s, 500 n. m.

sources of liability to repair, 453 n. c, 500, 501.

rateable to repairs of, 500, 501.

indictable for not building a, 500 n. g.

may levy rate for repair of a new, 500 n. g, k.

may be sued for non-repair of, 501.

meaning of, in pleading, 500 n. g, i.

repairs of, how compellable by indictment, 500 n. o.

liability of corporation to repair county, 501.

BRISTOL,

chamberlain of, 86.

jurisdiction of, justices of, 346 n. k.

sheriff of, 353.

custom of foreign attachment in, 330.

parol covenant in, 335.

calling woman whore in, id.

in debt on bond, 336, 339.

BUOYAGE,

what, 163.

BURGAGE,

tenants in, as to their voting for members of parliament, &c., 411, 412 n. o.

BURGESS,

not within 6 & 7 Vict. c. 89, 227 n. x.

mandamus to restore a, 227 n. x.

judgment of bribery against a, 234.

may copy entries in minute book of the council, 357 n. l.

to inspect voting papers for councillors, 401.

how to bring action for penalty, &c., against mayor and other officers, 418.

action on case, 427 n. o.

BURGESSES,

as to revising the list of, in a new corporation, 17.

burgesses, meaning of, 30 n. f.

burgess, meaning of in Municipal Corporations Act, 393 n. f.

who are to be, 387—393.

quo warranto to try right to be, 394.

have a freehold in the franchise, 393 n. f.

exempt from serving on juries, when, 480.

how disqualified to be councillor, &c., 397, 398.

disfranchisement of, 398.

how to vote for wards, &c., 404.

lists of persons claiming to be, &c., 435.

BURGESS LISTS,

making up and revival of the, 390—393

refusing to revise, 405, 406.

power of mayor to insert on, 393 n. g.

fine on mayor for neglect, 423 n. h.

effect of being on, between 22nd October and 1st November, 397 n. g.

mandamus to insert on, 405 n. z.

expenses of printing, &c., 487.

refusal of perusing, &c., 406.

title to be on, one qualification for aldermen, 416.

BURGESS ROLL,

who has a right to be on, 387.

making up of the, 393, 394.

mandamus to enrol on, 392 n. c., 406 n. a.

restore to, 393 n, d.

BURGESS ROLL—*continued*.

when begins to take effect in each year, 397 n. *g*.
 copy of, 435.
 how to be made up in wards, 404.
 mistaken use of term, 405 n. *z*.
 none to be removed from, on affidavit, 410.

BUTCHERS,

the company of, 92.

BYE-LAWS,

definition of, 76.
 power of making, when incident to corporations, *id*.
 imposing an oath, *id*. n. *h*.
 on whom binding, 77.
 power of making, where vested, 77 n. *u*.

when bad, 76 n. *h*., 77—80.

if cumulative on a statute, 77, 78.

founded on custom, 78, 79.

must strictly follow it, 79.

powers given in charter, *id*.

regulating elections, 79, 80.

when considered as part of charter, 80.

general rules of, *id*.

when bad though not disallowed, 81.

must not limit discretion given by the charter, *id*.

how far may regulate a right, *id*.

elections to office, *id*.

imposing penalty for refusal of office, 82 n. *x*.

founded on custom, 82 n. *x*.

cannot annul a custom, 83.

in restraint of trade, *id*.

regulation of, 84.

giving power to imprison, *id*.

forfeit goods, 84, 85.

in the nature of a forfeiture, 85.

of distress, 85 and n. *x*.

reasons for, need not be stated in, 86.

in Latin, *id*.

reservation of penalty in, 86 and n. *i*. 87.

who to sue thereon, 87.

construction of, 88, 89.

validity of, how questioned, 89.

effect of exacting money under, 89, 90.

evidence of a, 90, 91.

against, 90.

repeal of, 90, 91.

what evidence that not inconvenient, 90.

effect of usage as to a, 91.

replacing lost bye-law, *id*.

pleading same, 91 n. *r*.

certain kinds of, to be allowed, &c., 91, 92.

effect of allowance, 92 n. *z*.

founded on custom of London, 92.

of railway companies, 92—94.

joint stock companies, 93.

disallowance of a, by railway commissioners, 94.

of municipal corporations, 95—97.

respecting a ferry, 186.

where actions on, may be tried, 194, 195.

chamberlain of London, &c., may sue on a, 195.

officers in general cannot do so, 196.

suing on a, 201, n. *z*., without one, 271.

corporators bound to know every, 207 n. *k*.

suing for penalty on a, 217, 218.

delegating power of election, 218.

cannot narrow number of the eligible, 219.

give casting vote, 219.

settling mode of elections by, 219, 220.

penalty in, for refusing office, 223—225.

to qualify for office, 240.

as to action on a, against corporation, 276.

inspection of entry of a, 312.

meaning of *pain* in a, 362 n. *n*.

in a municipal corporation, 362—364.

what certain enough in such corporation, 363.

how to be enforced in municipal corporations, 364.

validity of, how triable, *id*.

what unreasonable, 364 n. *y*.

to imprison, bad, 370, 371.

ascertaining fine for non-acceptance of municipal offices, 401, 419.

penalties, &c., under old, 487 n. *k*.

breach of a, no ground for quo warranto, 527.

substituting declaration for oath, 539 n. *a*.

oath cannot be imposed by a, 594 n. *d*.

CALLS,

relief in equity against, 292

evidence in action for, 319 n. *a*.

CAMBRIDGE,

University of, reincorporated by statute, 19 n. *b*.

its powers over prostitutes, &c., 516 n. *h*.

may imprison for incontinency, 516.

how visited at different times, 517 n. *n*.

CAMBRIDGE—*continued.*

- statutes of, 517 *n. n.*
 - mandamus lies to, 518.
 - warrants of Charles 2 to, 518.
 - dispensation with statutes of, 518.
 - power in statutes of, to alter and amend, &c., 518, 519 *n. u.*
 - Chancellor of, his power, 518, 519 *n. u.*
 - jurisdiction of court of, 519—524.
 - power of banishment in, 518 *n. s.*
 - Vice-chancellor of, his power to interpret, &c., statutes, 518 *n. s.*
 - visitor of what colleges in, 530 *n. x.*
 - privilege of servants of, 523.
 - letters-missive of Chancellor of, 525.
 - claim of consuance, &c., how made by, 525, 526.
 - is clerk of the market, 526.
 - cannot, as such, imprison, 526.
- CANDIDATE,
- who is, at an election, 204 *n. a.*
 - disabled to be a, 205 and *n. f., i.,* 208.
 - when becomes officer, 210.
 - infancy of a, 211 *n. o.*

CANON,

- a corporation sole, 581. 588—590.
 - who is, 581, *n. x.*
 - mortgage of his canonica portio, 581 *n. b.*
 - right of successor of, 585. 589, 590.
 - to definite portion of revenues, 585 *n. y.,* 593.
 - separate property of, how vested, 581. 585 *n. z.*
 - patronage of, how, 590.
 - levari facias as to property of, 585 *n. x.*
 - bond to, and his executors, 589, 590.
 - changes in situation of a, 592.
 - appointment of a, 592.
 - minor canon, 593.
 - as to ejectment for house, &c., 593 and *n. s.*
 - dilapidations, *id.*
 - where office of, is attached to arch-deaconry, 593, 594.
 - to other offices, 594.
 - institution and induction generally necessary, *id.*
 - when to have inspection of archives, &c., 595.
 - how to sue, 635, 636.
 - ejectment for house by, 637.
- CANTERBURY,
- sheriff of, 353.

archbishop of, whether visitor of University of Oxford, 517 *n. n.*

CARLISLE,

grant of privileges, &c., to, 116.

CARMARTHEN,

sheriff of, 353. 480 *n. n.*

CASTING VOICE,

- at an election, 80.
- of chairman of guardians, 619.
- of mayor, 415. 424.
- cannot be given by bye-law, 219.
- but may by prescription, &c., 219 *n. c.*
- given to chairman of meetings of the council in boroughs, &c., 357. 415 *n. f.*

CERTAINTY,

- what sufficient, in a grant, 31. 52.
- return to mandamus, 228, 229.
- quo warranto information, 258 *n. h., i.*
- indictment, 429 *n. l.*

CERTIORARI,

- to remove indictment against a corporation, 275 *n. s.*
 - costs thereof, 437.
 - what orders of municipal council removable by, 360.
 - as to removal of indictment by, 374 *n. f.,* 496.
 - motion for removal of order of payment by, 378.
 - judgment of quarter sessions irremovable by, when, 450.
 - after delivery of, action lies against recorder, &c., 451.
 - as to removing convictions by, 451, 452.
 - when demandable by crown, 452.
 - attachment for proceeding after delivery of, 462, *n. i.*
 - proceedings when not in general removed by, 463 *n. m.*
 - when must be delivered to the judge, 463 *n. n.*
 - direction of, 463 *n. o.*
 - removal of judgment of borough court by, 466.
 - what proceedings removable by in boroughs, &c., 467, 473, and *n. k.*
 - form of, for removal of order for contract with council for maintenance of prisoners, &c., 473 *n. l.*
 - form of rule for, 473 *n. m.*
- CHAIRMAN,
- of meetings of municipal councils, 357.
 - board of guardians, 619.
- CHALLENGE,
- form of, 480 *n. x.*

CHALLENGE—*continued*.

- to the array, what good, 259 n. *p*, 354 n. *n*, 479 n. *o*, 481.
- of a juror, 316 n. *e*, 420, 588 n. *g*.
- of the polls, 481, n. *y*.

CHAMBERLAIN,

- of London, Bristol, &c., 86.
- custom of London makes him a corporation sole, 659.
- of London, how a corporation sole, 629.

CHANCELLOR,

- of Oxford, *vid.* OXFORD UNIVERSITY.
- of Cambridge, *vid.* CAMBRIDGE.
- the Lord, a quasi corporation sole, 661.

CHANTRIES,

- abolished, 124, 598.

CHAPLAIN,

- of borough gaol, &c., 485.

CHARITABLE CORPORATION,

- person injured by, no right of indemnity out of charity funds, 118.
- bequest to, when bad, 121.
- unduly possessed of estates, 138.
- governor of a, cannot be lessee of, 145.
- always subject to visitation, 553 n. *e*.
- petition to Lord Chancellor respecting, 553, 554.
- not barred by time, 564 and n. *x*.
- taking account in favour of, 565.
- effect of lapse of time as to departure for scheme of a, *id.*
- statutes of, seem to be *imposed* on a, 578.

CHARITABLE USES,

- what, 113—116.
- devise to, must be to a corporation, when, 115 n. *u*.
- lands held to, when administered in equity, 117.
- corporation seized to, how looked on there, 118.
- remedy against, *id.*
- surplus of funds devoted to, 559, 560.
- alienations for, when void, 119, 120.
- abroad, 121, 122.
- and superstitious blended, 125.
- dispositions to, when void, *id.*
- need not appear on face of conveyance, 128.
- as to sale of estate settled to, 137, 138.
- letting lands settled to, 142 n. *t*, 144, 149 n. *g*.
- duration of leases of such lands, 145.
- when leases by corporations not within statute, 150.
- costs of petition to Lord Chancellor respecting estates held for, 489.

- municipal bodies hold property in trust for, 489. *Vid.* TRUSTS.
- gifts for maintenance of schools when good as, 565.

CHARITY,

- nature of a, cannot be altered, 552 n. *a*, *b*.
- surplus of a, 559, 560.
- definition of a, 114, 115.
- costs of a charity suit, 289.
- petition respecting, 512 and n. *p*, *q*.

CHARTER,

- what is, 9.
- granted *de assensu prælatorum*, &c., effect of, 10, 24 n. *k*.
- if confirmed by act of parliament, 10.
- if granted under authority confirmed by statute, *id.*
- once granted irrevocable, *id.*
- mode of obtaining municipal charter, 10 n. *a*.
- charter of private corporation, *id.*
- opposing grant of former, *id.*
- latter, *id.*
- effect of, granting only a limited duration, 10, 11.
- of incorporation, who may grant, 11.
- legal effect of charter other than royal, 11 n. *f*.
- granted to a commonalty, 12 n. *m*.
- use of the word *communia* in ancient, 12 n. *q*.
- defined, 13.
- effect of, on statutory corporation, 7 n. *e*.
- if granted before time of legal memory, 10.
- by subjects, 11 n. *f*, *i*.
- cannot be forced upon a corporation or individuals, 13.
- effect of a new charter, *id.*
- powers of crown to grant charter of municipal incorporation, 16, 17.
- of municipal incorporation, when valid, 17.
- illegality of a, who to prove, 17 n. *u*.
- acceptance of a, what the rule of, 18.
- affidavit of, when necessary, *id.* n. *b*.
- by whole body, when *semb.* necessary, 19 n. *c*.
- must be of the whole or none, 19.
- for ever, *id.*
- may be varied by accepting new one, *id.*
- illegal, effect of acceptance of, 20—23.
- of Bewdley, 20, n. *n*.
- recital in, 21 n. *q*.
- in force until repealed, 21 n. *r*.

CHARTER—*continued.*

surrender of, when valid, 21, 22.
 grant of, in consideration of surrender of a former void charter, nugatory, 22 n. *t.*
 may be good against grantees, secus as to others, 22 n. *x.*
 contrary to statute void, 22 n. *y.* 23.
 with non obstante clause, 23 n. *z.* 25 n. *r.*
 in hindrance of trade, void, 23 n. *a.*
 incorporating aliens, 23.
 of confirmation, 23 n. *g.*
 ignorance of, cannot be pleaded, 23.
 new, why commonly drawn as a confirmation, 23 n. *h.*
 must not be pleaded as a grant and a confirmation, 24 n. *h.*
 how to plead a, id.
 effect of, on a statutory corporation, 24 n. *k.*
 fresh charter by the old name, 24.
construction of, 25—29.
 two intents, 25.
 double intent, 26 n. *u.*
 three intents, 26.
 construction of word majority, &c., 263 n. *h.*
 means of construing, 27.
 what not to be presumed in construing, 27 n. *e.*
 usage cutting down sense of a charter, 28.
 when words doubtful, id.
 how to be taken against grantee, 29.
 repugnant clauses, id.
 when incidents pass by a, id.
 cannot alter the law, id.
 date of, id.
 words of creation, 30, 36, 37.
 must give a name, 30.
 earliest recorded, 31 n. *g.*
 must define limits of municipal corporation, 31 n. *l.*
 when passes tolls, 32.
 concessimus et confirmavimus, how construed, 32, 33.
 consuetudines, &c., 32 n. *r.*
 repetition of same ideas in, id.
 parliamentary, how repealable, 33.
 rights granted by, cannot be interfered with, id.
 words of exemption, how construed in, id.
 disqualification how, id.
 date and delivery of, 34.
 meaning of "years" in, id.
 words conveying monopoly, id.
 prohibiting trade, id.
 restraining it, id.
 of permission to hold courts, id.

direction, 34 and n. *s.* 35.
 power of distress, 36.
 consuance of pleas, id.
 non intromittant clause, id.
 inspection of, 37, 38.
 evidence of, 38, 39.
 presuming existence of, 38 and n. *d.*
 bill of discovery prejudicial to, 38 n. *b.*
 profert of, 38 n. *e.*
 oyer, id.
 copy of a, 39.
 avoidance of, 39—45.
 by statute, 39.
 scire facias, 40, 42—45.
 in part by sci. fa. 40—42.
 validity of, how questionable, 41, 42.
 granted in pursuance of statute, whether repealable, 42 n. *h.*
 how to be cancelled, 44 n. *s.*
surrender of, 21, 22. 45—47.
 when restrained, 46, 158.
 effect of statute upon, 47.
 designation of grantees of a, 48.
 grantees of a, how bound, 70.
 bye-law, when considered part of a, 80.
 giving power to imprison, 85, 86 n. *d.*
 may grant in remainder to corporation which it creates, 111.
 breach of, may render liable to action, 154.
 granting exemptions, 182 notes.
 of foreign corporation, how proved, 200 n. *q.*
 incorporating inhabitants, 203 n. *p.*
 206 notes.
 granted since 7 Will. 4 & 1 Vict. c. 78 . . 253.
 to burn or raise the, 265.
 construction of provisions relating to disfranchisement, id.
 how to obtain a, for a banking copartnership, 276 n. *b.*
 may impose a duty, for breach of which corporation may be indictable, 284 n. *f.*
 surrender of, when restrained, 293.
 bill of discovery to detect breaches of a, does not lie, id.
 probably must be produced, 294.
 cannot be attacked on quo warranto against individual corporators, 295 n. *h.*
 sci. fa. to repeal, 295—298.
forfeiture of, 295.
 new charter after seizure of liberties, 297 and n. *o.*
 what franchises to be claimed by, 299 n. *v.*
 pleading a charter, 299.

CHARTER—*continued*.

new charter altering name, &c. does not necessarily abrogate prescriptions, &c. 301 *n. n.*

new charter, when cannot revive old corporation, 303.

can, 304.

must be adopted by majority, &c.

304, *n. a.*

instances of grants of new, 304 *n. z.*
new, cannot be imposed on University, 515.

surrender of, 306, 307.

inspection of, 311 *n. x.*

custom contrary to, is upset by, 323.
may be used either as a grant or a confirmation, 324.

may erect a county of a city or town, 348.

who to keep the, 434.

under 7 Will. & 1 Vict. c. 78, how not to be attacked, 445.

admiralty, &c., jurisdictions under a, abolished, 449 *n. r.*

sometimes gave power to tax, &c., 490 *n. z. c.*

when undue admission of freemen operates to forfeit a, 504, *n. l.*

how may incorporate a hospital, 568.

explained by founder's statutes, 573,
whether may give veto to master of hospital, 578.

may empower visitor to alter statutes, 578 *n. h.*

construction of granting exemption from toll, &c., to dean and chapter, 595.

CHESTER,

mode of incorporating by charter in the county palatine of, 10 *n.*

custom of foreign attachment in, 330,
sheriff of, 353.

his duty in executing criminals, 353 *n. d.*

CHIEF JUSTICES,

the, of either bench, quasi corporations sole, 661.

CHRIST'S HOSPITAL,

case of discovery by, 122.

a corporation, trustees for, 126, 127.
unduly possessed of an estate, 138.

School Act, does not extend to, 558.

CHURCH,

appropriated to a corporation is disappropriated on dissolution, 303 *n. t.*

sale of church patronage by corporations, 492, 493.

union of churches in boroughs, &c., 493, and *n. t.*

property in a, 606.

CHURCH BUILDING ACTS,
stated, &c., 104, 105.

CHURCH RATES,

corporations when liable to, 285, 501 *n. r.*

mandamus when goes to enforce a, 606 *n. t.*

retrospective, 614 and *n. f.*

CHURCHWARDENS,

a quasi corporation, 500, 601.

which may reside in two persons, 604.

or by custom in one, *id. n. x.*

election, appointment, swearing in of, 600 *n. m.*

have no common seal, 603.

who cannot be, 600 *n. m.*

what acts one of the body cannot do, 604.

are temporal officers, 600 *n. m.*; and mere bailiffs, 606.

notice to one notice to all, 604.

cannot take a lease, 600 *n. o.*, 608 *n. z.*

or real property, 605.

cannot make a lease, 606.

nor take grant of remainder of a term, 605 *n. m.*

oath of, 600 *n. n.*

what actions may bring, 601—603.

what cannot, 602 *n. d.*, 606.

what suits in equity, 603.

what property, &c., in the goods of the parish they have, 601, 602, 605, 606.

cannot covenant, &c., 603.

evidence of tenancy under them, 606 *n. b.*

what gift, &c., they cannot accept, 601.

cannot release debts, &c., *id.*

make promissory note, 603, 604.

warrant of attorney, 663.

rights of successors, 601, 603; and liabilities, 602—604.

predecessors, 601, 602.

de facto churchwardens, 602.

may be removed by parishoners, 601, 604, 605.

when may bring ejectment and how, 605 *n. m.*

all must join in suing, 603.

when may plead general issue, &c., 605.

indictment against, 602 *n. g.*

notice to quit by, 605 *n. m.*

bequest to, for charitable use, 603 and *n. r.*

bond to, 603 and *n. p.*

case against them, 605.

CHURCHWARDENS AND OVERSEERS.

how to sue in ejectment, 190, 279 *n. y.*

be sued in same, 279, 280.

how constituted, 608 *n. y.*

nature of their incorporation, 279, 280 *n. z.*, 607, 609.

majority of, what a, 280, 607.

not partners to bind one another, 607 *n. v.*

whether can mortgage lands, &c., 614.

notice to, 607 *n. v.*

when must produce parish books, 615.

empowered to repay predecessors, &c., 608.

take and hold lands, &c., *id.*

leases, &c., 608, *n. y. z.*, 614.

but not in mortmain, &c., 611.

copyhold lands not vested in, 609.

legal estate in what lands, &c., are, 609 and *n. e.*, 612, 613.

summary jurisdiction as to these, 613.

any member of, may order distress for rent, &c., 610.

cannot defeat act of majority, 610,

whether may plead general issue, &c., 615.

notice to quit by, 611; its form, 613 *n. y.*

bond to, 611, 612, 615.

how execute a lease, 612.

to sue, *id.*

when individually liable on lease to them, 614.

CINQUE PORTS.

courts do not take notice of, 476 *n. d.*

justices of, *id.*

victualler's licenses in, *id.*

barons of, 30 *n. f.*

direction of certiorari to, 463 *n. o.*

jurisdiction of, 453 *n. d.*, 454 *n. k.*

CITIZEN,

meaning of, 343 *n. a.*

CITY,

style of corporation of a, 52, 342.

what not a, 52.

suburbs of a 283 *n. g.*

liberties, 332.

whether crown can create a place into a, 343 *n. a.*, 348.

county of a, rateable to repair bridges, &c., 283.

register of voters for parliament in, 411.

CIVIL LAW.

rule of, as to interest of members in goods of corporation, 2.

adopted in courts of Universities, 519, 520.

CLERK,

service on clerk of a corporation, 275 and *n. o.*

as to bill of discovery against, 287 *n. f.*, 293 *n. z.*

entries by, 318, 319.

CLERK TO JUSTICES,

in municipal corporations, fees of, 374.

clerk of peace cannot be, 443.

how appointed, 473.

his fee, 474, 488 *n. n.*

how restrained from practising, 473.

alderman or councillor may not be, *id.* of a county, 381.

does not hold an office, 474.

CLERK OF THE MARKET,

when indictable, 175 *n. k.*

corporation may be a, 245 *n. u.*

CLERK OF THE PEACE,

of a borough, quo warranto lies for, 252 *n. i.*

infant may be, 443 *n. n.*

how appointed, 443.

cannot be clerk to the justices, *id.*

his duties, 443, 479.

fees, 443.

amotion of, *id.*

mandamus to, when lies, *id.*

power to appoint an assistant, when, 449, 450.

to give notice of holding of quarter sessions, 479.

summon jurors, *id.*

of a county, a quasi corporation sole, 661.

CLERK OF WORKS,

mandamus for, 250, 384 *n. c.*

COLCHESTER,

custom of foreign bought, &c., at, 322, 329.

COLLEGE,

master, of, cannot devise lands to, 110 *n. s.*

devise to a, 114, 115, 123, 124.

may accept, or otherwise, a devise, 124.

when excepted out of 9 Geo. 2, c. 36, 126.

cannot present master to a living, 149 *n. y.*

the Universities not corporations of colleges, &c., 515.

whether power to interpret statutes of a, constitutes a visitor, 518, 519 *n. x.*

COLLEGE—*continued*.

within the privilege, as defendant, of the University Courts, 521.
 privilege of servants of a, 522, 523.
 nature of the incorporation of colleges in the Universities, 529.
 style of the corporation of a, *id*.
 every, has a visitor, *id*.
 names of head of, need not be stated in pleading, 529 *n. o*.
 meaning of the term, *id*.
 domus in statutes of, 529 *n. t*.
 "admission to office" in, *id*.
 how compelled to perform a contract, 532.
 trust, 532 *n. o*.
 effect of visitor's interpretation of statutes of a, 529 *n. t*.
 power of visitors of, 531—540. *Vid*. VISITOR.
 publication of statutes of a, 530 *n. v*, 293 *n. b*.
 elections in, 531, 532 *n. l*.
 contrary to the statutes, 530 *n. z*.
 abuses in, 532 *n. l*.
 dispensation with statutes of, when presumed, 530 *n. z*.
 notice not taken that college has a visitor, 532 *n. q*.
 offences against statutes of, 530 *n. z*.
 when visitor becomes head of, 531 *n. a*.
 nature of foundership of a, 531.
 majority in a, *id*.
 right of admission to a, 531, 541.
 fellow of, 532 *n. l*.
 may assign profits of fellowship, 537 *n. k*.
 as to letting rooms of a, *id*.
 his title to revenues, &c., 538.
 mandamus does not lie to restore, 538.
 oaths of, 539.
 scholars of, 532 *n. l*.
 fellow-commoners, 533, 534.
 visitor has right of entry, &c., into, 536.
 members of a, sworn to observe statutes, &c., *id*.
 incident to places of corporators of a, to submit to visitation, *id*.
 acts of parliament in favour of a, how construed, 539.
 when chargeable with costs of a visitation, 536.
 devise of advowson to, in trust, &c., 543.
 effect of suspension from office in, 537 and *n. h*.
 contumacy, when cause of deprivation in a, 537 *n. f*.

how to plead deprivation of head of, 537 *n. g*; to bond given to college, 544.
 profits of fellowship of a, may be assigned, 537 *n. k*.
 mandamus does not go to restore to fellowship in, 538.
 letting fellow's rooms in, 537 *n. k*.
 how to plead seisin, 538 *n. l*.
 effect of sentence of expulsion of member of, 538.
 mandamus to admit close fellow, 544.
 no *right* of admission to a, 538 *n. n*, 541.
 may be a visitor of a school, 538 *n. o*.
 practice as to grant of a rule for mandamus against a, 538 *n. p*.
 return to mandamus, 540.
 close fellowships in a, 539 and *n. t*, 543, 544.
 annexed fellowships, 552 *n. c*. 543 *n. x*.
 quo warranto does not lie to try right to a fellowship, 539.
 bill to discover college statutes, *id*.
 mandamus to amove from fellowship, *id*.
 dictum of Lord Mansfield respecting, 540 *n. e*.
 not bound by acquittance given by head, 544.
 name of a, 540, 541.
 how rateable to the poor, 541 and *n. k*.
 to land tax, *id*.
 property tax, *id*.
 has absolute power over admission to, 541.
 cannot add to permanent number of its corporators, 541.
 nor can founder, 543.
 an action on the case against a, 542 *n. s*.
 when must use its common seal, 541.
 leases of, 544.
 must authorize bailiff to enter for condition broken by, 541 *n. m*.
 whether stranger may receive deed to use of a, 544.
 how to accept addition to their endowments, 542.
 indenture of annexation, *id*.
 not bound to accept accession to their property, 542 *n. q*.
 instance of refusal of same, *id*.
 whether can accept without consent of crown, when visitor, *id*.
 compelled to perform a trust like individual, 542.
 visitatorial power as to annexed fellowships, &c., 542, 543.

COLLEGE—*continued.*

bound by statutes of annexed foundation, 542.

when equity interferes to compel execution of trusts of annexation, 542 n. s.

covenant in deed of annexation how enforced, *id.*

limitations on a devise to a, 545.

devise for the benefit of particular member of a, *id.*

misnomer of, in a devise, 545 n. o.

in universities, not restrained as to purchase of advowsons, 546.

how empowered, 550.

cannot present head to a living, *id.*

devise of lease of, 546.

may advance money for repair of parsonages, &c., 550.

renewal of lease of, 546, 557.

leases of, generally, 549 and n. r.

order entered on audit book not binding on unless under seal, 546.

list of cases respecting colleges, &c., 550, 551.

members of a, when personally responsible, 546, 547.

petitioning Great Seal against, 563.

how to account for waste of funds, &c. 547, 548.

tenant of void lease of a, 547 n. a.

pleading lease of a, *id.*

members of, may be liable for misdeeds of predecessors, *id.* n. c, 548.

when equity will interfere in case of trusts, though there is a visitor, 548; when not, *id.* 554 n. e.

must not mix charitable funds, 548, 552 n. a.

costs of recovering against a, for a misappropriation of charity funds, 548 n. k.

how may augment livings, &c., 548, 549.

identity of lands within manors of a, 549.

how convey land for sites of schools, *id.* 550.

benefices annexed to headships of, 550.

COLONY,

how to grant, &c., lands situate in a, 147 n. h.

COMMISSARY,

of a visitor, 535 and n. m.

COMMON,

bye-law of a corporation regulating enjoyment of, 79 n. l.

lands included in Statute of Mortmain, 99 n. l.

in gross, 185, 327 n. b.

reservation of rights of, 185, 505, 509.

of estovers, 185, n. b, 327 n. b.

turbary, 324 n. f.

freeman, how to prescribe for, in a new borough, with increased limits, 346 n. k.

COMMONALTY,

use of the word, 12 and n. q.

could not incorporate, 12 and n. m.

COMMON SEAL,

release by every one of the corporators bad; ought to be under the, 1, 55 n. n.

effect of levying troops under, 3.

individuals liable for illegal acts done under, *id.*

bond under, but in name of all existing corporators, *id.*

acceptance of charter need not be under, 23.

omission to grant power to use, 30.

corporation aggregate speaks by its, 55.

rule as to affixing the, *id.*

keepers of, refusing to affix, 55, 56.

to answer in chancery necessary, 56.

when unnecessary where there are directors, &c. *id.*

must be put to return to mandamus, 57. *Vid. tam.* 63.

requisite to divest an interest, *id.*

what not a substitute for *id.* n. p.

whether necessary to create tenancy at will, *id.*

to appointments to offices, 58.

to removals from office, *id.*

incident to corporations, *id.*

whether proof of being a corporation, *id.*

when necessary to discharge an officer, *id.*

what may be, 59.

whether may be changed, *id.* 60.

to warrant of attorney, 60.

submission to arbitration, *id.*

presentation to living, *id.* 61.

does not validate a contract which the corporation make, 60.

exceptions to rule of corporation acting by, *id.*

assumed to be affixed, 60 n. u.

need not be to bills and notes by trading corporations, 61.

nor to orders for inserting advertisements, &c., *id.*

to appointment of agent, *id.* n. c.

absence of, when not an objection in mouth of a defendant, 62.

to act of amotion, 240 n. i. 244.

COMMON SEAL—*continued*.

disfranchisement, 264 *n. i.*
 contracts not under the, when enforced, 62.
 when needed to authorize small acts, *id.*
 presumption of, in debt, *id.*; trover, 63.
 as to indicting for fraud in absence of the, 62 *n. k.*
 acts not requiring, 63.
 affixing, equivalent to delivery of deed, &c., *id.*
 how performed, 64.
 effect in protecting individuals, *id.*
 cannot be assumed at pleasure, *id.*
 to a surrender, 65, 127, 128, 158.
 bond, 65.
 what acts legal without the, *id.*
 proof of, 66.
 how to be affixed, *id.*
 when does not indicate a corporation, 67.
 may be affixed by the minority, 71.
 necessary to accept grant under, 110.
 cannot be affixed during a vacancy, *id.*
 indispensable to pass an interest, 147, 148.
 is irremovable from domicile of corporation, 147 *n. h.*
 affixing equivalent to delivery, 147, 148.
 authority under, to distrain, 150 *n. b.*
 enter for condition broken, 151.
 as to mutuality of contract not under, 178 *n. m.*, 194, 618, 619.
 whether must be affixed to appointment of steward of a manor, 188 and *n. k.*
 acquittance of debt due to corporation must be under the, 428, 429.
 in case of distraining for amercement, &c., 188, 189.
 need not be averred to be affixed to the demise in ejectment, 189.
 to notice to quit, *id. n. z.*
 when implied to have been affixed, 190, 191 *n. n.*
 to appointment of attorney, 190.
 auditors in account need not be assigned under the, 192.
 of foreign municipal corporation, 200 *n. r.*
 not needed to give title to an officer, when, 210 *n. n.*
 effect of, to promissory note, &c., 276.
 presumption of, in trover, 277, 278.

usurping an, is illegal, 281 *n. p.*
 when not sufficient evidence, 288.
 to application to parliament for a fresh statute, 290.
 effect of want of it, to a contract, 294.
 persons assuming a, liable to quo warranto, 300.
 necessary to authenticate consent of corporation to surrender, &c., 302.
 putting to surrender, without such consent, indictable, 306 *n. h.*
 corporation without a, 310.
 want of, some evidence, that the body not a corporation, 310 *n. p.*, 568.
 proves itself, 310.
 entry in minute book not equivalent, 357 *n. k.*
 mandamus to affix to appointment of officers, 378 *n. c.*
 does not go to detach. *id.*
 ought to be put to appointment of town clerk, 433.
 so to retainer of town clerk, 433 *n. m.*
 must be to resolution to compensate, &c., 436.
 contract for improvements of the borough, 488 *n. o.*
 warrant respecting borough rate, 490.
 conveyance of advowson, church patronage, &c., 492.
 assent to union of churches, 493.
 warrant to distrain for bridge rates, 501 *n. u.*
 appointments, &c., under charitable trustees, 513.
 to order or resolution of a college, in order to bind the college, 546.
 visitor cannot compel the affixing of, 532 *n. p.*
 lease sealed with seal of agent, and not with common seal, bad, 546 *n. z.*
 return to mandamus by college need not be under, 540.
 cannot be removed, 576.
 of a college, 541, 544.
 presumption from absence of a, 568.
 of a hospital, 579.
 dean and chapter, 586, 587, 591, 597.
 effect of want of, in churchwardens, 603.
 and overseers, 609, 614.
 guardians of the poor may have, 616.
 effect of contracts of, not under common seal, 617, 618.
 effect of their dissolution on contracts under, 621.

- COMMON SEAL**—*continued*.
 joint stock companies must contract under, 625 n. s.
 but bound by parol contracts, *id*.
 corporations aggregate to execute building leases under, 655, 656.
- COMMUNIA**,
 use of the word, 12 n. q.
- COMPENSATION**,
 to officers removed, &c., 379—382.
 town clerk, 436.
 bonds for, 436 n. l, 488 n. m.
- COMPOSITION WITH CREDITORS**,
 disqualifies from retaining what municipal offices, 417, n. s.
- CONCESSIT SOLVERE**,
 debt, on, 336.
 pleadings in, *id*. n. f.
- CONFIRMATION**,
 charter of, 23.
 of parsons' leases, &c., 640, 642, 643.
 bishops, 639.
- CONSTABLE**,
 quo warranto for, 262.
- CONSTABLES**,
 in municipal corporations, how to be appointed, 367, 368.
 who fit men, 368 n. q.
 exempt, *id*.
 notice of appointment, *id*.
 quo warranto for office of, 368.
 indictment for refusing office, 369.
 oath, *id*.
 mandamus to restore or discharge, *id*. n. e.
 swear in, 368 n. r.
 notice of action, 369 and n. y, and costs, 369.
 venue, 369.
 not corporate officers, 368 n. r.
 do not gain a settlement, 368 n. t.
 powers of, 369, 370.
 punishment of, 370 and n. g.
 whether dissenters exempt from being, 368 n. q, 370.
 office of, whether may be served by deputy, 370.
 duties of, 371, 372.
 protection of, 372, 373.
 expenses of, 372 and n. y.
 special constables, 374, 375.
 number, &c., of, to be reported, &c., 375.
 in the Universities, 523 n. f, 527 and n. b.
- CONTEMPT**,
 what a, of the mayor, 422 and n. x.
 425, 428, 429; incorporators, 463, 464.
 fine for, by justices, 470.
 of Chancellor's Court in Universities, 516 n. i.
- CONTRACTS**,
 simple contracts binding a corporation, 55—57.
 principles on which rest, 60—62.
 equity, when interferes to enforce, 62, 619.
 annul, 576.
 contracts of joint stock corporations bind them though not under seal, 625 n. s.
 mutuality of, 62 n. k.
 corporation suing on, estopped to say not duly entered into, 63.
 contracting to grant lease, 147 n. e.
 executory and executed, 149.
 of sale, executed by mayor, 152, 153.
 not under seal, not necessarily mutual, 178 n. m, 617, 618.
 by guardians of poor, 617, 618, 619.
 when bind the corporation, though made before it was incorporated, 294.
 made by an agent, 294, 546 n. z.
 what disqualify to be councillor, &c., 397, 398, 407, 417, 426.
 for maintaining, &c., prisoners, 473 and n. l, 454—456, 484.
 committing prisoners to gaol of another borough, 456.
 with committee of district prison, 456 n. x.
 these last may be made contingently, 482 n. k.
 and when in existence, save from the obligation of maintaining a borough gaol, 482.
 of guardians of poor, in case of their dissolution, 621.
- CONUSANCE**,
 claim of, by Universities, 522, 525, 526.
 affidavits in answer to, 522 n. d. Vid. UNIVERSITIES.
- CONUSANCE OF PLEAS**,
 how to be claimed, 36.
 extent, of, *id*.
 in Norwich, 47.
 effect of grant of, 329, 464.
 pleading, &c., 464.
 operation of statute giving an old form of action in a new case, &c., *id*.
- CONVEYANCE**,
 by or to corporation, as to name in, 51, 52.

CONVEYANCE—*continued.*

formalities of 9 Geo. 2, when needed in, 108.

what best mode of, 139, 140.

CONVICTION,

at quarter sessions, whether removable, 451.

for keeping open beer-house, &c., 454 *n. g.*

COOKS,

the mystery of, &c., 200 *n. m.*

COPYHOLD,

corporation aggregate cannot hold lands in, 109.

not vested in churchwardens and overseers, id.

corporations sole cannot hold by, 630.

CORONER,

whether within 6 & 7 Vict. c. 89, 227 *n. x.*

quo warranto for office of borough coroner, 262.

venire facias, when awarded to, 480 *n. x.*

removing inquisitions of, in a county of a city, 351.

directing process to, 354.

in what borough to be appointed, 444.

his fees, id.

how to be elected, id.

his duties when sheriff is a party to a suit, &c., id. 445

cannot be justice of peace, 469.

to lay an account of all inquisitions, &c., before the council, 445.

how to try right to the office, id.

motion of, id.

deputy coroner, 444 and *n. q.*

CORPORATION,

definition of, 4.

an abstraction, 3.

what cannot do, id.

a single person, 4 *n. s.*

members of, 5.

indispensable requisites to creation of, id.

how may be formed, id.

most usual mode, 6.

five origins of, id.

sole and aggregate, id.

proper, 5.

prescriptive, 7.

how to plead a prescriptive corporation, id.

parliamentary, id.

how may be altered, id. *n. e.*

statutory powers of, 7.

dividing a, 8, 12 *n. q.*

compounding two or more into one, 8.

by implication, 8, 30 notes *e, f.*

private or public, 9.

how may be empowered to create a corporation, 12.

municipal could not create municipal, id.

restricted to the objects specified, in its charters, 13.

name, 13, 14, 24, 25.

must sue, &c., by its, 50.

by implication, id.

in leases, &c., 51.

of municipal corporations, 52.

place formerly essential to, 14.

not now, 53, 54.

naming of first corporators in, 14.

at common law cannot exist for a limited period only, 15, 16.

by statute may, 16.

erection of a municipal, still a common law prerogative of the crown, id.

powers of crown therein, 16, 17.

majority of, must accept new charter, 19.

by charter, may be reincorporated by statute, 19 *n. h.*

need not accept new charter under common seal, 23.

what is such acceptance by, id.

era of corporations, 31 *n. g.*

prescriptive, how to be abated, 42 *n. h.*

how compellable to bring in charter to be cancelled, 44 *n. s.*

what, restrained from surrendering charter, 46.

reconstruction of, after surrender, id.

of what number may consist, 48.

a county cannot be incorporated, id.

compound, id.

whether compound or not, a fact for a jury, 49.

how opened to every one, id.

need not be named of a place, when, 53, 54.

whether can be two of same name, 50.

devise to, 51.

lease by, id.

may purchase by what name, id.

naming in bill in equity, 53.

how acts and binds itself, 55.

trading corporation how bound, id.

how answers in chancery, 56 and *n. u.*

makes feoffment, 56.

lease, id.

presentation to living, id.

appointment of attorney, id.

surrender of lease, id.

contract to pay money, &c., id.

borrow money, id.

CORPORATION—*continued.*

- authorizes bailiff to enter, &c., id.
- after adopting agent's act, cannot object that his authority was not under the common seal, 57.
- when may bring use and occupation, id.
- proof of claim to be a, 58.
- servant of, how to justify in trespass, 59 n. *k.*
- when cannot bind them, 59.
- how commanded to do small acts, 60.
- if trading, may accept, &c., bills and makes notes without seal, 61.
- so may order insertion of advertisements, id.
- execution of writ, id.
- agent of, suing, 61 n. *c.*
- binding them, 61.
- when not bound by simple contract, id.
- liable for money had and received, id. n. *g.*
- cannot object to the absence of their common seal to a contract, 62, 63.
- cannot indict in such case, 62 n. *k.*
- when not, by seal unduly affixed, 64.
- who may not sue as a, 65.
- how to surrender, id.
- acts by majority, 68.
- its will, how ascertained, 69.
- how relieved in equity, 71, 72.
- bye-laws*, 76—97.
- when bound to pursue remedy given by statute, 79 n. *n.*
- cannot sue in their own name on bye-law, 87.
- bound by bye-law, 88.
- may be sued by an officer, 89.
- liable in trespass, id.
- exaction of money under bye-law may be fatal to, id. 90.
- books of, when evidence of bye-laws, 90, 91.
- property*, 98.
- power to purchase, id.
- license in mortmain not essential to a, 101 n. *z.*
- grant by, for church endowment, 106 n. *n.*
- purchasing fee-farm rents, 107.
- mode in which takes lands, &c., id.
- could not do homage, &c., id.
- cannot hold by copy, 109.
- be joint tenant with another corporation of land, id.
- may be tenant in common, when, id.
- whether has a fee-simple, id. 110.
- lands of, when revert to donors, id.
- how to accept grants, &c., 110.
- state of, during vacancy of its head, id. 111 n. *t.*
- may take rent issuing out of lands in tail male, 111.
- could not take lands by devise, 112.
- may now, 113.
- take in trust for individual, 115.
- when hold lands subject to equity, 116.
- bequest of money to a charitable, 117.
- must account for trust funds, id.
- lands of, how revert, id.
- compellable to discover, id. n. *u.*
- chargeable with interest of trust funds, 118.
- remedy against corporations trustees of charities, id.
- grants to, void, when, 119.
- devise to a non-existing, 123.
- remainder in a corporation when divested, id.
- head of, cannot devise to, id.
- may accept, &c., a devise, 124.
- grants, &c., to, for charitable uses, when void, 125.
- may take husbandry lease, 127.
- when has only the management of property, 128, 129.
- whether may grant real property, 129—153.
- undertaking public trust, cannot divest themselves of means of performing it, 136 n. *t.*
- when not accountable in equity, 138, 139.
- may hold in trust for private purposes, 139 and n. *k.*
- omnia rite acta applied even against, 143 n. *b.*
- name of, in a lease, 145, 146.
- demise in ejectment, 146 n. *b.*
- how to grant, &c., lands lying out of England, 147 n. *h.*
- declare on their deed, 147 n. *l.*
- may be enfeoffed by a corporator, 149 n. *y.*
- cannot lease trust estates, when, id.
- may lease in mortmain, 150.
- when estopped to deny assignee of term to be their tenant, 152.
- when may act under general authority, 154.
- liable to action in case, id.
- how does corporate acts, id.
- incident to trading corporation to apply to parliament, when, 159.
- may sue for duties*, when, 159.
- when may have port duties, 160 n. *e.*

CORPORATION—*continued.*

indictable for non-repair of a port,
161 *n. p.*
responsible to party injured, 164.
how to prove right to market toll,
167 *n. u.*
liability of, under grant of market,
168.
how may demise a market, 169 *n.*
h. tolls, 170; forfeit, 169,
distraint for market tolls, 170,
171.
remedy for subtracting of tolls, 171,
172.
placing market stalls without
leave, 174 *n. y.*
as to suing and being sued for tolls,
177, 178.
indictable for misfeasance, 180 *n. b.*
when relieved in equity as to tolls,
182.
may sue for breach of right of their
corporators, 184.
bye-law respecting a ferry, 186.
be lord of a manor, 187.
their remedy as such against
steward, &c., 188.
how to appoint him, 188 and
n. k.
be inappropriate rector, 191.
sue for injury done to their head,
&c., 193, 197.
prove debts, &c., 197.
move to rescind final order, &c.,
198.
as to suing as common informer, &c.,
id.
in ecclesiastical courts to have
faculty to enable them to oc-
cupy a pew, &c., 198, 202.
as to suing in equity, 199, 200.
foreign corporations suing here,
200, 201.
may be executor, 202.
sue corporator for refusing office,
221.
discretion of *a*, not interfered with,
226 *n. u.*
power of amoving from office, 240—
247.
obligation of same, 243.
court does not interfere with a pri-
vate, 272.
what officers may fill, 245.
have a veto on resignations, 268.
how compelled to perform duties,
269—271.
conform to general law, 271 *n. m.*
constitution of *a*, is obligatory, 270
—272.
suspended, 270 *n. k.*

for purposes of trade, whether can
sue a corporator, 271.
not compellable to declare dividends,
272.
how to recover statutory debts, 271
n. r.
how compelled to appear, 274, 275.
only can appear, 274 *n. h.*
served with writ to summons,
274, 275.
waiver of service by *a*, 275 *n. r.*
head of, need not be named in writ,
275 *n. o.*
notice to any member not notice to
the body, 275 *n. r.*
for what may be indicted, 275.
when not bound by bills, promissory
notes, &c., 276.
action on case lies against, 277.
right of, to stop for debts due to them
out of dividends, 276 *n. c.*
may hold an office, 277 *n. f.*
be inhabitants and occupiers, 285.
when may sue a member, 276, 277.
cannot do wrong, &c., 278 *n. h.*
when liable for tort of their agent,
278.
in ejectment, 278—280.
for poor rates, 285.
how to be indicted, 284.
whether can enter into recognisances,
284 *n. e.*
when not accountable in equity,
281.
not liable for certain acts done by
majority, *id.*
how to proceed against persons claim-
ing to be *a*, 281, 282.
whether assuming to act as *a*, is an
offence, 280 *n. p.*, 282.
de facto, effect of bond by, 283.
fine on, how leviable, 284 *n. d.*
indictable for disobeying order of
quarter sessions, 285.
liable to repair turnpike roads, *id.*
sequestration in equity, 286.
colourable suing in equity, 286.
individuals cannot be permitted to
appear on the record as *a*, *id.*
cannot be sued during a vacancy, *id.*
n. z.
name of the head need not be stated
in suit against, 286 *n. z.*
as to parties in suits against, 287.
without the jurisdiction of equity,
287 *n. d.*
must be joined with clerk, &c., in
bill of discovery, 287.
when party to breach of trust how
may be sued in equity, *id.*
how, when connected with land, *id.*

CORPORATION—*continued.*

punished for contempt in equity, 288, 289.
 pays costs of charity suit, when, 289.
 when equity interferes against a, 289, 292.
cannot act beyond scope of its institution, 291.
 a statutory, acting within its powers, cannot be relieved against, 292.
 may be bound by contracts made before it was incorporated, 294.
 when may repudiate contract of an agent, *id.*
 Statute of limitations as to, *id.*
 how to take advantage of want of jurisdiction in court where sued, *id.*
how dissolved, 295—303.
 by prescription, how dissolved, 296.
 custos of a, when appointed, 297 n. n, 302.
 whether franchise of being a, may be seized, 298 n. r.
 never dissolved for want of appearance to a quo warranto, 298, 299.
 persons assuming to be, liable to quo warranto, 300 and n. k.
 not altered by change of name, &c., 301 n. n.
 cannot be dissolved at pleasure of the crown, 302.
 when integral part is gone, 302—304.
 not duly electing their head, 303.
 dissolved for some purposes only, 303—305.
 when not revivable by new charter, 303.
 property passes from it on dissolution, *id.*
 the franchises of, 303 n. r.
 annuities payable to and by a, 303 n. t.
 personalty of, on dissolution, 304.
 offices, 307 n. h.
 aggregate, not same as aggregate of its members, 304 n. y.
 wanting an integral part, continues to act, 304 n. z.
 by prescription, how to dissolve itself, 306, 307.
 evidence of name of, 310.
 parliamentary, how to be dissolved, 307, 308.
 cannot surrender, 308.
 whether a body is a corporation is for the jury, 310.
 not liable to disclose grounds of defence, 313.
 show books, when, 314, 315 n. y.

evidence of notice to a, 315.
 challenge in action by, 316 n. e.
 acts of, how proved, 317.
 cannot make evidence for itself, 318.
 exceptions, 319.
 for what cannot prescribe, 320, 325.
 alteration of name, &c., does not destroy prescriptions belonging to, 323.
 when cannot prescribe, 324 n. d, 325.
 may be indictable for breach of custom, 328 n. o, 334.
 prescribing for keyage, &c., 329.
 may bring case for breach of custom, 335.
 in a borough affected by the customs thereof, 339.
 has no common law power to appoint constables, 368.
 when may augment a priest's stipend, &c., 492 n. r.
 when liable to poor rate, 496.
 of proprietors of waterworks, when and how liable to the poor, 496 and n. n.
 notice to one member not notice to all, 604.
 when said to be inhabitants and occupiers, so as to be liable to poor, bridge, highway, &c., rates, 496—502.
 place not essential to a spiritual, 598.
 privileges of University Courts extend to a, 521.
 when cannot renounce an annuity, 559.
 may be visited by another corporation, 534 n. c, 561, 562.
 when barred by Statutes of Limitations, 564 n. x.
 what does not constitute a corporation visitor, 537, 561, 562 n. b.
 how may appoint to mastership of a school, 564.
 must perform a trust like an individual, 542, 562, 563.
 power of appointment to school by, 564.
 liability of successors in, for misdeeds of predecessors, 547 n. c, 561.
 how to demand tithes, 564 n. u.
 misappropriation of charity funds by, 548 n. k.
 as visitors of a school, 562.
 when takes surplus of charity funds, 559—561.
 judicial notice to a, 580 and n. q.
 two persons may constitute a corporation of a free grammar school, 558.

CORPORATION—*continued*.

cannot be sued in trespass along with its head, 591.

empowered to convey lands for sites of schools, &c., 558; and to accept grants of lands for education, id.

obliged to compensate misappropriation of charity funds, 561.

cannot contract with their visitor, 576.

every, may convey lands, &c., to guardians, 616 *n. k.*

CORPORATIONS SOLE,

definitions of a, 48, 626.

origin of, 626.

creation of, by implication, 632.

when fee simple passes to, 110.

how to plead seisin in, 136 *n. r.*

to state name in demise in ejectment, 146 *n. b.*, 189, 190.

Chancellor of Oxford seems to be a, 515 *n. d.*

constituted by grant of advowson to senior fellow of a college, 543.

lands, how to be granted to, 632.

exchange of advowsons by, 635.

instances of, 594.

presentations to livings by, 632 *n. o.*

cannot be copyholders, 630.

license in mortmain to, id.

bond given to, and his successors, &c., 589, 590, 629 and *n. q.*

cannot take goods in succession, 626, 630.

erection of, by letters-patent, 626.

a queen regnant a, 627.

the king a, 626.

has two capacities, 627.

may take, &c., lands in natural capacity, 627 *n. u.*

how said to be invisible, 627 *n. t.*

may take chattels in succession, 629.

demise of, 630.

grant of lands to, 630, 631.

in frankalmoign, 632.

a bishop a, 629.

grant of lands to, 630, 631.

an office to, 631.

a parson a, 636.

an archdeacon a, 656.

corporate seal of, 633.

how might be enfeoffed to free alms, 632 *n. x.*

grant to, when not to be made in time of vacancy, 632.

divests interest by deed, 634.

resignation of, 635.

disclaimer of, 638.

whether may authorize entry, &c., by parol, 634.

grant of an office by, 635.

cannot grant, &c., to themselves, id. mode of trying right to be a, 635, 638.

leases by, 641.

how to prescribe, 636.

whether may exist though deprived of lands, id.

restrictions on disposal of lands, 638, 639.

there must be a rent reserved, 642 *n. y.*

chargeable, with annuity, 636 *n. c.*

arrears of annuity when go to executor, 639.

waste by a, 637.

injunction against, 644.

prohibition, id.

how to sue, 635, 636.

to be sued, 635, 636 *n. y.*

abatement of suit by death of, 637.

will be presumed duly appointed, id.

effect of excommunication of, id.

whether may appear in person in action, 636.

instance of appearance in person, 636 *n. a.*

effect of judgment against, 639.

acceptance of rent by successor, 640, 642 *n. y.*

debt for rent by, 649.

when lands not let at ancient rent, 651.

cause of deprivation, 644, 645.

effects of it, 631.

may take, &c., lands to charitable uses, 648.

cannot make leases without reserving rent, 642 *n. y.*

consent of patron, &c., 643.

except of what objects of demise, 649, 652.

renewals of leases by, 652—654.

liable to dilapidation to successor, 644 and *n. k.*

successor of, shall not be impoverished, 645, 646.

when bound by covenants, &c., 646 *n. c.*

not bound by grant of new office, 647, 648.

cannot permit usurpation, 647.

may be lords of manors, 650, 651.

successors bound by the custom of the manor, 650 *n. k.*

renewals of leases for lives by, 652—654.

conditional surrender of lease for lives, 652, 653.

CORPORATIONS SOLE—*continued.*

- exchange of lives in, 654.
- lessee under lease bad by 6 & 7 Will.
4, c. 20, not bound to pay rent,
654.
- building leases by, 655.
when void, *id. n. h.*
parsons, &c., in London, *id. n. e.*
whether to be executed by corpo-
rate seal, 655, 656.
- may grant lands for sites of schools,
656.
- rector a corporation sole, 656 *n. s.*
- perpetual curate one when, 657,
658.
whether within Statutes of Mort-
main, 657, 658.
may take by devise, 657 *n. e.*
what constitutes a, 658.
- ministers of district churches, 659.
- Chamberlain of London, *id.*
- resignation of, and effect, *id.*

CORPORATORS,

- interest of, in goods, &c., of corpora-
tion, 2.
in real property corporeal, 3.
- aggregate of, not the corporation, *id.*
- not liable for corporate acts, 5.
- who may be, 5.
- who not, 6.
- have the option to accept a new char-
ter, 13.
- first corporators how may be named,
14.
- majority of, must accept charter,
18.
- necessity of proof of acceptance of
incorporation by, 20.
- what is such proof, 23.
- cannot plead ignorance of their char-
ter, &c., *id.*
- inhabitants cannot be obliged to be-
come, 26 *n. b.*
have no inchoate right to be, *id.*
cannot be forced to be a corporation
by the crown, 33.
- claims to exemptions, how proved,
33, 34.
- inspecting charters, 38.
- consent of *all*, when necessary, 46.
- number of, 48.
- naming all the, in bill in equity, 53.
criminal proceedings, *id.*
- signature of majority to a resolution,
55.
- information against, when lies, 64.
- concerned in affixing common seal,
when protected, 64.
- objecting to bye-laws, 78.
- disfranchising a, 262—267.
- causes of same, 265—267.

- duty of to attend corporate meetings,
265 *n. s.*
- suspension of a, 267.
- resignation of a, 267, 268.
- release of his right, 268.
- whether may be sued, &c., 271.
- disputes between, will not be settled
by the Queen's Bench, 272.
- when may maintain suit in equity
against the corporation, *id.*
- when not suable by them, 276, 277.
- when liable to information, 281.
costs of wilful delay, *id.*
quo warranto, 282 *n. s.*
for contempt in non-payment of
rates, 285.
- when may file a bill against the body,
286 and *n. c.*, 290 *n. (g)*, 292.
- the grounds of relief from calls, 292.
- applying for inspection of books, 298
n. r., 311—314.
- persons cannot become, in order to
inspect, &c., 312 *n. e.*
- effect of admission by, 315.
- admissibility of, as a witness, 315—
317, 501 *n. b.*
- challenge of as a juror, 316 *n. e.*,
481.
- entries when not evidence against,
319.
- when ought to prescribe in the cor-
poration, 320.
- of an University, 515, 516.
- may appeal to a visitor, stranger can-
not, 533.
- has no seisin in the realty, &c., 538.
- when personally responsible for acts
done in the name of corporation,
546, 547; and how, 547 *n. b.*
- may be responsible for misdeeds of
a former generation, 547 *n. c.*
- of hospital, how nominated, 571 *n. p.*
576, 577.
- classes eligible to be, 81, 82.
- what does not confer right to be, 89.
- evidence of deceased, 90, 91.
- exemption from tolls of, 97 *n. e.*
- may take leases from corporation,
149.
- when may enfeoff their corporations,
id. n. y.
- whether may distrain without autho-
rity, 151.
- summons to, 155—157.
- bound to attend corporate meetings,
155.
- as to privilege from arrest, 156, 157.
- when responsible for corporate acts,
157, and *n. l.*
- may be witnesses for corporation,
166 *n. l.*

CORPORATORS—*continued.*

corporation may take a grant for their, 184.
 prescribing in their corporation, 185 *n. y.*
 how to claim exemptions from juries, 193.
 remedy for breach of, 200.
 indictable, &c., for refusing office, 193, 221.
 kindred to, cause of challenge of juror, 193 *n. g.*
 may sue in equity, when, 200.
 admission requisite to constitute, 203 *n. p.*
 non-attendance of, at corporate meetings, 204 *n. d.*
 bound to know their bye-laws, &c., 207 *n. k.*
 times of the corporate meetings, 211 and *n. u.*
 bound to know their election to offices, 217.
 judgment of bribery against, 234, 235.
 indictment against, 235.
 residence of, presumed, 263 *n. e.*, 265.

COSTS,

when corporators liable for, 157 *n. l.*
 of indictment by corporation, 190 *n. g.*
 corporation suing *qui tam* may have, 198.
 disobedience to mandamus, 227 *n. u.*
 of return to mandamus, 228 *n. x.*, 240 *n. f.*, *g.*
 in debt for bribery, 234 *n. r.*
 of feigned issue to try title, 259 *n. u.*
 relator's costs in *quo warranto*, 259 and *n. u.*, 260.
 defendants in same, 260, 262.
 of mandamus to restore, 267.
 to proceed to election, 415 *n. h.*
 compensation, jury, &c., 273.
 delay, 281.
 parties joined in discovery, 287 *n. g.*
 a charity suit, 289.
 prosecuting indictment in a county of a city, 351.
 out of one, 352.
 of constables, when sued for act done as such, 369.
 of maintaining propriety of acts done to enforce public duty, 373, 374.
 of application for mandamus to insert name on burgess lists, 405 *n. z.*
 of resisting mandamus, &c., 408, 409.
 of application for *quo warranto* against councillor, 414.

plaintiff compellable to give security for, in action for penalty against mayor, &c., 418.
 when mayor to pay, of disobeying writ of mandamus, 424 *n. m.*
 when to be indemnified from, 427.
 of indicting for assault of mayor, 429.
 under 5 & 6 Vict. c. 97, s. 2, 429, 430.
 of amoving, &c., order of council, 437.
 of witness, how to be paid, 439.
 of prosecutions, &c., 453 *n. c.*, 454—456, 484.
 how to be estimated, 455.
 of court of recorder of united district, 457 *n. d.*
 of visitation, when corporation is visitor, 534 *n. c.*
 of commencing in a borough court a suit, where title, &c., in issue, 460.
 taxing costs of visitation, 536 *n. a.*
 of relator of *quo warranto* for acting as judge of borough court, 462.
 in debt on judgment of a borough court, 467.
 of appeal against summary conviction of borough justices, 472, and *n. i.*
 of erecting county gaol, 482 *n. k.*, 484 *n. o.*
 of trying, &c., district prisoners, 483.
 who is founder's heir, &c., 544.
 defending *quo warranto*, 488.
 information against alderman, *id.*
 of showing cause against rule for mandamus to receive vote, &c., 489.
 of petition to Lord Chancellor, *id.*
 of prosecutions for assaults, &c., of officers, &c., *id.*
 for non-repair, &c., 502 *n. b.*
 to be recovered in action against person for thing done under Municipal Corporations Act, 503.
 of application to be admitted to freedom of borough, 508 and *n. e.*
 bill to compel college to grant new lease, when dismissed with, 547.
 of recovering against corporation for misappropriation of funds, &c., 548 *n. k.*, 561 *n. y.*
 cannot be released by one churchwarden, 604.
 in actions against churchwardens, 605 *n. l.*
 of churchwardens and overseers, 615 *n. i.*

COUNCIL,

the, in municipal boroughs, &c., 355.
 is the agent of the corporation, id., 357.
 as to disobedience to mandamus, 355 *n. a.*
 how to elect mayor, aldermen, &c., 355, 356.
 whom to consist of, id.
 is not *a* corporation, nor *the* corporation, 357.
 now the governing body, id., *n. g.*
 minutes of, how to be entered, 357 and *n. k.*
 interested councillor cannot vote in, 357 *n. i.*
 adjournment of meetings of, 357, 358.
 casting vote of chairman of meetings, 357.
 who to preside at meetings of, id.
 notice of meetings, when necessary, 357—359.
 power of calling together, 358.
 summons to attend meetings of, id.
 quarterly meetings of, id., 359, and *n. o.*
 power to delegate functions to committees, 359, 360.
 why cannot appoint borough gaoler, 359 *n. r.*
 regulate fees of Court of Requests, 359.
 when not responsible to third persons, 359, 360.
 orders of, for payment of money, removable, by certiorari, 360.
 so resolutions for same, id. *n. u.*
 to appoint trustees, &c., 360, 361.
 statutory powers of paving, lighting, &c., 361, 362.
 passing bye-laws, 362—365.
 how to enforce bye-laws, 364, 365.
 powers of executing securities for debts, &c., 365.
 restrained from selling, &c., lands, &c., id.
 approbation of Lords of Treasury, when necessary, to enable to dispose of real property, id., 366.
 what leases may grant, 366, and *n. g.* 367.
 may determine to have a police magistrate at a salary, id.
 must provide a police office, when there is a separate commission, &c., id.
 must appoint a watch committee, id., 368.
 what ordinary and extraordinary officers may appoint, 378.

how may compensate officers, 379—382.
 how to elect treasurer, &c., 378.
 may adopt Baths and Washhouses Act, 385, 386.
 take gift, &c., for support of museum, 386.
 powers as to nuisances removal, id.
 acts of, how to be pleaded, id., 387.
 not a continuation of any former body, 386.
 what contracts with, disqualify to be councillor, &c., 397.
 must admit councillor de facto, when, 401.
 giving notice of vacancy of office, 407.
 excluding councillor when elected, 408, 409.
 aldermen members of, 415.
 liable for costs of mandamus to proceed to election of aldermen, id., *n. h.*
 how to declare vacancy in office of alderman, &c., 417 *n. s.* 426.
 within what time to fill up such vacancy, 417 *n. s.*
 when to appoint substitute to mayor, 419.
 to elect mayor 9th November in each year, 421, and *n. c.*
 mayor to preside at, convene, adjourn, &c., when, 423.
 power to allow salary to mayor, 424.
 effect of their laying a borough rate without authority, 428.
 must supply vacancy in mayoralty, how, 430.
 must take security from town clerk, 433.
 minutes, how to be drawn up, 435.
 may remunerate town clerk, when, &c., 436.
 how to appoint and fill up vacancies in coronership of borough, &c., 444.
 how to obtain a grant of separate quarter sessions, &c., 446.
 how to pay expenses of prosecuting, &c., prisoners, 454—456.
 to have an account of expenses, &c., from county treasurer, 456.
 may contract with committee of district prison, id.
 and contingently, 482 *n. k.*
 may hire, &c., room for holding petty sessions, 474 *n. t.*
 may contract for prisoners, &c., though they have no gaol, &c., 482, 483.

COUNCIL—*continued.*

and for building, &c., a district prison, 483.
 agreement to contribute to such expenses need not be made at quarterly meeting of, *id. n. m.*
 may appoint committee of justices to treat for these objects, *id. n. m.*
 may borrow for building, &c., district prison, 484.
 may make gaol rates, *id.*
 purchase land for providing a prison, *id.*
 contracts of, for maintenance of prisoners in county gaols, *id.*
 powers of the, as to building, &c., the gaol and house of correction, 485 *n. d.*
 cannot spend the principal, &c., of moneys, &c., 487 *n. i.*
 cannot carry proceeds of sale of real property to the borough fund, *id.*
 what expenses may charge upon the borough fund, 487, 488.
 when may defend *quo warranto*, *id.*
 cannot defend information against allowance, &c., *id.*
 nor show cause against rule for *mandamus*, &c., when, 489.
 majority of, when personally liable for expenses, &c., *id. n. s.*
 how to pay a fine set upon the corporation, 489.
 cannot pay out of borough fund costs of petition to Lord Chancellor, &c. *id.*
 what law expenses may defray, *id.*
 for what purposes, and how to lay a borough rate, 490, and *n. y.*
 powers of levying a rate, *id.*
 obliged to pay debts of corporation, &c., 490—493.
 form of order of, for a borough rate, 490 *n. a*, 491.
 must sell church patronage, 492.
 how to convey it, *id.*
 apply proceeds, *id.*
 when not to present to living, *id.*
 may augment stipend of priests, &c., *id. n. r.*
 must live upon its income, 493.
 to appoint overseers, when, *id.*, 494.
 may impose district rate, 493—495.
 when may levy museum rate, 495.
 baths, &c., rate, *id.*
 may require account of trust funds, &c., 514.

COUNCILLORS,

fine for refusal to become mayor, 225.

showing cause against rule for *mandamus*, 356 *n. d.*
 interested cannot vote, 357 *n. i.*
 by whom elected, 387.
 who qualified to be a, 397,
 how many go out each year, 387.
 disqualification to be, 397, 398, 401.
 exemptions from being, 401, 402.
 bankruptcy of, 398.
 mode of election of, 398—400.
 thrown away votes at elections for, 399 *n. r.*
 publication of list of elected, 401.
mandamus to take office, in case of refusal, 401 and *n. e.*
 when a person becomes councillor *de facto*, 401.
 to make declaration, &c., *id.*
 elections of, when borough divided into wards, 402—404.
 numbers of, in each ward, 402, 403.
 when one elected in more than one ward, 404.
 extraordinary vacancy in office of, *id.*, 405.
 how long to hold office, *id.*
 put off the burgess roll for non-payment of rates, *id.*
mandamus to proceed to election of, when goes, *id.*
 mayor to preside at elections of, 423.
 when *mandamus* to permit to exercise office proper, 405.
 to proceed to election, *id.*
 may not be clerk to justices, 473.
 election of, when not a nullity, 405 *n. s.*
 penalty for acting without having made declaration, &c., 418.
 at extraordinary vacancies, 405.
 bankruptcy of, 406, 407.
 exempt from serving on juries, 480.
 fine for absence of, 406, 407.
 compounding with creditors insolvency, &c., &c., 407.
 notice of vacancy of office of, *id.*
 office of, when becomes void, *id.*
 what contracts not to be interested in, *id.*
 what declarations to make, *id.*, 408.
 difficulty as to making them, 408.
 when to make, *id.*
 if excluded after election, *id.*, 409.
 amotion of, 409, 410.
 election of, within what time to be questioned, 409.
 in wards, 419.
quo warranto against when granted, 410.
 costs of, when must pay, 414.

COUNCILLORS—*continued*.

evidence of acceptance of office of, 410.

duly elected, *id.* n. x.

resignation of, 414.

office of recorder, incompatible with, *id.* n. b.

election of, to be alderman, 416.

mandamus to receive vote of, 489.

when personally liable for a proceeding of the council, *id.*

COUNTY,

the inhabitants of, cannot be incorporated, 48.

corporation must not be named of a, 53 n. k.

prima facie liable to repair bridges, 500.

corporation, when liable to repair county bridge, 501.

master of hospital, when has not vote for member for, 567 n. k.

COUNTY OF A CITY,

rateable to repairs of bridges, &c., 283, 284.

may extend beyond the city, 283 n. c.

as to executing criminals in, 321 n. y.

what evidence of jurisdiction of, 345 n. h.

compensation jury when summonable from, *id.*

limits of a, 346.

qualification of jurors in a, 480.

venire fac., *id.* n. x, 465 n. k.

guildhall of a, whether within the county at large, &c., &c., 347 n. n.

felony committed in precinct added to, 347, 348.

may be erected by the crown, &c. *id.*

trial of quo warranto against alderman in a, 420.

there must be a sheriff, or sheriffs of, 348.

treasurer of, removable on quo warranto, 441.

act of parliament required to disunite any part of a, 348.

power of recorder of a, 446 n. i.

boundaries of, whether identical with those of the city, 348.

alteration of, judicially noticed, 349.

mayor not returning officer of, 427.

judicially noticed, 349.

when trials to be had in, &c., 349—352.

inquisitions and indictments removed from, 351.

changing venue in, 352 and n. y.

JANUARY, 1851.—11

appointing case to be tried in adjoining county, 480.

place of holding assizes for, 352.

sheriff of, 353—355.

process in, when to be directed to elisors, &c., 354.

right of voting for members in, 411, 412 n. o, 465 n. k.

challenge to array for unindifferency of sheriff of a, 481.

special juries in, *id.*

COUNTY OF A TOWN,

rateable to repairs of bridges, &c., 283, 284.

Vid. COUNTY OF A CITY.

COURT,

effect of new grant of a, 33.

tearing, &c., records of, 420 n. l.

franchise of holding, cannot be lost, 34, 35.

persons before whom to be held, 34 n. s.

right to be sued in corporate, 36.

waiver of, *id.*

of reversion, when, &c., held, 431, 436.

superior, 87.

obligation to hold, cannot be waived, 378 n. a.

Pie-Poudre, 181.

in a corporate town, 195.

of quarter sessions, 449—458.

of requests, 359.

is to judge of reasonable cause of amotion, 241 n. o.

of record, quo warranto for holding, 262.

judgment in, 300 n. f.

how corporation to take advantage of want of jurisdiction in the, 294.

evidence of ancient, 324 n. d.

of recorder of an united district, 457 and notes.

charges of, at which district prisoners tried, how defrayed, 483.

of Chancellors of Universities, 516 n. i, 519—526.

of Lords High Stewards of Universities, 519 n. b.

COURT-HOUSE,

contract of council for building, &c., of a, 483.

loan of money for, 484.

COURT OF RECORD.

of a borough, how established, 459.

for the trial of what actions, *id.*

of what not, 460.

who eligible to be judge, 459.

how often to be held, *id.*

how far jurisdiction of, reaches, 459, 460, 464.

COURT OF RECORD.—*continued.*

practice in, &c., 459 and *n. i.*, 461, 462. 464 and *n. t.*
 pleading in, 460 *n. m.*
 writ of trial to recorder sitting in the, 460.
 not a king's court of record, 468.
 writ of error admits its being a, 460 *n. o.*
 fees of registrar of, and appointment, 460 *n. p.*
 attorneys practising there, 460, 461.
 new trial in, 462.
 when granted, cannot be laid aside, *id.*
 non-user of, *id.*
 quo warranto for acting as judge of, *id.*
 information on penal statute does not lie in, 464.
 attachment against judge of, 463 and *n. i.*
 writ of error in, 460 *n. o.*, 463 *n. l.*
 removal of causes from, 463, 464 and *n. l.*
 may fine jurors, &c., 465.
 mandamus to restore officer of, 465 *n. g.*
 incidents to, 465.
 mandamus to compel obedience to order of, 465, 467.
 judgment cannot be given in before appearance of defendant, 465.
 pleading in, *id.* and *n. k.*, 466.
 process out of, 465 *n. k.*
 direction of writ of error, &c., 466.
 style of the court, *id.*
 venire de novo, *id.*
 scire facias on judgment of, *id.*
 removing a record of, *id.*
 writ of error, &c., *id.* and *n. u.*
 debt on judgment of, 466, 467.
 whether witnesses, &c., privileged while attending, 467.
 mandamus to judge of, to hear and determine, *id.*
 customary process in, 468.
 custom to try by six jurors, *id.*
 in the Cinque Ports, 476 *n. d.*
 liability of officers of borough courts for escapes, *id.*
 juries in, 479, 480.

COURT ROLL,

corporation aggregate cannot hold by copy of, 109, 187 *n. z.*
 nor corporation sole, 630.

COVENANT,

against dean and chapter, 588 *n. t.*
 action of, by corporation, to exempt from toll, 184, 191.
 sole executors, 629, 630.

officer in a corporation not bound by his predecessor's, 196.
 by hospital for renewal of leases, 575.

churchwardens and overseers cannot make a, 280.

when equity interferes on breach of a, 289.

custom to sue on covenant made *ore tenus*, 336.

action of, for damages only, may be tried by an University Court, 522.

in deed of annexation, 542 *n. s.*
 churchwardens cannot make, 603.

COVENANTS,

of municipal corporations, 140, 141.
 for renewal of leases, 143.
 of sole corporations, 627.
 what covenants bind their successors, 646.

COVENTRY,

sheriff of, 353.

CRANAGE,

what, 164.

CRIER,

custom that public, should have that crying of all sales of goods to be sold by auction, 331.

CROWN,

power of, in granting charters, &c., 13.
 dividing corporations, 8.

uniting, *id.*

not the only source of incorporation, 11.

cannot obtrude a charter, 13.

may delegate power of naming first corporators in a new corporation, 14.

may grant power to admit others, to certain individuals, 14, 15.

may grant to an individual power to incorporate *pro hac vice*, 15.

erect a guild or fraternity, 15 *n. g.*

at common law cannot incorporate for a limited period, 15, 16.

is not empowered by statute to do so, 16.

powers of, in granting charters of municipal incorporation, 16, 17.

may delegate power of appointing the first members of a newly erected municipal corporation, 17.

unrestricted in grant of incorporation as to size of the place, 17, 18.

grant of, how avoided, 21 *n. q.*
 when bad, 22.

how limitable, 22 *n. y.*

what cannot grant by charter, 23 and *n. a.*

power to vary constitution of a sta-

CROWN—*continued.*

tutory corporation, 24 n. k.
 construction of grant of, 25—27.
 cannot derogate from, 33.
 make a man a corporator, id.
 grant a monopoly, 34.
 pleas of the, 34 n. s.
 right to repeal a charter, 42.
 bound to allow sci. fa., 42 n. e.
 consent to try sci. fa. at nisi prius
 unnecessary, 45 n. o.
 what franchises may exist in, 45, 303
 n. r.
 acceptance of surrender by, 46 n. a.
 cannot incorporate a county, 48.
 may constitute a city, 52.
 power to grant licence in mortmain,
 98.
 escheat to, on grant in mortmain,
 100.
 right to enter for mortmain when
 accrues, id. 103.
 waiver of, 101.
 grant of lands rendering rent by, 107,
 108.
 not bound by statute of quia emptor-
 es, 108 n. u.
 right of, on grant to superstitious
 uses, 124, 125.
 when may create a port, 161.
 right of market, &c., of, 165 n. h.
 what toll cannot grant, 167.
 prerogative to distrain, 168.
 whether can grant exclusive market,
 &c., 176.
 might grant exemption from tolls,
 182 n. d; compare, 183 n. i.
 whether can grant an escheat fish-
 ery, 187 n. r.
 pardon by, 235.
 ejectment will not lie against, 279.
 to assume corporate powers a con-
 tempt of the, 281, 282.
 pleads double, &c., in quo warranto,
 299, 300.
 cannot derogate from its own grant,
 301 n. n, 302.
 dissolve a corporation, 302.
 franchises revert to, on dissolution,
 303.
 as to personality, 304.
 when may revive a corporation, id.
 commands the services of the sub-
 ject, 354.
 how, 627.
 how takes, &c., lands, id.
 and grants them, 628, 629.
 chattels, &c., 627.
 and grants them, 629.
 acceptance of rent by, in vacancy of
 bishopric, 642 n. y.

when may demand removal of con-
 viction, 452.
 might give power to tax by charter,
 490 n. z, c.
 cannot impose new statutes on the
 Universities, 519.
 cannot pardon offences against Uni-
 versity statutes, 515.
 nor college, 530 n. z.
 whether can grant inheritance of
 visitatorial power, 529 n. s.
 patron of all deaneries, 581 n. y.
 presentation by, 593, 594.
 when visitatorial power results to,
 529, 530 n. a.
 as founder's heir, may dispense with
 college statutes, 530.
 mode of visitation by the, 531 n. a.
 costs thereof, 536 n. a.
 how to determine a question between,
 and a subject, as to visitatorial
 power, 534.
 how to visit when founder's heir,
 540.
 is visitor where no special visitor is
 appointed, 540.
 consent of, when necessary to accept-
 ance by college of increase to en-
 dowments, 542 n. g.
 grants to senior fellow of a college,
 543.
 appointment to mastership of school
 in patronage of the, 557 n. y.
 visitor of dean and chapters, 582.
 grant of patronage by, to dean and
 chapter, 584.
 when visitor of deanery, 586.

CURATE,
 cannot take to charitable use, 115.
 presentation of a, 492.
 obligation of maintaining, &c., id.

CUSTOM,
 of foreign bought and foreign sold,
 28, 29, 85.
origin of customs, 29 and n. t.
 all that parliament might enact not
 good by way of custom, 29 n. t.
 requisites of, 29.
 perception of forfeiture under a, 56.
 for grounding a bye-law, 78.
 return of to writ of habeas corpus, 79.
 may extend to new offices, 239.
 what, 176.
 of lien for wharfage rates, 8.
 for guild to create guild, void, 12.
 certifying a, in courts at Westminster,
 63.
 to found a bye-law, 82.
 once reasonable, whether good al-
 ways, 82.
 to take ballast, &c., 82 n. d.

CUSTOM—*continued.*

good in a borough, but not elsewhere, 82.
 bye law cannot annul a, 83.
 how abrogated, id.
 to restrain trade, id.
 might be sued upon, id.
 to imprison, 84, 85.
 not judicially noticed, 85 n. y.
 what evidence of custom to exclude, 90.
 to devise in mortmain, 112 n. g.
 to take fine on alienation, &c., 135 n. k.
 tolls originating in a, 163 n. g.
 of toll-traverse, 164.
 to demand unreasonable toll, 169.
 unreasonable, 169 and n. o.
 to exclude from selling out of market, &c., 176.
 claim piccage, 177 n. x.
 how abrogated, id.
 to fowl in a warren, 187 n. z.
 venue local in action on a, 192 n. s.
 to be judge and officer, 197.
 as to corporate meetings, bad, 212.
 elections, good, 218.
 to defranchise for words, 264, 334 n. e.
 refusing to pay sums due by, 265.
 falsely certifying a, 277 n. g.
 of London, how certified, 288.
 as to noticing customs once certified, id.
 in a corporation, how proved, 317.
 must be pleaded, 320.
 proof of, id.
 when not good, id.
 may be inconsistent with the common law, id.
 of a city or town not judicially noticed, id. n. e.
 need not be conformable to law, 328.
 who not good witness to disprove a, 321.
 originating since Ric. 1, id.
 of exclusive trading in London, 322 n. d.
 to bind, not to sue out of the borough, 328 n. t.
 when not abrogated by statute, 322, 323.
origin of, 328.
 legal commencement of, presumed, 328 n. r.
 to elect by ballot, 322.
 of foreign bought and foreign sold, 322, 323, 329.
 cannot be prescribed against a statute, 323.

acceptance of inconsistent charter upsets a, 323.
 to enrol grants of lands, &c., id.
 sell by other than statutory weights, &c., 323.
 for inhabitants to enjoy rights, &c., in alieno solo, 326 and note a, 327.
 to have estovers, 327 n. b.
 to cut rushes, 327 n. c.
 take sand, 327.
 differs from prescription, 327, 328.
 infraction of custom not indictable, 328 n. o.
 to seize goods forfeited, 329.
 of foreign attachment, 329, 330.
 to demise by parol, &c., 330.
 demise gavelkind lands, id.
 every custom to be construed strictly, id.
 that all leases for more than such a time should be void is bad, id. n. s.
 for bellman to have a pint of grain, &c., 331.
 no custom of market overt for pawning, id.
exclusive, not necessarily bad, id.
 not to employ, hire, &c., any but freemen, now abrogated, 332.
 not objectionable for extending beyond liberties of a city, id.
 for innkeeper to sell a horse that eats his value, &c., id.
 of tanestry, id.
 remedy against corporation for neglect of duty imposed by, id.
 to prevent any person, not free, keeping shop, &c., for putting to sale wares, &c., now illegal, 332, 333.
 to distrain, &c., 333.
 seize unserviceable goods, &c., 333, 344.
 in defiance of reason, 334.
 to imprison, id.
 seize, &c., tainted victuals, id.
 may be enforced against a corporation, id.
 by same, 335.
 enlarge an estate, id.
in opposition to law, when good, id.
 repugnant to justice bad, id.
 contrary to rules of pleading, id.
 to sue on covenant made ore tenus, 336.
 concessit solvere, id.
 assumpsit solvere, 337.
 must be stated in pleading, id.
 how, id.
 whether can be set up by statute, 338, n. z.

CUSTOM—*continued*.

- to bring dower by plaint, 338.
- try by six jurors, 339.
- in borough extends to affect other corporations in it, *id*.
- of lien, *id*.
- how to be tried in a county of a city, 354.
- might give power to appoint constables, 368.
- of London, as to election of aldermen, 420.
- to disfranchise or amove for speaking opprobrious words of an alderman, *bad*, 430.
- to hold Pie Poudres Court, 467.
- customs may be time out of mind, and yet not coeval, 468.
- of the Cinque Ports, 476 *n. d*.
- to rate inhabitants, &c., 490 *n. c*.
- for mayor, &c., to appoint overseers of part of a parish, 498.
- to repair highways, 501.
- to rate inhabitants to bridge rate, *id*.
- cleanse watercourse, 502.
- as to oath of admission of freemen, 507 *n. u*.
- for freemen being inhabitants, &c., to have common, 510.
- of University Courts to arrest out of jurisdiction, 521.
- process in such case, *id. n. r*.
- to distrain, &c., 522 *n. b*.
- of a manor, binds successor of a corporation sole, 650 *n. k*., and 651.

CUSTOS,

- of a corporation, when put in, 297 *n. n*., 302.

DATE,

- of a charter, 34 and *n. i*.

DEAN,

- a corporation sole, 581, 588—590.
- who the founder of, 581 and *n. a*.
- cannot be presented to a church by the chapter, 584 *n. s*.
- every, is appointed by the crown, 585.
- separate property of, how vested, 581, 585 *n. z*., 588.
- right of, to his portion of the aggregate revenues, 587, 588.
- is a dignitary, 585 *n. a*.
- patronage of, 590.
- when has the freehold, 585 *n. b*, 594.
- is head of the corporation, 585.
- cannot be joined with them in action of trespass, 591.
- has a life estate, 585.
- quare impedit to try right of, 586.
- crown when visitor of, *id*.

has no negative voice, 586, 587.

casting vote, 592 *n. n*.

cannot divest an interest out of the corporation, 586.

voidable lease may be set up during time of same dean, &c., 587, 590.

agreement for lease by, when binds the body, 586 *n. l*.

rights of successor of a, 587, 588.

bond given to, and his successors, 588—590.

effect of attainder, deprivation, &c., on acts of the corporation, 591.

acts of *de facto*, 591 *n. x*.

effect of installation of, 591, 594.

obligation given by, 591.

cannot lease to the chapter, *id*.

presentation of, 591, 592.

what acts may do by deputation; 597, 598.

how to sue, 635, 636.

DEAN AND CHAPTER,

of Christ Church, Oxford, 529 *n. n*.

definition of a, 581.

a spiritual corporation, 582 *n. c*.

style of members of, 581 *n. x*.

must be in holy orders, *id*.

separate estates of, where vested, 581.

nature of their incorporation, 589, 590.

majority in, 594, 595.

charter of exemption, &c., to, 595.

how founded, 581 and *n. a*.

founder's statutes of, 582, 583.

alteration of, 583, 584.

whether have force of law, 583 *n. r*, 594.

how to prescribe, 581 *n. b*.

when liable on implied contracts, 597 *n. z*.

cannot impose oath by bye-law, 594 *n. d*.

gift to, when good, 581.

when bound by parol executory contract, 597.

parol agreement for renewal of lease, 596.

how to accept surrender of lease, 597 *n. y*.

general visitor of, 582.

appeal from, *id*.

grant to, for superstitious uses, 598, 599.

bishop as visitor of, 582—585.

common seal of, 597.

as to depriving by vote of, 582, 584.

great seal, 583.

acts of, how long bind, 597.

patronage held by, 584, 591.

DEAN AND CHAPTER—*continued.*

the corporation cannot present the dean to a church, 584 n. s, 591.
 may appoint minor canons, 593.
 trusts vested in ecclesiastical commissions in property, 581, 585 n. z.
 chapter house of, where may be, 598.
 dean the head of, 585.
 effect of his death, 587—590, 597.
 attainder, &c., 591.
 mandamus, when lies to, 586.
 state of, in vacancy of, headship, 586—588.
 members of, when may vote by proxy, 595.
 act of parliament when not presumed against, 586 n. d.
 scire facias on judgment recovered by, 592.
 dean has no negative voice in 586, 587, vid. 592 n. x.
 deed of, how to be executed, 591, 595, 596.
 how must accept rent, 586, 588 n. s. demise, 586 n. l.
 voidable lease of, how set up, 587, 588.
 when may avoid lease, 587.
 covenant in bad lease, 588 n. t.
 specific performance, &c., by, 586 n. l.
 cannot lease to dean, 591.
 deed of, where may be made, 598.
 bailiff of, 586 n. l.
 they are not impeachable of waste, 592.
 how to convey lands sold under railway act, 586 n. l.
 produce of sale, 596.
 how many canons in each, 593.
 how to present to a living, 587.
 bring an action id.
 effect of surrender of lands to crown, 596.
 power of sale, &c., of lands, &c., of, 588 n. x.
 what building leases may grant, 655 n. e.
 challenge of juror, in action by, 589 n. g.
 administration bond to, 590.
 when bound by acts of dean, &c., 591.

DEBT,
 a, must be paid, though borough fund deficient, 490.
 statutory mode of recovering, when to be followed, 271 n. r.
 by a corporation,
 for duties, 159.

petit customs and port dues, 160 n. c.
 primage, 164, 165.
 market tolls, 167.
 stallage, 175.
 amercement, 189 n. p.
 fine for contempt, 422 n. x.
 penalty, 198.
 not taking declarations, &c., 418.
 value of lands taken by railway company, 273.
 on a bye-law, 88, 97.
 lease of market tolls, 170 n. s.
 bill of exchange, 276.
 when lies by corporation against its officers, 87.
 members, 72.
 not against corporator after dissolution of the body, 64.
 against a corporation,
 on bond, &c., 276 n. z, 227 n. e.
 for a penalty, 276 n. z.
 common seal, when presumed in, 62.
 for rent on lease of tithes, 649.
 on concessit solvere, 336.
 bond and writ of inquiry, &c., 339.
 for bribery, 234 n. r.
 on judgment of a borough court, 466, 467.
 for escape out of borough gaol, 465, 466.
 lies not for a bridge rate, 501.

DECLARATION,
 what, to be taken by corporate officers, 224 n. e.
 sheriff, 353 n. e.
 councillors, &c., to make what, 401, 407, 408.
 must be taken, 408 n. h, 425.
 by Quakers, Moravians, &c., 408 n. k.
 when to be made, 408.
 as to aldermen administering, 417.
 renewal of, with respect to estate, id.
 when may be refused to be administered, id.
 neglect to make, &c., how punishable, 418 and n. t.
 what to be made and subscribed, 418, 419.
 when, 418.
 refusal of, equivalent to refusal of office, 419 n. x, 422.
 under 9 Geo. 4, c. 17, 419, 425, 433.
 by assessors, 431, 432.
 town clerk, 433.
 borough justices, 469.
 head of a college, 539, 540.

DECLARATION—*continued.*

need not be tendered, 433 n. z.
substituted for oath in Universities,
539 n. a.

DEED,

presumption as to, 66, n. c.
when not necessary to be proved
against a corporation, 148.
whether necessary to authorize a dis-
tress, 150.
of annexation. Vid. COLLEGE, and
543 n. x, 549.
signing a, 147, 148.
for settling identity of lands, &c., of
a college, 549.
by hospital located in one county and
sealed in another bad, 576.
hospital pleading profert of, 579.
how to sue on, if made to corpora-
tion in wrong name, 51 n. l, et vid.
146 n. b.
of dean and chapter, 591, 595, 597,
598.
guardian of poor, 619, 620.
corporations sole, 633, 634.
resignation by, 268, 414.

DEGREES,

nature of power of conferring, 516
n. i.
mandamus to admit and restore to,
528.

DELIVERY,

of deed dispensed with by affixing
common seal, 63.
lease id.
sealing deed by common seal, equi-
valent to, 147, 148.

DEMISE,

by a hospital, 569, 580.
how made by a corporation, 56 and
n. k, 64.
what corporation may take by, 127
—129.

by corporation, 143.
by college, 540, 547 n. a.
in ejectment 146, n. b.
from year to year, 149.
by dean and chapter, 586 n. l.
to churchwardens and overseers,
612, n. q.

DETINUE,

for books of a corporation, 242.
against a corporation, 280.

DEVISE,

to corporation, as to its name, 51,
52.
of beneficial estate, 109 n. b.
by master of a college, 110 n. s.
custom of devise in mortmain, 112
n. g, 337.
corporations may take by, 112, 113.

to a corporation to charitable use,
114 et seq.

to a college, 114, 115.

to charitable use, when void, though
use good, 115 n. u.

to private use, good, 116.

to charitable corporation for its own
objects, id.

void in part, id.

terms on which made, enforced, 117,
120.

of money realized out of lands, 119.
which may be construed two ways,
120.

to poor of a place, id.

instances of, within statutes of mort-
main, 121.

of personal estate, when bad, 121
n. r.

of money to be laid out on land, 122.
to such charity as testator had for-
merly directed, id.

when to take effect, 123.

to Downing College, id.

a non-existing corporation, id.

college, when not good, 124.

when good, 545.

an University, id.

of advowson to a college, 544, 546.
misnomer in devise to a college, 545
n. o.

of college lease, 546.

to master, &c., of a college, 545 n. n.

of a debt and for foundation of
school, 558.

rents and profits, 559, 560.

surplus rents, &c., 561.

to a hospital, 570, 571.

governors of a hospital, 577.

perpetual curate augmented, 657
n. e.

DINNER,

bye-law ordering the giving of a,
when bad, 80, 81.

DIRECTORS,

effect of contract by, 55.

when may contract, &c., without
common seal, 56.

bill in equity against, 291.

whether quo warranto lies against,
307.

DISCLAIMER,

of office, &c., 258 n. l.

corporate character, 269, 299.

effect of, in quo warranto, by corpo-
ration sole, 638.

DISCRETION,

when not interfered with, 226 n. u,
231 n. u, 252 n. r.

DISFRANCHISEMENT,

effect, of, 262, 263.

DISFRANCHISEMENT—*continued.*

- how differs from amotion, 263.
- power of, where resides, 263 *n. h.*
- for offences against corporator's duty, 264, 265.
- indictable, 265.
- of a mixed character, 266, 267.
- an odious act, 265.
- remedy for undue, 267.
- equity, where interferes in, 267 *n. g.*
- of burgesses, 398.
- freemen, 504 *n. m.*

DISPENSATION,

- with statutes of a college, 530 and *n. z, a.*

DISQUALIFICATION,

- to vote for member, 506 *n. s.*, 411, 412.
- to be alderman, 416.
- to be councillor, &c., 397, 398, 401, 402.
- how to be communicated, 398, *n. p.*, 409, 410.
- will justify refusal to administer declaration, &c., 417.

DISSENTERS,

- ministers of, disqualified for municipal office, 226, 416.

DISSOLUTION,

- how effected, 295—303.
- in case of guardians of poor, 621.
- effects of various modes of, 303.
- cannot be effected at will of the crown, 302.
- seizure of liberties not equivalent to, 297 *n. o.*, 298 *n. q.*
- instance of, by judgment in quo warranto, 300 *n. k.*
- others, 304 *n. z.*
- effect of, by loss of all members, 303.
- release of rent, &c., 306.
- of parliamentary corporation, 308.
- liability to county bridge, where falls on, 501 *n. y.*
- for some purposes only, 303—305.
- probable, when cause to refuse quo warranto, 409.
- effect of, on property, franchises, &c., 303 and *n. r.*
- things granted by the corporation, 303 *n. r.*
- personalty, 304.
- in case of guardians, &c., 620, 621.

DISTANCES,

- measurement of, 387, 389 *n. f.*, 507 *n. l.*

DISTRESS,

- under a bye-law, 85.
- when implies a sale, *id.* and *n. x.*
- must be appointed in the bye-law, 87.

in municipal corporations, 88.

power of distress given by bye-law, 36.

charter, *id.*

bailiff taking, making cognizance for taking a, 60 *n. s.*

bailiff to take, how constituted, 150.

for tolls, &c., 161 *n. i.*, 163, 164 *n. o.*, 170.

toll-thorough, 165 *n. z, a.*

on lease of tolls, 170 *n. s.*

for a tensary, 171 *n. c.*

on goods damage feasant, 171.

for stallage, 176.

what ratification of a, 177 *n. y.*

for picage and stallage, 177.

on what goods, *id.*

americiament, 188.

fine on resignation, 225.

refusal to accept office, *id.*

rent of tithes, &c., on lease of corporation sole, 649.

for sewers rates on a corporation, 284 *n. f.*

poor rates, 284.

penalty under a custom, 333.

for refusing office, 419

paving, &c., rates, 362 *n. k.*

under Towns Improvement

Clauses Act, 372.

for expenses of removal of nuisances, 386 *n. q.*

effect of illegal warrant of, for levy of borough rate, 428.

against town clerk for refusing to deliver up books, &c., 434.

in a statute always implies sale, 471 *n. d.*

for offences against Municipal Corporations, Act, 471.

mandamus to make a, 490 *n. y.*

to compel appearance of corporation, 496.

to realize bridge rate, 501.

power of, for an annuity, &c., 545, 546.

may be ordered by one of the body of churchwardens and overseers, 610.

DISTRICT PRISON,

when council may agree to contribute towards erecting a, 483.

visiting justice of a, 483 *n. m.*

trial of prisoners from a, 483.

purchase of land to build on, 484.

governor of, 485 *n. b.*

DISTRINGAS,

cannot be awarded by University Court, 521 *n. p.*

to compel an appearance, 274, 286, 496.

DISTRINGAS—*continued.*

enforce decree in equity, 289.

repairs of a bridge, 500 n. o.

DIVIDENDS,

of stock, proceeds of sale of real property, &c., how to be disposed of, 487 n. i.

DOWNING COLLEGE,

devise to, 123.

DRUNKENNESS,

good cause of amotion, 241 n. o.

DURATION,

of a corporation, what, 3, 4.

may be for a limited period, 16.

of an usage, 28.

of leases by corporation, 143—145.

of office of mayor, 421.

DURHAM,

the city of, how incorporated, 11.

DURHAM AND SADBERGE,

rights of incorporating exercised by bishop within the county palatine of, 11.

DUTIES,

where corporations may sue for, 159.

ECCLESIASTICAL COMMISSIONERS. *Vid.* DEAN and CHAPTER.

ECCLESIASTICAL CORPORATIONS,

whether aggregate or sole, public bodies, 9.

antiquity of, 11 n. e.

granted their lands in fee farm, 129,

130. *Vid.* DEAN AND CHAPTER

and CORPORATIONS SOLE.

EJECTMENT,

corporate name in demise by a corporation, 52 n. a.

demise in, how proved, 57.

by the king, 628 n. b.

as to name of head in demise in, 146 n. b, 189, 190.

need not execute power of attorney, 189.

aver the demise to have been under seal, 189.

sci. fa. by successor of a corporation sole, in, 638.

against a corporation, 278—280.

rule for judgment, 279.

consent rule, id.

against what bodies does not lie, 279, 280.

churchwardens and overseers, 280.

by donors in case of dissolution, 305, 306.

evidence of corporator in, 316.

laying demise in borough court, 465 n. k.

parson when cannot bring, 649 n. g.

cannot be tried in University courts, 522.

amotion or deprivation by visitor may be tried in, 532 n. k.

against master of a free school, 556 n. o, 564, 557 n. x.

tenant from year to year of dean and chapter, 597.

for canonry, house, &c. 593 n. s.

by churchwardens, 605 n. m.

and overseers, 612 n. q.

demise, count, evidence, id.

declaration how to be served in ejectment against them, id.

Officers of Ordnance cannot defend an, 624.

ELECTION,

the incident mode of keeping up the succession of members, 26, 27, 49.

may be without seal, 58, 65.

majority at a, 70, 71.

bye-laws as to, 79—81, 88.

casting voice at an, 80.

notice of assembly for, 156.

poll at an, who to grant, 203 n. q.

show of hands, id.

validity of votes at, how decided, 203 n. q, 208.

when to be made to an office, 203.

presiding officer secedes, 204.

void, 204, 205, 243.

majority abstains from voting, 204—209.

votes thrown away at, 207, 208.

of aldermen how to be made, 209, 415.

where several vacancies are to be filled, how, 208, 209.

when void for irregularity, 421 and n. c.

disqualification to vote at, 208 n. p.

void when incapacitated person chosen, 416.

of addition to an indefinite body, 208, 209.

when compelled, 209 n. y.

validity of, how decided, 211, 214.

summons for an, 211, 212, 217 n. f.

meeting for an, 211 n. n.

precedes all other business, when, 212 n. y.

municipal, 212 n. y.

disturbance of an, 212 n. d, 214, a. p, 220 n. l.

presiding officer at an, 212, 213.

what not a due election, 213, 216, n. a.

of municipal officers, how questioned, 215 n. s.

personating an elector at, 214 n. p.

to an officer, must be taken notice of by corporator, 217.

ELECTION—*continued.*

as to delegating power of, 218, 219
n. c.
 casting voice at an, 219.
 equality of votes at an, 219 *n. e.*
 right of approval of an, 219.
 by a definite body of which A. and
 B. are to be two, 220 and *n. l.*
 veto at an, 220.
 Chancery no jurisdiction as to, 221
n. p.
 when mandamus to proceed to, goes,
 226 *n. u.*, 227 *n. x.*
 bribery at corporate, 232—236.
 parliamentary, 413.
 when votes are equal, 232 *n. a.*
 votes by ballot in, 256.
 illegal in, 256 *n. q.*
 proxy, *id.*
 of officers, when to be held, 379.
of councillors, 398, 399.
 when borough divided into wards,
 402—404.
 within what time questionable,
 409.
 day of returning officers at elections
 of councillors, 398 *n. p.*
 presiding officer, *id.*
 thrown away votes at, 399 *n. r.*
 in case of extraordinary vacancies, in
 boroughs, &c., 404, 405.
 new election of councillors, when,
 405.
 mandamus to proceed to election of
 councillors, *id.*
 formers of parliament, 411—413.
 if void by statute, quo warranto must
 be had, 421 *n. g.*
 disturbance of, ground for informa-
 tion, 421 *n. c.*
mayor's duties as to taking poll at,
 423.
 arranging for parliamentary, 423
 n. a.
 publication of result of, in boroughs,
 &c., 423.
 secession of presiding officer at, be-
 fore business completed, 343, 424.
 returning officer of parliamentary, in
 boroughs, &c., 424.
 refusal of poll at, good ground of ac-
 tion, 425.
of assessors, 431.
 expenses of, payable out of borough
 fund, 487, 488.
 contrary to college statutes, 530, *n. z.*
 in colleges, 531, 532 *n. l.*
 visitor's power over, 532, 538, 539.
 of head of a college, 543.
 master's single negative, 75 *n. e.*
 in hospitals, 577, 578.

ELEGIT,

ejectment to enforce an, 279.
 on judgment for salary, 433 *n. x.*
 available, though lands held for pub-
 lic purposes, 489.
 to execute judgment on bond of cor-
 poration, 382 *n. t.*

ELISORS,

when process to be directed to, 354.
 form of writ to, 354 *n. o.*

ENTRY,

on lessee for condition broken, 151,
 579 *n. l.*
 how to plead, 151 *n. k.*, 588 *n. s.*
 as to tolls, 178 *n. l.*
 churchwardens cannot sue for, 606.
 pleading entry as servant of church-
 wardens and overseers, 612 *n. q.*
 whether corporation sole by parol
 may authorize, 634.

ETON,

college of, 124, 558, 565 *n. f.*
 identity, &c., of lands, &c., of, 549.
 statutes of, 565.

EVIDENCE,

what *prima facie*, of incorporation, 50.
 prescriptive corporation, 51 *n. e.*
 common seal, when presumed, 62, 63.
 of charter, 38, 39.
 bye-law, 90.
 deceased corporators, 90, 91.
 as to name in demise in ejectment,
 146 *n. b.*
 of tenancy from year to year, 149,
 150, 547 *n. a.*
 right in corporation to take port
 dues, &c., 161, 162.
 place being a port, 162 *n. q.*
 toll-traverse, 164 *n. o.*
 franchise of a market, &c., 165 *n.*
 g.
 corporator may be witness in action
 for tolls, 166 *n. e.*
 of assent to remove market, 168 *n. c.*
 right to inspect books on question of
 tolls, 169 *n. n.*
 of user of a market, 179.
 incorporation of foreign incorpora-
 tion, 200 *n. q.*
 being a candidate at elections, 204
 n. a.
 judgment of ouster, when is, 215.
 and its effect, 260.
 of writ of mandamus coming to hands
 of head of corporation, 228.
 on return of, "not duly elected," 230.
 of bribery, 233 *n. p.*, *q.*, 234 *n. r.*
 on quo warranto information, 255.
 256.
 what, of user, 256 *n. u.*
 of disfranchised corporator, 268, 269.

EVIDENCE—*continued.*

disfranchisement and release for purposes of, 268.
 of certificate of a corporation, 288.
 foreign corporation, 288 *n. o.*
 costs of suppressing evidence, 289.
 inspection of corporate books, 298, *n. r.*
 deed of grant evidence of name, 310.
 of an aggregate corporation, *id.*
 of seal of a foreign corporation, 310. *n. p.*
 common seal proves itself, 310.
 inspection of entries in books, &c., 311, 312, 314.
 charters, 311 *n. x.*
 in action for tolls, 312 *n. e.*
 corporation not obliged to disclose their own, 313.
 rule to inspect, 313, 315.
 effect of admissions by corporators, 315.
 notice to a corporation, *id.*
 admissibility of corporation as witnesses, 315—317.
 books, entries, &c., 317—319.
 of custom, 320, 321.
 of custom to take tolls, &c., 321.
 of immemorial usage, 321 and *n. q. y.*, 327 *n. f.*
 ancient court, 324 *n. d.*
 custom and prescription, 328.
 of locality of a borough, 345 *n. h.*
 jurisdiction of a county of a city, 345 *n. h.*
 usage after a statute, evidence of what usage before, 647 *n. o.*
 boundaries of a town, &c., 345 *n. h.*
 an appointment to office, 357 *n. k.*, 379 *n. g.*
 acceptance of office of councillor, 410.
 on issue of, "duly elected councillor," 410 *n. x.*
 of conviction, 427 and *n. i.*
 intentions of founder or donor, 560 and *n. q.*
 in respect of charity claims, 565.
 what not sufficient evidence of appointment of town clerk, 433.
 presumption arising from want of common seal, 568.
 of declaration of use, 576 *n. q.*
 what evidence on not guilty against clerk of peace, 443.
 that a court is a court of record, 459 *n. h.*
 of corporators when admissible, 502, *n. b.*, 506 *n. o.*, *et vid. CORPORATORS.*
 proof of residence in University, 520 *n. e.*

of servants, 522.
 of acceptance by college of a grant, 544.
 as to heirship of founder, 544 *n. d.*
 that corporation was known by a certain name, 570 *n. d.*
 of property belonging to a parish, 609 *n. f.*
 what, of induction of a parson, 640 *n. i.*

EXCHEQUER BILLS,

the commissioners of exchequer bills
 loans may lend to councils, when, 481 *n. o.*

EXECUTOR,

a corporation aggregate may be, 202.
 rights of, in case of corporation sole, 629, 638, 639.

EXEMPLIFICATION,

of royal charter, 38, 39.

EXEMPTION,

grant of, to corporations, 2 *n. m.*
 from prisage, 31 *n. m.*
 how construed, 33, 34.
 from being sued out of corporate limits, 36.
 what not an, 37.
 what a void grant of, *id.*
 how to try right to, 37 *n. u.*
 from tolls, 97 *n. e.*, 174, 182—184, 595.
 crown might grant, 182 *n. d.*; compare, 183 *n. i.*
 from serving on juries, claim of, 185, *n. y.*, 193, 200 and *n. m.*
 as to establishing in equity an, 200.
 from serving in municipal corporations, 225, 226.
 quo warranto for claiming a franchise of, 261.
 from toll, 327, of freemen, &c., 505.
 offices in municipal corporations, 401, 402.
 jurisdiction of county justices, 477.
 serving on juries, 470, 479 *n. p.*, 480.

EXETER,

customs of, 79.
 established by statute, 330.
 foreign attachment in, *id.*
 custom of selling horse that has eaten his value, 322.
 sheriff of, 353.

FACULTY,

to occupy a pew, &c., may be had by corporation, 198.

FAIR,

definition of, 165.
 as to tolls at a, 166.

FEE-FARM,

rents, property of corporations in, 107.

FEE-FARM—*continued.*

grants in, by corporations, 130, 131.

FEE-SIMPLE,

in corporation lands, &c., 109, 110.
whether corporation can grant in,
130 n. *l*, 135.

in lands, &c., of a parson, 636, 637.

of a bishop, 636 n. *f*.

FEIGNED ISSUE,

to try right to office, 215 n. *y*, 238
n. *q*, 248 n. *m*, 622

elect, 218 n. *t*.

a return, 228 n. *a*.

right of nomination to fellowship,
543, 544; and form of it, 544

n. *d*.

to advowson, 220 n. *o*.

of stranger to appoint, 219 n. *c*.

right to parish books, 602, 603.

right to be churchwarden, 600 n. *m*.

costs in, 259 n. *u*.

FELONY,

by corporator of University, how tri-
able, 519 n. *b*.

FEOFFMENT,

how made by corporation, 56, 139,
140.

as to making to a corporation, 107,
570 n. *d*, 597 n. *x*.

to parishioners, 606.

FERRY,

when may be set up, 186.

remedy for interference with, 192, 193.

neglect to keep boats, &c., 192.

FINE,

definition of, 224 n. *f*, 362 n. *n*.

under bye-laws, 97.

for refusal of office, 221, 222.

payment of, 223, 224.

for contempt, 422.

on resignation of office, 225.

refusal of office, 225, 401.

customary 109 n. *g*.

on alienation, 135 n. *k*.

how levied on a corporation, 284 n.
d, 489.

limit of municipal bye-law, 362.

for absence from office, 406, 407.

corruption, &c., 413.

in lieu of service, 419 and n. *y*.

for neglect of duty in revising bur-
gess lists, 423 n. *h*.

not returning a writ, &c., 464.

on jurors for non-attendance, 465.

by borough justices, 470.

always payable to borough fund, 487
and n. *k*.

on corporation for non-repair of a
bridge, 500 n. *o*.

payment of, on renewal of lease,
&c., 140—142, 144 n. *t*.

for renewal of hospital leases, 577.

lease by corporation sole, 646,
655 n. *h*.

FISHERY,

several, &c., 186, 187.

FOREIGN ATTACHMENT,

custom of, 329, 330, 339, 340.

FOREIGN BOUGHT, &c.

custom of, 28, 29.

where good, 85, 322, 329.

where obtains, 322.

FOREIGN CORPORATION,

when may sue here, 50.

certificate of, 288 n. *o*.

FOREIGNERS,

who, 6.

inspecting charters, 38.

books, 169 n. *n*.

when may question validity of char-
ter, 41.

bound by bye-laws, 77.

custom to exclude, 83.

evidence of it, 90.

FORFEITURE,

of goods cannot arise bye-law, 84.

directly or indirectly, 85.

of charter, 295.

when good, 85.

of the corporation, 89, 90.

of shares, 292.

FOUNDER,

statutes of, how must be accepted,
19 n. *e*.

will, how observed as to leases, 144,
145.

equity compels production of copy
of will of, 293.

when is visitor of his foundation,
517.

who is, *id*.

king, when founder, 517 and n. *l*.

how may dispose of visitatorial
power, 529, 530 and n. *u*.

semb. cannot alter his statutes, &c.,
530.

his will to be followed, *id*.

if his heir a lunatic, *id*. n. *a*.

effect of his reserving part only of
the visitatorial power, 530 n. *u*.

consent of heir of, to alteration of
his rules, 543 n. *n*.

heir of, how ascertained, 543, 544.

how far can restrain legal powers of
a visitor, 530, n. *v*.

number of corporators fixed by, can-
not be increased, 541, 542.

king bound by statutes tending to
perform will of a, 530 n. *y*.

cannot add to original number of his
foundation, 543.

as to pleading that power given by

FOUNDER—*continued*.

him to visitor is unreasonable, 530
n. y.
 inquiry to discover heir of a, 531 *n. a*, 539.
of a college, foundership incident to blood of a, 531.
 is not subject to forfeiture or escheat, *id.*
 cannot alter his endowment, *id.*
 when equity will not interfere with his rules, &c., &c., 543 *n. n.*
 may alien right of nomination, 531.
 how ought to frame statutes, 532 *n. m.*
 will of, to be observed, 536.
 effect of lapse of time as to departure from it, 565.
 what grant by a, does not make a visitor, 537.
 meaning of founder's kin, 539 *n. s.*
 crown, how to visit when founder's heir, &c., 540.
 of additional fellowships, 542.
of a school, will of, to be observed, 552 *n. a.*
 cannot exempt from payment of poor rates, 552 *n. b.*
 when his will, &c., vests surplus funds in corporation, &c., 552 *n. d*, 559, 560.
 his intentions as to school, &c., 555, 560 and *q.*
 surplus of estates granted by a, 559—561.
 when has been appropriated by corporation with his knowledge, 561.
 devise by, of surplus to his executors, &c., *id.*
of a hospital, intention of, 567.
 who the, 568.
 his name mostly introduced into name of the hospital, 568, 569.
 nominates the inmates, 571 *n. p.*
 by what words may found, 571, 572.
 statutes of, 572 *n. s*, 575, 578.
 may be looked at to explain character, 573.
 should be enrolled, 576 *n. q.*
 cannot alien estates of hospital, 575.
 except under Land Tax Acts, 575.
 how to appoint a visitor, 576.
 endow, 576 *n. q.*
 may reserve appointment of inmates, 576.
 declaration of use by, 576 *n. q.*
 if omits to name a visitor, 576 *n. r.*
 whether can grant a veto, &c., to the master, &c., &c., 578, 579.
of dean and chapter, who, 581 and *n. a.*

statutes of, 582—584.

altering, 583, 584.

whether have force of law, 583
n. r.

interpretations of, *id.*

may appoint bishop visitor of, 585
n. x.

of bishoprics, who, 631 *n. k*, 638
n. t.

FOUNDERSHIP,

of a college, &c. Vid. FOUNDER.

FRANCHISE,

effect of non-user of, 33, 37, 168,
 169 *n. i.*

loss of, 37.

which may exist in the crown and which not, 45.

of fair, market, &c., 165, 168.

ferry, 192.

condition annexed to all, 169 *n. i.*

may be vested in corporation for use of members, 184 *n. q.*

more than one may be joined in one quo warranto, 254.

as to mandamus to restore from suspension of a, 267.

effect of seizure of, 296—298.

of being a corporation, 298 *n. r.*

what claimable by prescription, &c.,
 299 *n. v.*

disclaimer of a, 299.

quo warranto only lies for claim of what, 300 *n. f*, 307 *n. i.*

revest in the crown on dissolution,
 303.

and how, 303 *n. r.*

of *retorna brevium*, 349 *n. g*, 468
n. g.

of burgess-ship, 393 *n. f.*

freeman, 504, *n. m.*

of voting for members of parliament,
 411—413, 506, 507.

FRATERNITY,

custom for one to create another bad,
 12.

a corporation may create a, *id. n. l.*

how restrained, 91, 92.

FREE GRAMMAR SCHOOLS,

account of funds of a 547, 548 *n. k.*

mandamus to admit usher of a, 238
n. r.

restore same, 250, 538 *n. o.*

definition of, 552.

effect of usage on, *id.* and *n. b.*

equity not competent to alter general constitution of, 552 *n. a.*

as to devoting funds of, to other objects, &c., *id.*

statutory powers of equity over, 552,
 558.

FREE GRAMMAR SCHOOLS —

continued.

do not extend to surplus of school funds, 552, 557 *n. y.*
 what schools, &c., do not extend to, 557, 558.
 mode of applying for remedy respecting, 553 *n. e.*
 when governors refuse to act, 557 *n. r.*
 object of the new enactment respecting, 553.
 power of visitors, where adequate, left untouched, 557.
 amotion of one of corporators of a, 554 *n. e.*, 563.
 governors of, 554 *n. e.*, 557 *n. r.*, 563.
 errors of college as trustees of a school, 554 *n. e.*
 improvement in plan of education in, 554 *n. e. f.*
 uniting, 556.
 who to be eligible to exhibitions in, 554 *n. y.*, 556, *n. p.*, 566.
 statutes of, 554—556, 557 *n. y.*, 564.
 power of establishing new statutes, 555, 556.
 revenues of, 555.
 what number may constitute a corporation of a school, 558.
 sites of, *id.*
 when exempt from Charity Commissioners Acts, *id. n. z.*
 devise for foundation of, 558, 559.
 fund given to members of a college in trust for 560 *n. q.*
 surplus of profits of estate granted to, 559—561.
 equity did not interfere where there was a visitor of, 562.
 new distribution of revenues of, *id.*
 setting aside leases, &c., of, 563.
 form of petition to grant seal respecting abuses in, &c., *id.*
 lease of school lands to governor of school, *bad, id.*
 how relief given in equity as to, *id.*
 statutes of limitations, &c., 564, 565.
 taking an account in favour of, 565.
 gifts for maintenance of, good as a charitable use, when, *id.*
 43 Eliz. c. 4, applicable to, exclusively, *id.*
 appointment of masters of, 556 *n. q.*, 557 *n. y.*
 qualification of masters of, 555, 556.
 leases by masters of, 555 *n. k.*
 patronage of mastership of, alienable, 577 *n. s.*
 removal from mastership by dean and chapter, 584.
 generally, 557.

FREEMAN,

of a company, mandamus to admit a, 238 *n. r.*

FREEMASONS,

lodge of, judicially noticed not to be a corporation, 65.

FREEMEN,

admissible to prove what custom, 335.

how to allege custom of taking apprentice, &c., 337.

how corporation to prescribe for their freemen having common, &c., 346 *n. k.*

claims to be upon roll of, examinable by mayor, 423.

roll of, how kept, 435.

made up, 507.

list of, how, 507, 508.

copy of, how procurable, 435, 507, 508.

lists of freemen, how to be published, &c., 435, 436, 508 *n. z.*

claimants objected to, 508.

when cannot be jurors, 481.

reservation of rights of, 504—506.

whether undue admission of, be a cause of forfeiture, &c., 504 *n. l.*

quo warranto to try right of being, 504 *n. l, m.*

or remove from roll, 504 *n. m.*

servitude entitling to freedom, *id.*

widows and kindred of, 504.

cannot be disfranchised at pleasure, and why, 504 *n. m.*

cannot be created against their will, *id.*

have a freehold, *id.*

mandamus to admit, *id.*

ante-dating admission of, 508.

fees for admission of, 505.

application for, 508.

oath on admission, 507 *n. u.*

exemptions of, 505.

costs of application for admission, 508, 509.

not admissible by gift or purchase, 506.

residence of, how necessary, 506 and *n. s.*, 508, 509.

action by, against corporation, to enforce rights of, 506.

reservation of parliamentary franchise, 506, 507.

what not disqualification of, 506 *n. s.*

duty of returning officer as to, 507 *n. u.*

no stamp duty on admission of, 507 *n. x.*

by marriage, cannot vote for members of parliament, 507 *n. y.*

FREEMEN—*continued.*

- posting notices of objections to claims to be, 508 n. *a.*
- of London, 508 n. *a, d.*
- of Turkey Company, 509 n. *f.*
- rights of common of, 509, 510.
- plea in bar by, to avowry, &c., 510.
- avowry by, *id.*
- prescription by, 327, 510, n. *i, k.*
- FREEMEN'S LIST. *Vid.* FREEMEN.
- FREEMEN'S ROLL. *Vid.* FREEMEN.
- FRIENDLY SOCIETY,
- treasurer of a, a quasi corporation sole, 661.

GAOL,

- of a borough, contracting for building, &c., disqualifies from being alderman, &c., 417 n. *s.*
- who keeper of, in borough, 197, 424 and n. *u,* 485.
- gaoler, 485.
- chaplain, *id.*
- where prisoners committed from a, may be tried, 451.
- may be committed to another borough gaol, when, 456.
- order for contract for maintenance of borough prisoners in a county gaol, 473.
- quarterly gaol sessions, 475, 484, 485.
- appointment of surgeon of, 475.
- council to make contracts for conveyance, maintenance, &c., of prisoners to, 482.
- new gaol, how to be erected, 482 n. *i.*
- when erection of, once commenced, borough not liable to costs of county gaol, 482 n. *l.*
- one appointed to every borough having separate quarter sessions, 482.
- except where there is a contract, &c., *id.*
- rates for building, &c., 484.
- powers of council as to building, &c., 485 n. *d.*
- indictment for neglecting to repair, *id.*
- recorder's certificate as to repairs, *id.*
- county gaol within a borough, 486.
- GATESHEAD,
- the Barkers and Tanners' Company of, 11.
- GIFT,
- of chattels requires common seal, 65, 66.
- of rents and profits to a corporation, 559, 560.
- when good to schools, 565.
- dean and chapter, 581, 586.

GILDA,

- gilda mercatoria*, meaning of, 30, 31 n.
- gildate and incorporate synonymous, 31 n. *g.*

GLOUCESTER,

- custom of the honour of, 135 n. *k.*
- toll-traverse at, 164.
- sheriff of, 353.

GRAND JURY,

- the, of a borough, &c., 479.

GRANT,

- of charter of municipal incorporation, 16, 17.
- is still common law prerogative, 16.
- statutory limit thereon, 17, 18.
- when nugatory, 22 n. *t.*
- illegal, 22 and n. *y.*
- with non obstante clause, 23, n. *z.*
- once made cannot be resumed, 13.
- to may or and all other corporators, effect of, 2 n. *k.*
- of the crown,*
- intent of 26.
- how avoided, 21, n. *q.*
- to enure, 79.
- import of words in, 21 n. *q.*
- question as to, *id.*
- what a condition of every, 22 n. *y.*
- of forfeiture of goods, *bad*, 85.
- a port, 161 and n. *h.*
- port duty, 160 n. *e.* 161.
- exemption from toll, 182 n. *b,* *vid.* 2 n. *m.*
- unreasonable toll, 169.
- to senior fellow of a college, 543.
- to the men of Islington rendering rent, 107, 108.
- city of Carlisle, 116.
- may make a place into a city, 52.
- to a corporation by a new name, 571 n. *n.*
- not yet in existence, 573.
- tenere placita*, when *bad*, 26 n. *u.*
- of fair, &c., 31.
- of a market, 167, 168, 176.
- repeal of this, 168.
- its forfeiture, 169.
- Evidence,*
- of acceptance of charter as fresh grant, 23.
- by college, 544.
- of grant of ferry, 192 n. *y.*
- presumption of a, 161 n. *l,* 162.
- in favour of a, 39.
- of increase to endowments not binding on corporation, 18 n. *b.*
- as to repealing part of a, 42 and n. *b.*
- in mortmain, not void, 100.
- in remainder, 101.

GRANT—*continued.*

not according to 9 Geo. 2, c. 36,
when void, 119.

of right to lay chains in river, &c.,
120.

as to their name, 51, 52.

of next avoidance of advowson,
55.

license, 56.

incorporal hereditaments, 110.

by corporations,

for church endowment, 106 n. n.

by municipal, 140.

of annuities, 146 n. d.

to the mayor, *bad*, 426.

of reality, 99 n. m, 129—143.

in vacancy of head, 110.

not in existence, 111.

to corporations,

as regards name, 51, 52.

what good words of, 31 n. l.

designation of grantees, 26 n. x.

custom more effectual than, 29.

usage not to cripple a, *id.*

how to be taken, *id.*

when incidents pass by, *id.*

must be certainty, 31.

of "town with all it appurtenan-
ces," 32.

omnes piscarias, &c., *id.*

all mines, *id.*

market, *id.*

toll, *id.* n. n.

fair, *id.*

liberty of holding a court, 33.

felon's goods, &c., *id.*

consuance of pleas, 36.

power tenere placita, *id.*

exemptions, 37.

of lands for education, &c., 558,
560.

whether corporation may grant, &c.,
reality, 129—143.

does not destroy prescription, 301 n.
n, et vid. 323—325.

whether implied in a prescription,
324 n. a.

how to be pleaded, &c., 299.

by and to hospitals, 570, 571.

college out of rectory impropriate,
548, 549.

as to repealing part of a, 42 and
n. b.

by and to corporations sole; vid.
CORPORATIONS SOLE.

GREAT SEAL,

the, what is now, 628.

GUARDIANS OF THE POOR,

election, appointment, duties, &c.,
616 n. k.

how far a corporation, 616, 617.

may sue and be sued, &c., 616 n. k,
617.

power of a majority of, 616 n. k, 619,
621.

what lands vested in, 616 and n. k,
617.

may have and use common seal, 616.

indictment by, 617.

liability of, on contracts not under
seal, 617, 618.

when individually liable, 618.

legal estate in parish property, 623.

where cannot contract, 618 n. m.

equity will not interfere in con-
tracts of, 619.

chairman has casting vote, 619.

distinctions between guardians of an

union and of a parish, 619 n. t.

mandamus to pay money, 622, 623.

name, 619, 620.

when rateable to poor, 620.

dissolution of, *id.*, 621.

quo warranto not proper to try right
to be guardian, 622.

GUILD,

how constituted, 11 n. c.

custom of London, 12.

how restrained, 91, 92.

HABEAS CORPUS,

cum causa, return to, 79, 428.

punishment for not returning, 463
n. i.

removal of causes by, 463, 464.

HAMLET,

meaning of, 341 n. t.

HARROW SCHOOL,

lease of lands of, &c., 563 and n. n.

HAVERFORDWEST,

sheriff of, 353.

HEAD,

distinction between, and integral
part, 25 n. q.

duty of, as to contracts, 62.

concurring in acts, 68.

heriot due on death of a, 109 and n.
h.

grant cannot be made to a corpora-
tion in vacancy of, 110, 586.

cannot devise to the corporation,
123.

as to meaning of, in a lease, 146 n.
b.

cannot take a lease, when, 149.

bond, *id.* n. y.

be presented to a living by a
college, *id.*

as to demand, and acquittance for
rent, by, 150 n. b, 549 n. r.

evidence against, on return to man-
damus, 228.

HEAD—*continued*.

- during vacancy of, corporation cannot be sued, 286 n. z.
- cannot bind college by his acquittance, 544.
- name of, need not be mentioned, 529 n. o, 286 n. z.
- omission to elect on a proper day, 303.
- when integral part of a college, 550.
- when visitor of college becomes head, 531 n. a.
- cannot be compelled by visitor to set seal to an answer in Chancery, 532 n. p.
- when required to have a property qualification, 543.
- separate visitor of a, 536 n. x.
- devise to the college by, bad, 545.
- deprivation of, how to be pleaded by college, 537 n. g.
- benefice annexed to office of, 550.
- how entitled to revenues, &c., 538.
- cannot be sued in trespass along with the corporation, 591.
- has not a sole seisin in his office, 538.
- to subscribe declaration at his admission, 539, 540.
- mandamus to compel him to affix common seal, &c., 541.
- exempt from penalty for non-residence, 550.

HEIR,

- when takes by descent, 115.
- consent makes devise good, 112, 119.
- stands seised to use of devisee, 115.
- cannot alter terms of devise, 117.
- lands when revert to, 117, 559.
- of founder, how ascertained, 531, 539, 543, 544.
- consent of, 543 n. n.
- mandamus to, &c., 543, 544.

HEREFORD,

- punishment of a mayor of, 464 n. b.

HERIOT,

- when payable on death of head of corporation, 109.
- as to common seal to authorize seizing an, 189.
- not reckoned part of an ancient rent, 651 n. o.

HIGHWAY,

- corporation, how rateable to repair a, 283, 501.
- indictable for obstructing, 284.
- non-repair of, 501, 502.
- accounts of expenditure, &c., on, 436.

JANUARY, 1854.—45

liability of corporation to repair, 501.

HOLY ORDERS,

- persons in, disqualified for municipal offices, 226, 416.

HOMAGE AND FEALTY,

- corporation could not do, 107.
- yet held by tenure of, id.

HOSPITALS,

- power of erecting, 12, 15.
- leases of, 74.
- power to hold lands, 106.
- devise to poor of, 120.
- when may take money arising from sale of real estate, 122.
- colourable, 125.
- cannot present masters to livings, 149 n. y.
- mandamus to restore officer of, 250.
- quo warranto does not lie for headship of, 299 n. x.
- what does not constitute a visitor of a, 537.
- the same in nature as colleges, 567 and n. i.
- definition of 567.
- not necessarily connected with medicine, &c., id.
- common seal essential to, 567.
- are local corporations, 568.
- name, 568—570.
- not nuisances, 568.
- how founded, 568, 571, 572.
- who the founder, 568.
- how may be incorporated, id.
- notice to General Board of Health as to, id.
- license to found, id.
- meaning of domus as applied to, 568 n. n.
- misnomer of a, 569 n. b.
- when may be known by more than one name, 570.
- essentials of a, id.
- local bodies, 576.
- nomination of corporators of, 571 n. p.
- how forfeited, id.
- incorporation precedes endowment, 572.
- when complete, id.
- amotion of corporators, &c., of, 572 n. s.
- visitor when to be applied to, id.
- charters of, how explained, 573.
- 39 Eliz. c. 5, as to erecting, 573, 574.
- leases by, 574, 575, 580.
- setting aside, 576 n. o.
- renewals of 574 n. b, 575 n. g, m, 577.
- of houses, 574, 575.
- when bind, 575.
- aliening in fee, 574 and n. f.

HOSPITALS—*continued.*

rent, 575.
 land-tax, *id.*
 may improve the estate, &c., *id.*
 judgments contrary to founder's statutes, *id.*
 cannot contract with visitors, 576.
 present master to a living, *id.*
 how to be endowed, 576 *n. q.*
 visited, 576 and *n. r.*
 spiritual, how visited, 576 *n. r.*
 royal, how, *id.*
 common law, *id.*
 right of appointing masters of, 576, 577.
 limitation of patronage of, 577.
 lands of, *id.*
 elections in, 577, 578.
 in debt against, what no plea, 577 *n. s.*
 majority in, to do acts, 578.
 advowson of, how nominated to, *id.*
 statutes of, semble imposed, 578, 579.
 officers of, 580 *n. u.*
 servants of, *id.*
 may consist of two persons only, 578 *n. d.*
 judicial notice of, 580.
 how to plead right of way, 579.
 rateable to poor, 580 *n. u.*
 land-tax, *id.*
 property tax, *id.*
profert by, 579.
 avowry by, 579 *n. l.*
 injury by, must be compensated by guilty majority, 579.
 assets will not be marshalled in favour of, *id.*
 petition for relief by, 579, 580.
 women may be corporators of, 580.
 cannot surrender, *id.*

HOUSE,
 what occupation, &c., of a, gives right to be on burgess roll, 387, 388.
 meaning of, 507 *n. y.*
 lease of, by hospital, 568 *n. n.*, 574
 ejectment for, of a canon, 637.

HOUSE OF CORRECTION,
 one to be in every borough having quarter sessions, &c., 482. *Vid.* GAOL.
 what prison county court may use as a, 484 *n. y.*
 chaplain of, 485.

HUNDRED,
 officer of, when a quasi corporation sole, 661.

HUNTINGDON,
 grant of annuity by the burgesses of, 130 *n. k.*

IDENTITY,

continuous, of corporations, 5 *n. t.*
 how secured, 548.
 of lands within manors of colleges, &c., 549.

IMMORTAL,
 meaning of the term, as applied to a corporation, 3.

IMPLICATION,
 creating a corporation by, 8.
 statutory corporation by, *id. n. o.*

IMPRISONMENT,
 of constable for neglect of duty, 370 and *n. g.*
 when bye-law cannot affix punishment of, 84—86.
 corporation cannot prescribe for right of, 325, 334.
 incident to fine, 362 *n. n.*
 by justices, 471.
 for incontinency, 516.
 breach of orders of University as clerk of the market, 526.

INCOMPATIBLE OFFICE,
 effect of accepting an, 243 *n. e.*, 244 *n. g.*, 246.
 cannot be forced on a corporator, 247.
 what are, in boroughs, 417, 437.
 not, in boroughs, 424.
 vicarage not, with mastership of a school, 556 *n. o.*

INCONTINENCY,
 powers of Universities to imprison for, 516.

INCORPORATION,
 what prima facie evidence of, 50.
 operates as a new, 52.
 not proof of, 67.

INCORPOREAL HEREDITA-
 MENTS,
 corporation how to take, 110.

INDENTURE,
 sealing counterpart, when suffices, 110.
 of annexation to a college, 543 *n. x.*
 by a hospital, 570.

INDICTMENT,
 whether corporation can institute, in absence of common seal, 62 *n. k.*
 lies for affixing common seal, when, 64 *n. i.*
 not for breach of bye-law, 84.
 whether lies for violating Municipal Corporations Act, s. 94, 140 *n. p.*
 against corporator, 157 *n. l.*
 not a ground for refusing mandamus that indictment lies, 159.

INDICTMENT—*continued.*

when lies against owner of a port,
161 *n. p.*, 162.
corporation for non-repair, 164
n. s.
breach of duty as to keeping a
market, 168, 180 *n. b.*
lies against corporation for misfeas-
ance, 180 *n. b.*, 213 *n. g.*
by corporation, how authorized, and
as to costs, 190 *n. g.*
for misapplication of tolls, 192 *n. t.*
negligent keeping ferry, 192.
libel, 193.
not taking office, *id.*
disturbing and slandering, &c.,
their officers, 197.
election, 212 *n. d.*, 214 *n. p.*, 220
n. l.
personating municipal elector, 214
n. p.
riotously meeting without due
summons, 217 *n. f.*
lies against corporator, 235.
when not necessary for amotion, 242
n. r.
for disfranchisement, 265, 266.
against corporation must be remov-
ed, and why, 275 *n. s.*, 284.
may be against two corporations, 277
n. f.
one and an individual, 278 *n. n.*
for breach of charter, 277.
putting common seal to surren-
der, &c., 306 *n. h.*
non-performance of public du-
ties, 283.
not repairing a bridge, 283 and
n. x., 284.
words said of the mayor, 429.
for disobedience to a statute,
284.
false return to mandamus, 428.
obstructing a highway, 284.
to compel treasurer to pay mo-
ney, 439.
breach of sect. 94 of Municipal
Corporations Act, *quære*, 366.
refusing to serve as constable,
369.
of constable for neglect of duty,
370.
words against mayor, &c., 429,
430.
not repairing a gaol, 277 *n. g.*,
485 *n. d.*
sea banks, 277 *n. g.*
amendment of, by quarter ses-
sions, 451 *n. m.*
assaulting the mayor, 429.
obeying order of quarter ses-

sions, 285.

removal by certiorari, 374 *n. f.*,
451, 452.

personating a voter at election
of councillors, 400.

riot at election, 416 *n. h.*

when found by grand jury of county
of a city, 351.

against mayor for absence from
duties, 423.

what kind of, lie against corpora-
tions, 284 *n. d.*

when restrained, 288 *n. n.*

lies not for breach of custom, 328
n. o.

venue in, when to be laid in county
of a city, 347 *n. n.*, 349, 350.

when to be tried in adjacent county,
349—352.

constable's expenses of defending
indictment, 374.

of corporation for refusal to pay poor
rates, 496.

removal of and appearance to, *id.*

for non-repair of bridge, 500.

not building a bridge, *id. n. g.*

result of, against corporation, 500
n. o.

for non-repair of highway, 501, 502.

form of such indictment, 502 *n. c.*

for neglect to cleanse watercourse,
502.

by guardians of poor, 617.

venue, &c., in, against persons acting
under Municipal Corporations Act,
503 and *n. g.*

for admitting freemen contrary to the
Municipal Corporations Act, 504
n. l.

against member of an University for
treason, &c., 519 *n. b.*

college, for removing on a sen-
tence of expulsion, does not lie,
538 *n. n.*

against a schoolmaster, &c., 558 *n. z.*

by churchwardens, &c., 601 *n. t.*

against them, 602 *n. g.*

INFANTS,

when cannot be corporators, 6;
churchwardens, 600 *n. m.*

excluded from municipal corpora-
tions, 6, 422.

members of railway corporations by
devise, &c., 6, 211 *n. o.*

whether may be town clerks, 433
n. s.

clerks of peace, 443 *n. n.*

masters of hospitals, 577 *n. s.*

INFORMATION,

on penal statute does not lie in bo-
rough court, 464.

INFORMATION—*continued.*

for libel against a guilty majority, 281.

mayor, 429; alderman, 430.

refusing office of sheriff, 353.

constable, 369 *n. a.*

misconduct as judge of borough court, 463.

bribery at election of member of parliament, 413.

acting as alderman, &c., without making certain declarations, 418 *n. t.*

refusal of office, 419 *n. y.*

bribery at corporate election 421 *n. c.*

against justice for absence, &c., 475.

disturbance of election, 421 *n. c.*

maliciously refusing spirit license, 422.

absence from duty, 423.

false return, 428 *n. x.*

assault of mayor, 429.

against town clerk for misconduct, 438.

what may be tried at borough quarter sessions, 457 *n. f.*

costs of defending an, against alderman, not payable out of borough fund, 488.

against corporation for non-repair of a bridge, 500 *n. m.*

privilege of University, when allowed in an, 522; as to plea of it, 523 *n. n.*

in equity against visitor, 533.

election of a fellow, 539.

for surplus rents, &c., 561.

against churchwardens and overseers, 615.

INHABITANTS,

effect of grant of lands to, 8, 9.

lease to, 9.

a portion of the, of a town or borough, may be incorporated, 16, 17.

effect of incorporating the, 26.

meaning of, in a charter, 26 *n. z.*; 31.

cannot be obliged to become corporators, 26 *n. b.*

in old charters called burgesses, 31 *n. g.*

how explained by usage, 31.

how to take advantage of corporation courts, 36.

of a county, cannot be incorporated, 48.

use of the word in a bye-law, 80 *n. y.* cannot claim exemption from tolls, 174 *n. c.*

effect of charter incorporating, 203

n. p., 206 notes.

of county of a city, &c., how liable to repairs of bridges, &c., 283, 284.

liable in quo warranto for assuming to be incorporated, 300.

as to their prescribing, &c., 326, 327.

what not evidence of grant to, 327

n. f.

claiming exemption from toll, 327.

custom to tax or rate, 490 *n. c.*

when corporations are within poor laws, 496 and *n. n.*

may be rated for repair of a new bridge, 500 *n. k.*

means of levying such rate on, 501.

liable to county bridges on dissolution of corporation, *id. n. y.*

right of voting for members of boroughs, 507 *n. y.*

custom for inhabitant freemen, &c., to have common, 510.

INJUNCTION,

applying to dissolve an, obtained by a corporation, 38 *n. y.*

against surrendering charter, 158.

repairing to a market, 171 *n. f.*

setting up a market, 179 *n. s.*

suing for petty customs, 182 *n. z.*

a trespass, 287.

action against a corporation, 288 *n. n.*

indictment, *id.*

using parliamentary powers, 289.

pursuing undertakings, 290, 291.

surrender of charter, 293.

soliciting act of parliament, &c., 488 *n. o.*, 499.

ringing morning bell of church, &c., 604 *n. u.*

when operates like a mandamus, 293.

does not go to restrain from amalgamating, 199 *n. c.*

goes to restrain parson from waste, 637, 644.

not to restrain publishing college statutes, 293 *n. b.*

levying a borough rate, &c., 493.

whether goes to a visitor, from Queen's Bench, 535.

on instance of single shareholder, 290, Salomons v. Laing, 19 L. J. (N. S.) Ch. 291.

INNS OF COURT,

the, not corporations, 58 *n. a.*

INSIGNIA,

mandamus to give up the, 421.

mayor not to attend Nonconformist place of worship in, 426.

INSOLVENCY,

as to motion for, 242 *n. p.*, 407.

INSOLVENCY—*continued*.

disqualification by, 406, 407, 417
n. s.

INSPECTION,

of voting papers, &c., 433 and n. d.
fees for inspection of burgess rolls,
436.

refusing, in case of burgess lists,
406.

of roll of freeman, 508 n. b.

of University archives, 527.

corporate muniments, 37, 38.

of books, &c., in quo warranto, 527,
169 n. n.

of documents of dean and chapter,
595.

INTEGRAL PART,

corporation, whether *suspended* by
loss of, 25.

cannot take lease, 149.

presence of majority of each, 155.

dissolution by loss of, 302, 304, 580
and n. s.

apprehended not objection to
granting quo warranto, 304 n. z.

which are integral parts of a college,
550.

INTENT,

the, to be observed in construing
charters, 26 and n. x.

ISLINGTON,

grant to the men of, 107, 108.

JEW,

cannot be churchwarden, 600 n. m.
whether can be candidate, &c., 207

n. i.

may be mayor, &c., 425.

admission of, as freemen, &c., 507
n. u.

JOINERS,

the company of, 92.

JOINT STOCK CORPORATIONS,

how erected, 625 n. s.

nature of, id.

effect of complete registration on, id.
contracts of, id.

name of, id.

bye-law of, 93.

license to, for holding lands, 106 n. p.
service of writ on, 275.

bills and notes of, 276 n. d.

JOINT TENANT,

corporation cannot be, with corpora-
tion, 109.

nor with individual, id.

as to joint tenancy between corpora-
tion sole and individual, 631.

JUDGE,

who cannot be, 87, and n. l, 281.

punishment of a mayor for sitting as,

in his own cause, 464 n. b.

JUDGMENT,

of forfeiture, effect of, 41.

on writ, of scire facias, 43 n. o, 44.

of seizure or ouster, 45 n. u.

on debt for bribery, 234 n. r.

on mandamus, 229 n. i.

in quo warranto, 217, 235, 255, 258,
259, 261.

form, 259 n. s.

of capiantur pro fine, 282 n. s,
296 n. m.

of ouster, 296 n. m.

for holding court of record, 300
n. f.

in a borough court, 337, 338, 354 n.
o, and error thereon, 338.

elegit to execute, 382 n. t, 433 n. x.

evidence of conviction, 427 n. i.

removing proceedings to enforce a,
463 n. m.

in court of record, 465.

pleading recovery of, in court of re-
cord, 465 n. k.

writ of error on, in a Borough Court,
466.

scire facias on, in the same, id.

contrary to founder's statutes, 575.

scire facias on, by master of hospital,
577.

successor of corporation sole, &c.,
638, 639.

of quod capiatur against corporation
sole, 638.

by default, against the same, 639.

JUDICIAL NOTICE,

is taken that "A. B. & Co." is *not* a
corporation, 50 n. b, 65, 569
n. x.

a lodge of freemasons is not,
65.

of number of sheriffs, &c., in coun-
ty of city, 355.

a chamberlain, &c., 86.

limits of powers of Borough
Court, 461 n. u.

extent of a port, 161 n. i.

jurisdiction of University
Courts, 524 n. z.

statutory corporation, 202, 310
n. p.

already certified custom of Lon-
don, 328 n. t.

municipal corporation, 343.

county of a city, 349 and alter-
ation of its bounds, id.

style of a corporation, 349.

is *not* taken that a body is not a cor-
poration, 310 n. p.

of customs of towns or cities,
320 n. e.

JUDICIAL NOTICE—*continued.*

that sheriff was a corporate officer, 355.
 of practice of a Borough Court, 461 *n. u.*
 of towns being Cinque Ports, 476 *n. d.*
 of the incorporation of a hospital, 569 *n. x.*
 that no such corporation exists, 580.
 of jurisdiction of visitor, when, 532 notes *k, q.*
 but is of the *term* visitor, 536 *n. y.*
 what taken of practice, &c., by Court of Error, 628 *n. f.*

JURA REGALIA,
 holders of, might incorporate, 11.
 instances of this 11, 12.

JURISDICTION,
 of equity as to charities, 562 *n. b.*
 of visitor, 532 *n. k,* 534 *n. h,* 536.
 Courts of Universities, 519—524.
 of equity over borough property, 488—490, 493.
 of justices of the Cinque Ports, 476 *n. d.*
 all capital, &c., abolished, 449 *n. r,* but not equitable, 465, 468.
 of county justices, 452, 453, 469, 475—477.
 borough justices, 453, 469, 470, 475—477.
 borough court of record, 449, 460.
 quarter sessions, 449, 457, 458.
 an united district, 457.

JURORS,
 who to be in boroughs, &c., 479.
 how summoned, *id.*
 under District Courts, &c., Act, 479 *n. p.*
 jurors' book, *id.*
 exemptions, 479 *n. p,* 470, 480.
 when may be summoned a second time in the same year, 480, *n. q.*
 qualification of, in counties of cities, 480.
 quashing panel of, 480 *n. x.*
 suggestion to try issue by men of county, &c., 480 and *n. x.*
 venire facias, &c., 465 *n. k,* 480 *n. x.*
 challenge of array of, 480 *n. x,* 481.
 where corporation party are interested, freeman cannot be, 481.
 nor kin of a corporator, *id.*
 challenge of the polls, 481 *n. y.*
 when may be interested, 481.
 list of special jurors, *id.*
 challenge of juror as akin to one of

dean and chapter, 589 *n. g.*

JURY,
 of the borough on writ of trial, 460.
 compensation, where to be taken from, 345 *n. h.*
 a visitor cannot summon a, 544.
 from county of city when to try felony, &c., 347.
 action on case, 348, 465 *n. k.*
 quo warranto, 348 *n. o.*
 grand jury of county of city, 351.
 when trial to be by jury of county adjoining, 352, 354.
 one of them related to sheriff, 354 *n. n.*
 special jury, 481. Vid. CHALLENGE.
 summoning and fixing jurors on, 465 479.
 custom to try by six jurors, 468.
 justices exempt from serving on, 470.
 chartered and customary exemptions abolished, 479 *n. p.*
 other exemptions, 480.

KEELAGE,
 what, 163.

KEYAGE,
 bill in equity for, 181.
 prescription for, 329.

KING,
 not the only origin of corporate bodies, 11.
 empowered by statute to incorporate for a limited period, 16.
 powers of municipal incorporation, 16, 17.
 his grant, how avoided, 21 *n. q.*
 what cannot grant, 23.
 power to vary constitution of a statutory corporation, 24 *n. k.*
 construction of charters of, 25 *et seq.*
 when may have scire facias to repeal charter, 40.
 cannot prejudice the interests of subjects, 101 *n. a.*
 grant to him, 110.
 only, could order imposition of oath, 210, *n. g.*
 his courts of record what, 333 *n. v.*
 may erect a county of a city or town, 348.
 cannot grant his prerogative impliedly, 477.
 when is founder, 517 and *n. l.*
 when visitor, how to exercise visitatorial power, 529.
 how visits hospitals founded by, 576 *n. r.*
 the, a corporation sole, 626.

KING—*continued*.

- has two capacities, 627.
- how must command, *id.*
- takes, &c., lands, *id.* n. *u.*
- a surrender, 627.
- may present to a benefice, *id.* n. *x.*
- license an absence, &c., 628.
- how must divest an interest, *id.*
- retain a chaplain, *id.*
- demise in ejectment by, *id.* n. *b.*
- when to grant under the great seal, 628, 629.
- sign manual, 628.
- how to dispose of chattels, 629.
- his rights as founder of bishoprics, 631 n. *k.*, 638 n. *t.*

KINGSTON-UPON-HULL,

- early charter of, 31 n. *g.*
- Trinity House of, 162.
- sheriff of, 353.

LADY MARGARET'S READER,

- a corporation sole, 196 n. *b.*, 518, 594.

LANCASTER,

- mode of incorporating by charter in the county palatine of, 9 n. *s.*
- of appointing to free grammar school in, 557 n. *y.*

LAND CHEAP,

- what, 187.

LANDS,

- effect of grant of, to *men* of Islington, 8, 26 n. *u.*
- lease of, to inhabitants, 9 n.
- grant of, in mortmain, 100.
- without reservation, 107 n. *u.*
- what extent of, may be bought by municipal corporations, 108.
- what estate in, corporations have, 109, 110, 136.
- devise of, to charitable uses, 114.
- whether corporations may grant in fee, 129—135.
- covenants, &c., respecting, how to be made by municipal corporations, 140—142.
- fine on letting, 142 and n. *t.*
- out of England, how to lease, 147 n. *h.*
- revert on dissolution, 303, 305, 306.
- of municipal corporations, how may be sold, mortgaged, &c., 365, 366,
- purchase of, for site of prison, &c., 484.
- proceeds of sale of, by corporation, 487 n. *i.*
- not exempt from execution, 489.
- purchase, &c., of, for site of museum, &c., 495.

- granted to municipal corporations on charitable trusts, 511, 512.
- of a college, how annexed to a church, 549.

identity of lands within manors, &c., of colleges, &c., *id.*

reverter of lands devised on illegal condition, 559.

of a hospital, 577.

dean and chapter, 586—588 and n. *x.*

what, may be held by churchwardens and overseers, 608, 609.

conveyed by any corporation to guardians of the poor, 616 n. *k.*

how the crown may hold, &c., 627 n. *u.*

LAND TAX,

redemption of, by corporations, must be reserved in parson's &c., lease, 107, 121, 140 n. *p.*, 650 n. *l.*

corporation when liable to, 285.

college, how rateable to, 541 n. *k.*

hospitals, when may alien under acts for, &c., 575.

rateable to, 580 n. *u.*

LEASE,

by corporation, not avoided for defect in name of latter, 51, 52.

delivery of, 63.

when avoided, 63 n. *l.*

parol promise to renew a, 65.

what, not objectionable as being mortmain, 127.

husbandry lease to corporation, *id.*

what, corporation may take, *id.*

how must surrender a, *id.*

concurrent, how, 128.

municipal corporation, how to make a, 140, 141.

for years, lives, &c., by municipal corporations, 141, 142.

collusive, 142.

counterpart of, when producible, 142.

covenant for renewal of a, 143, 144, 152.

for lives, 143.

of charity property, 144 and n. *k.*

of master of a school, 555 n. *k.*, 563.

for 999 years, 144.

by hospitals, 574—577.

as to setting aside, 144 n. *i.*, 563.

founder's will as to duration of, 144, 145.

lessee, when made to account, 145, 563.

form of corporation leases, 145—148.

error in name of corporation, 146, 569, 570.

how must originate, 146.

when cannot be made, *id.*

reddendum in, *id.*

LEASE—*continued.*

how to be made of lands beyond the seas, 147 n. *h*.

sealed with agent's seal, bad, 546 n. *z*.

agreement to execute a, 147 n. *e*.

name of lessee, 147 n. *h*.

attorney to deliver a, 147 n. *k*.

as to *signing* a, 147, 148.

commencement of, 148.

effect of, when not sealed with common seal, id.

void and voidable, 149, 549 n. *r*.

may be made to a corporator, 149.

but not to a head, &c., id.

when not a corporator, id. n. *g*.

in mortmain, by corporation, 150.

for years, how determined, 151.

erasure in, id. n. *g*.

surrender of, to a corporation, 152.

to dean and chapter, 597 n. *g*.

of tolls to and by a corporation, 170.

dean and chapter, 586 and n. *l*, 590, 591.

renewal of, when not compelled by mandamus, 252 n. *r*.

avoided on a dissolution, 303 n. *g*, 306 n. *f*.

what terms of years may be granted

by lease by municipal corporations,

366 and n. *g*.

by corporation to mayor, bad, 426.

by churchwardens and overseers, 612.

of charitable trust estates hitherto vested in corporations, 511 n. *p*.

of a college, 544, 546, 547, 549 and n. *r*.

pleading it, 547 n. *a*.

tenant under a void, id.

to corporation sole,

for years, 629, 630.

and an individual, 630, 631.

avoidance of voidable, effect of, 646.

surrender of, id.

by corporation sole, 638 n. *s*, 639, 649.

effect of taking fine, &c., 646.

parson, 639—641.

made between presentation and induction, 641.

bishop, 646.

usurper, void, 641.

for forty years, id.

concurrent lease, 641, 642 n. *z*, 643.

farming, 641.

of tithes, 649.

of lands held to charitable use, 648.

renewals of, 652—654.

when good against grantor, 643.

LESTAGE,

what, 163.

LETTERS MISSIVE,

respecting claim of conusance, &c., 525.

LIABILITIES,

of corporations remain after change of name, 24.

LIBEL,

cause of amotion, when, 241 n. *o*.

disfranchisement, 266.

ground of information against majority, 281.

LIBERTIES,

meaning of, 344. n. *f*.

of a city, 283 n. *y*, 332.

pleas claiming various, 299 n. *a*.

seizure of, 305.

LIBERTY,

a, not determined by non user, 35, 37.

LICENCE,

to hold in mortmain, 101—104, 126.

not assignable, 102.

not revocable by demise of the crown, 102.

how granted, 102 and n. *t*.

from Board of Trade, 106 n. *p*.

to *alien in mortmain*, 126 n.

hold in mortmain, 572, 573 n. *t*, 574, 630.

of schoolmaster, 556, 558 n. *z*.

to found hospital, 568.

lease to parson, 640

LICHFIELD,

custom at, 331.

sheriff of, 353.

LIMITATIONS,

of prosecutions of offences under Municipal Corporations Act, 475 n. *z*, 503.

of actions by corporations, 202, 203.

against same, 294.

against justices, 475.

their officers, &c., 374.

operation of statutes of, for and against corporations, 305, 564 and n. *z*.

against mayor, 430 n. *g*.

LINCOLN,

custom of, 85.

sheriff of, 353.

LISKEARD,

how incorporated, 51 n. *i*.

LIVERPOOL,

custom of foreign attachment in, 330.

LIVERYMAN,

mandamus to admit, 238 n. *r*.

LIVING,

presentation to, by a college, when void, 149 *n. y.*, 550.

the crown, 627 *n. x.*

municipal corporation, 492.

dean and chapter, and hospital, 587.

augmentation of, by a college, 548, 549.

LOCAL ACTS OF PARLIAMENT,

powers of, how disposed of, 361, 362.

LONDON,

custom in, for guild to create guild, void, 12.

confirmation of customs of, 48.

chamberlain of 48, 86, 195, 196, 629, common seal of, 66 *n. b.*

bye-law regulating a franchise in, 79 *n. l.*

customs of, excepted out of Municipal Corporations Act, 83.
to imprison, 84—86.

Court of Equity in, 468 *n. k.*

custom of, as to recovering penalty in bye-law, 86, 87.

as to trying actions on bye-laws in courts of, 87.

validity of bye-law of, how questionable, 89.

bye-law founded on custom of, 92.

custom of, to devise in mortmain, 112 *n. g.*

scavage and other duties in port of, 163.

wharfage, &c., in, 164 and notes *i. k.*
market days in, 168 *n. c.*

mayor, &c., of, liable for false certificate of a custom, 277 *n. g.*

how certify a custom, 288.

form of certificate, 329 *n. t.*

power of imprisonment in, 370, 371.

parson and churchwardens a corporation in, 605 *n. m.*, 279.

judicially noticed as a county of itself, 349.

indictments moved from, amendable in the Queen's Bench, 284 *n. d.*

indictment against slanderer of alderman of, 430.

judgment of *capiantur* in case of, 298 *n. q.*

for mayor, &c., of, respecting conservancy of Thames, 299 *n. v.*

election of aldermen in, 420.

freemen of, 508 *n. a.*, *d.*, 510.

custom of exclusive trading in, 322.
orphanage money in, 629, 659, 660.

foreign bought, &c., 322.

attachment, 329, 330, 339.

as to election of aldermen, 420.

market overt, 331.

innkeeper selling horse, &c., 332.

to disfranchise for words, 334 *n. e.*
commit, &c., *id.*

in debt on bond, 336 and *n. a.*

ancient lights, 327, 337 *n. p.*

bringing dower by plaint, 338.

resignation of office in, 414 *n. c.*

parsons, &c., in, may grant building leases, 655 *n. e.*

LORD HIGH TREASURER,

a quasi corporation sole, 661.

LUNATIC,

expenses of removing a pauper to a lunatic asylum, 450, 451, 499.

contribution of municipal corporation to a county lunatic asylum, &c., 499.

LYNN REGIS,

custom of, 82 *n. d.*

custom of foreign bought and foreign sold at, 322, 329.

MAIDENHEAD,

women corporators of, 387 *n. x.*, 6 and *n. x.*

MAJORITY,

corporations act by, 68.

especially when, 263 *n. h.*

effect of signature by majority to a resolution, 55.

assent of, by parol, to a presentation, 56 *n. c.*

binds the minority, 68, 263, 272.

of whole, when must meet, 69.

what is a legal, *id. n. u.*

at elections, 70, 71.

pleading a, 70 *n. e.*

absent, 70 *n. h.*

votes of a, when thrown away, 71.

how to be made up, *id.*

relieved against in equity, 7, 71—73

considered there, 199, 200.

in judicial acts, 75 *n. d.*

of a select body, 80, 155.

abstaining from voting, &c., 204—209, 231.

of integral part, 218, 219.

refusal to act according to law, 271 and *n. m.*

agreement of, cannot set up a void act, 272.

inserting a libel on corporation books, 281.

concurring do not render valid acts beyond the competence of the corporation, 291, 292.

what of municipal council necessary to pass bye-laws, 363, 364.

at election of councillors, 399.

of council, when liable personally, 489 *n. s.*

MAJORITY—*continued*.

in colleges, 531, 532 n. *l*.
 acting beyond competence of corporation personally liable, 547.
 in hospitals, 578.
 when guilty of illegal act, personally liable, 579.
 as to leases of, 74.
 in dean and chapter, 595.
 of churchwardens and overseers, 280, 607, 610.
 what is, 280.
 of guardians of the poor, 616 n. *k*.
MALDON,
 dissolution of corporation of, 304 n. *z*.
MALMESBURY,
 incorporation of, 30.
 not within Municipal Corporations Act, 509 n. *f*.
MANCHESTER,
 how incorporated, 9 n. *s*.
MANDAMUS,
 principle on which writ of, issues, 159, 225.
 may go, though indictment lies, 159.
 how directed, 208, 432.
 to a municipal body, 355 n. *a*.
 tested, 213, n. *h*.
 who to be joint relators of, 228 n. *b*.
 peremptory, 229, 230.
 rule for, &c., 406 n. *z*.
returns to, generally, 228—240, 249
 whether must have common seal, 57, compared with, 63.
 writ of, admits the body to be a corporation, 228 n. *z*.
 but must use its correct name, 51.
 when proper remedy to determine right to an office, 216.
 when mayor not compellable to deliver writ, &c., 430.
 when goes to proceed to an election, 204, 208, 209 n. *y*, 213, 219 n. *e*, 227 n. *x*.
 return to such writ, 211 n. *u*.
 ministerial officers bound to obey, 385 n. *e*.
 to swear in, cannot issue, when office is full, 409.
when the proper remedy, 251, 252, 257.
 in cases beyond the competence of the corporation, 272.
 does not go to compel renewal of lease, 152.
 try right to a deanery, 586,
 remove judgment of quarter sessions, 450.
 what no answer to, 269.
 when goes to permit holding court leet, 188 n. *i*.

how expedited in cases of municipal corporations, 226, 227.
 who may prosecute a, 226 n. *u*.
to admit or swear, into office, 210, 213 n. *i*, 214.
 generally, 236—238.
 examples of, 238 n. *r*.
 to freedom, under a custom, 335.
 to ministerial offices, 384 n. *c*.
 councillor de facto, 401.
 to freedom of borough, 504 n. *m*
 costs, 508, 509.
 to freedom of trading company, 509 n. *f*.
 to degrees in University, 515 n. *e*.
 close fellow, 544.
 return to same, id. n. *e*.
 churchwarden, 600 n. *m*.
 clerk to board of guardians, 622.
to affix common seal, 67, 71.
 common seal to appointment of officers, 378 n. *c*.
 University seal, &c., 517, 518.
 to administer declaration, &c., 224 n. *e*.
 return to same, 417.
to restore, 419.
 and good return to it, 217, 420 n. *l*.
 person unjustly excluded, 384 n. *c*.
 to burgess roll, 393 n. *d*.
 to degrees in University, 515 n. *e*, 528,
 generally, 244—248, 267.
 returns to, 248, 249.
 a mayor, 427.
 town clerk, 437.
 clerk of the peace, 443.
 one who was bannitus, 515 n. *e*.
 master of school, when refused, 538 n. *o*.
 when granted, 556. n. *o*.
 fellow of a college, when refused, 538.
 sister of a hospital, 572 n. *s*.
 rale nisi for, where there is a visitor, 532 n. *q*.
 that fact to be returned, 536 n. *y*.
 but not the cause of deprivation, 537 n. *d*.
 for what offices goes, 249—251, 267.
 constable, 369 n. *e*.
 freeman, 509 n. *f*.
 whether lies in case of suspension from office, 267.
 officer of Borough Court of Record, 465 n. *g*.
 what sufficient return to, for office held at pleasure, 437 n. *u*.

MANDAMUS—*continued.*

- to give compensation bond, 382.
- up documents, &c., 384, 385 n. *e.*
- insignia of mayoralty, 421.
- to guardians to pay over money, 622, 623.
- to amove*, 243.
- affidavits for, 416.
- action against mayor for false return to, 428.
- fellow of a college, 539.
- a Lollard from a scholarship in the University, 515 n. *e.*
- to proceed to election* generally, 204, 208, 209 n. *y.*, 213, 219 n. *e.*, 227 n. *x.*
- of sheriff, 354.
- assessors, 431.
- aldermen, 415, 416.
- councillors, 405.
- to receive vote of a councillor, 489.
- levy a rate, &c., 490 n. *g.*
- inspect books, entries, &c., 313 n. *o.*
- remove nuisances, 372 n. *t.*
- reimburse expenses of constables, 372 n. *y.*
- University Court to proceed, &c., 520.
- insert a name on burgess roll, 432.
- and how to direct it in such case, *id.*
- deliver up books, &c., 433 n. *k.*
- to pass a bye-law, 224.
- permit to exercise an office, 215.
- justices to sign poor rate, 411.
- take on him the office, 419 n. *y.*
- insert his name on burgess list, 405 n. *z.*
- permit to exercise office, 405, 408, 409.
- and good return thereto, 388 n. *d.*
- relieve against improper conduct of the members, 72.
- master, of a college, &c., 541.
- heir of founder, to appoint, &c., 534, 544.
- enrol on burgess roll, 392 n. *c.*, 388 n. *b.*
- enforce a church rate, 606 n. *t.*
- proceed to elect clerk to guardians, 622.
- compel alderman to serve as mayor, 225.
- performance of duties of an office, 239, 250, 251.
- of a corporation, 269—271.
- mayor, 424.
- mayor to put a question to a corporate meeting, 423 n. *y.*
- election of assessors, 431.
- mayor to sign table of fees, &c., 443 n. *g.*
- quarter sessions to give judgment, 450.
- hold borough court, 462.
- obedience to order of Court of Record, 465.
- judge of it to hear and determine, 467.
- payment of fees of clerk to justices, 474.
- payment of money not answered by showing a retrospective rate required, 491.
- college to perform contract, 532.
- visitor to appoint presentee, &c., 532 n. *n.*
- complicated bad*, 227 n. *u.*
- cross writs of, 227 n. *x.*
- costs of showing cause against rule for mandamus on behalf of councillor, &c., 356 n. *d.*
- to councillor to take office upon him, 401.
- to council to allow him to act as alderman, &c., 419.
- to declare vacancy, 426.
- to restore mayor, 427.
- costs of*, 267.
- judgment on*, 229 n. *k.*
- writ of error on*, 230.
- to a corporation to pay town clerk's salary, 433 n. *x.*
- direction of a*, 230—232.
- and return to writ, if to a college, 540.
- damages on traverses to return to, 240 n. *h.*
- demandable of right*, 251.
- does not issue* to a suspended corporation, 270 n. *k.*
- for benefit of individuals, 271, 272.
- to private corporations, 272.
- trading corporations, when, 272, 273.
- Bank of England to compel to pay dividends, 277 n. *g.*
- levy a rate, 285 n. *n.*
- to compel treasurer to pay witness's costs, 439.
- to declare fellowship vacant, &c., when refused, 539 n. *r.*
- to dean and chapter, 586.
- to swear in a canon, 593, 594.
- to visitor to restore canon, 593.
- churchwardens to deliver up books, &c., to successors, 602, 603.

MANOR,

corporation aggregate may be lord of, 187, 188, 549.

remedy for wreck, 188 n. c.

how to appoint steward of, 188 n. k.

settle identity of lands within, &c., 549.

corporation sole may be lord of, 650.

his successor bound by the custom of the manor, 650 n. k, 651.

tenants of, in a vacancy, 650 n. k.

MARKET,

grant of what conveys, 32 n. n and r, 173.

right of removal, 32 n. n.

contract to let a, 55 n. s.

definition of, 165—168.

kinds of toll in a, 166.

stallage in, 167 n. l, 172—175.

effect of grant of market, 167, 168.

when may be held, 168 n. c.

where, 168 and n. d.

where not, 168 n. b.

demise of a, 169 n. h.

goods in a, not distrainable, 171.

selling by sample in a, id.

ownership of soil of a, 172, 173.

correction of a, 172.

what extortion in owner of a, 175.

fraud on a, 175, 176.

clerk of the, 175 n. k.

custom to prevent selling out of a, 176.

condition in every grant of a, 176 n. o.

cleansing market place, 177.

corporation may lease a, 177, 178.

have remedy for erection of a new market, when, 178.

evidence of user of a, 179 and n. u.

who may hold a, 180 n. b.

parliamentary, 180, 181.

forfeiture of a, 181.

quo warranto for holding, 299 n. v.

but not for selling out of market, 300 n. f.

no market overt for pawning, 331.

action for slander of wares in, 467 n. d.

corporation liable to be rated for tolls of, 498.

MART,

definition of, 166 n. k.

MASTER,

of a college or hospital not presentable to a living by them, 149 n. y.

office not the subject of quo warranto, 299 n. x.

has not a sole seisin in his office, when. Vid. HEAD.

of a free grammar school, when made to account, 547.

as to a removal of a, 547 n. e, 556 n. o.

qualification of, &c., 555, 556.

lease of a, 555, n. k.

vicar may be, 556 n. o.

license of, 556, 558 n. z.

a public officer, 556 n. o.

grounds of dismissal of, id.

mandamus to restore a, id.

boarders of, when not to be eligible, 556 n. p, 566.

right of nominating, 556 n. q, 557 n. y.

retiring pension of, 556 n. x.

premises, and how recoverable from dismissed master, 557 n. x, 564.

action by, for nuisance, &c., 558 n. e.

for setting up another school, 558.

grant to corporation for support of a, 562.

petition respecting appointment of 563.

if appointed contrary to statutes will be removed, 564.

power of appointment of, cannot be delegated, 564.

given to vicar and churchwardens, how to be executed, 564 and n. r.

by corporation, 564 n. r.

validity of appointment of, when cannot be questioned, id.

appointment of, to schools under municipal corporations, 565, 566.

of a hospital, renewals of leases by, 574 n. b.

where succeeding, bound by lease, 575.

estates, how vested in, &c., 567 n. k. cannot be presented to church by the hospital, 576.

right of appointing, 576, 577.

his estate in lands, &c., 577.

quare impedit, when lay for, id. n. s.

quo warranto when, 577, 578.

office of, not grantable in reversion, 577 n. s.

nonage of, id.

claim of tithes by, 577 n. y.

when may take in succession, 577.

to refund fines for granting renewals of leases, 577.

how to sue, &c., id.

cannot have a veto on acts of the corporation, 578.

MASTER—*continued*.

how compelled to affix common seal, id.

his concurrence with majority, when unnecessary, id.

MAYHEM,

by member of University, how triable, 579 n. b.

MAYOR,

as to acquittance for rent by, 150 n. b.

signature of contract of sale by, 152, 153.

corporation may sue for assault on, &c., 190, and n. f. 193.

whether may be judge in a cause in which interested, 195.

might be gaoler, 197, 424.

9 Ann. c. 20, as to, 216 n. d.

liability of councillor on refusal to become, 225.

punishment of, for disobeying mandamus, 227 n. u.

evidence of false return by, 228.

punishment of, for false return, 240.

libel upon, 241 n. r.

voting at election of, 256 and n. r.

need not be named in writ of summons, 275 n. o.

may take recognisances, 338, 339.

to preside at council meetings, 357, 423.

powers of calling meeting of council, 358.

to be elected 9th of November, id.

before other business, 421 and n. c.

fine for refusal to serve, 362, 422.

mandamus to compel to enrol on burgess roll, 387 n. b.

duties in revising burgess lists, 392, 393.

as to burgess roll, 393, 394.

power to insert on burgess lists, persons omitted, 393 n. g.

duties at election of councillors, 399—401, 404.

as to mistake in list of elected, 401.

mandamus to insert name on burgess list, 405 n. z.

punishment for refusing to revise burgess lists, 405, 406.

mandamus to insert on burgess roll, 406 n. a.

proceed to election of successor, 424 n. m.

bankruptcy of, 406.

other disqualifications, &c., 422.

fine for absence of, 406, 407, 426.

re-eligible, when, 426.

compounding with creditors, insolvency, &c., 407.

how to give notice of vacancy of office, 407.

declarations to be taken by, 407, 408, 425.

casting voice in election of aldermen, 415, 424.

penalty on, for acting without having made, &c., the declarations, 417—419.

to appoint substitute to alderman, when, 419.

substitute for the, id.

charging mayor with subornation of perjury, when not good cause of moving alderman, 420.

outgoing alderman may be elected, 421.

in case of vacancy in office during the official year, id.

in case of irregular election, id.

withholding *insignia* of, id.

outgoing, may be re-elected, id.

new office of, essentially same as the old, id.

exemptions from serving as, id. n. e, 426.

duration of his office, 421 and n. f.

adjourned meetings, &c., 421 n. f.

may be escheator still, 421 n. l.

authority same as chief officer under old corporation, 422 n. l.

what sufficient acceptance of office, 422.

refusal of same, id.

who not ineligible to be, id.

malicious refusal to grant spirit license, id.

infant cannot be mayor, id.

duties of, 423—425.

means of enforcing, 424.

when indictable for absence, 423.

finable for neglect, 423 n. h.

not compellable by mandamus to put a question to corporate meeting, 423 n. y.

expenses of parliamentary elections, 423 n. a.

as to returning himself member of parliament, id. 427.

designedly hindering election of his successor, &c., 423, 424.

disobeying mandamus to proceed to election of successor, 424 n. m.

how may act under the Statute of Forceable Entry, 424 n. n.

casting vote of, 424.

returning officer at parliamentary elections, 424, 427.

MAYOR—*continued*.

penalties to be sued for before him, when, 424.
 keeper of borough gaol, *id.*
 to have precedence within the borough, *id.*
salary of, *id.*
 writ by corporation does not abate by his death, *id.*
 refusing to grant a poll, liable to action, 425.
 has right of action for words said of him as mayor, &c., *id.*
 acts done by, before acceptance of office, *id.* and *n. e.*, 426.
 Jew may be, 425.
 effect of Annual Indemnity Acts, 425 and *n. h.*
 Roman Catholic, 425.
 not being on burgess list, when not disqualification to be elected, *id. n. f.*
 acts of mayor de facto, 425, 426, 428.
 de facto may be liable in case for false return, 426, *n. n.*, 427.
 not to attend non-conformist place of worship in formalities, &c., 426.
 cannot take lease or grant from the corporation, *id.*
amotion of, *id.* 427.
 sitting at borough court, when election void, 426 *n. c.*
 vacancy in office of, how to be declared, 426.
 mandamus to restore, 427.
 liable to action for refusing vote of burgess, when, *id. n. o.*
 for destroying voting papers, *id.*
 within what time quo warranto against, to be applied for, &c., 427 and *n. l.*
 as to his defending same, 427.
resignation of, on paying fine, *id.*
 when liable as returning officer, *id.*
 for issuing warrant without jurisdiction, 428.
 for false return, *id.*
 to attachment, *d. and n. u.*
 indictment, 428.
 for disobeying habeas corpus, *id.*
 acquittance of debt by, *id.*
 bond of, *id.* 429.
 release by, 429.
 how protected, *id.*
 as to returning writ of mandamus, 430.
 when may have action, 429.
 may commit for contempt, when, 422, 429 and *n. h.*
 what is a contempt, 422 *n. x.*, 425.

when may plead general issue, &c., 429.

action against him, where to be laid, 430.

within what time, *id. n. q.*

vacancy of office of, must be supplied in ten days, 430.

effect of death of, on a bond, *id.*

to sign table of fees of clerk of the peace, 443 *n. g.*

duty, in absence of recorder, as to court of quarter sessions, 449 *n. r.*

punishment of, for sitting as judge in his own case, 464 *n. b.*

to be justice of the borough, and for one year after determination of mayoralty, 469.

conviction by, 472 *n. h.*

must sign table of fees of clerk to justices, 474.

warrants respecting borough rates, &c., 490.

to examine claims to be freemen, 507.

application to, for admission to freedom, 508.

to affix common seal to appointment, &c., under charitable trustees, &c., 513.

MAYOR AND COMMONALTY, a body having only a head, 25 *n. q.*

MAXIMS,

a man cannot do an act to himself, 197, 550, 576.

commonalty cannot create commonalty, 12.

contemporanea expositio fortissima in lege, 27.

cui licet quad est majus, quod minus est majus licet 537.

ecclesia meliorari non deteriorari potest, 652.

expedit reipublicæ ut sit finis litium, 636.

fortior et potentior est vulgaris consuetudo quam regalis concessio, 29, 85.

in eo quod peccat, in eo puniatur, 181.

judicium redditur in invitum, 207 *n. j.*

leges posteriores priores contrarias abrogant, 24.

lex neminem cogit ad vana, 245.

nemo potest esse tenens et dominus, 149 *n. y.*

nihil facit error nominis cum de corpore constat, 146, 540.

non potest esse judex et pars, 87 534.

MAXIMS—*continued.*

non poterit rex gratiam facere cum injuriâ et damno aliorum, 22.

omnia ritè acta presumuntur, 66 n. c, 143 n. b, 148, 152, 530 n. z, 597.

optimus interpret rerum usus, 27.

quiquid recipitur, recipitur ad modum, recipientis, 19 n. e.

quilibet potest renunciare juri pro se introducto, 19, 102, 223.

quod licet consuetudo est magnæ auctoritatis nunquam tamen præjudicat veritati, 28.

sublatâ causâ tollitur effectus, 306 n. f.

summum jus summa injuri, 298 n. r.

ubi major pars ibi totum, 68, 596 n. p.

wherever no man is bound to give, every man is bound to take, notice, 208 n. o.

MEETINGS,

corporate rules for conducting, 203—213.

effect of disobeying a mandamus, 219, n. e.

riots, affrays, &c., in 220 n. l.

chairman of, in municipal corporations, 357.

notice of, 357, 358.

MEMBERS OF A CORPORATION,

who may be, 5, 16, 17.

who not, 6.

succession of, 26.

when not personally responsible, 64.

eligibility to be, 89.

when to be summoned, 155—157.

MERCHANT TAILORS,

the company of, 86 n. c.

school of, 558.

master, &c., of, 196.

MERTON COLLEGE,

Oxford, heriot due to, 109 n. h.

MESNE PROFITS,

action for in case of corporation sole, 638 n. q.

METAGE,

claim for, 160, 164 n. m, 327 n. b.

extent of claim, 332.

MIDDLETON SCHOOL,

incorporation of, 558 n. d.

MILES,

measurement of the "seven miles" in the municipal Corporations Act, s. 9 . . . 387, 389 n. f.

in the Reform Act, 506, 507 n. t.

MINEHEAD,

dissolution of corporation of, 304 n. z.

MINISTERS,

of district churches, &c., corporations sole, 569.

MINORITY,

bound by majority, 68.

when not, 67.

at elections, 70, 71.

affixing common seal, 71.

how protected in equity 73, 199.

when may have an injunction, 290.

MINUTES,

of the council in municipal corporations, 357 and n. k.

copying entries of, 357 n. l.

of council, how to be drawn up, 435.

MONEY HAD AND RECEIVED,

when lies against corporations, 61 n. g.

MONOPOLY,

words in a charter conveying a, 34.

MOORAGE,

what, 163.

MORAVIANS,

declarations by, 408 n. k, 507 n. u.

MORTGAGE,

how to be made by municipal corporation, 141 n. s, 365, 366.

may be made for money borrowed to build district prison, 484.

of rates, &c., id.

as to payment of a, 487.

whether churchwardens and overseers can execute a, 614.

MORTMAIN,

meaning of, 133 and n. s.

Magna Charta, earliest statute of, 98.

license in, what, 98, 101—103.

statutes of, 98 and n. k, 99.

grant in mortmain not void, 100, 101.

gives no right of action, 100.

title to enter, 100 and n. q. when that accrues, 100.

in remainder, 100, 101.

grantee of lands forfeited in, how held them, 101.

who may grant in, 102.

what alienation is, 104.

as to grants for building churches, 104, 105.

church endowment, 106.

custom to devise in, 112 n. g, 337.

devise in, 120.

more land not to be brought into, 122.

land granted to build with is, 123.

license in, what implies, 126.

what leases are not in, 127, 614 and n. e.

in mortmain, are good, 150.

grant of advowson must contain license in, 493 n. s.

license to hold in, 572.

MORTMAIN—*continued.*

when dispensed with, 573, 574.
630.

how made to corporation sole,
630.

lease of lands already in, 574 n. *b*.
churchwardens and overseers taking
in, 611.

corporations sole within statutes of,
633.

except perhaps perpetual curates
augmented, &c., 657, 658.

MUNICIPAL CORPORATION,

powers of the crown to grant charter
erecting a, 16, 17.

charter of, when valid, 17.

cannot be two co-existent in the same
place, 18.

constitution of a, how determined, *id*.
cannot abandon the corporate func-
tions, 45, 46.

name and style, 52.

cannot make promissory note, 61.

bye-laws in, 87, 88, 95, 96.

what land may buy, 108.

hold their property in trust, *id*.

may take in trust and for private
purposes, 116.

hold what property in trust, 136 n. *t*.

how to mortgage, 141 n. *s*.

demise, covenant, &c., 141.

restrained from selling, &c., real
property, 140.

under the statute, not a new creation,
186.

cannot try actions in their own court,
194, 195.

how to pass bye-laws affixing fines
for non-acceptance of office, 224,
225.

bribery at elections in, 223—236.

retain power to disfranchise, 263.

how bound to repair bridges, &c.,
283, 500, 501.

liable to poor rates, 285, n. *i*.

act for the regulation of, stated and
commented on section by section,
341 et seq.

have no power to imprison, 370.

indictable for not repairing gaol, 485
n. *d*.

bridge, 500.

when may establish a museum, &c.,
495.

the new identified with the former,
342, 343.

must sell church patronage, 492.

remaining liable to maintenance of
priest, &c., *id*.

precincts exempt from authority of,
344 n. *f*.

how far divested of charitable pro-
perty, 511, 512.

has jurisdiction over whole of county
of a city, &c., 346.

jurisdiction of county justices in a,
469.

as to judicially noticing the name and
style of a, 349.

successors in, liable for misdeeds of
predecessors, 547 n. *c*, 548.

powers and duties of the council in,
355.

liability to poor rates, 496—499.

other rates, 495, 500—502.

may have action against sheriff of
county at large, when, 353 n. *e*.

acts by the council, 355 and n. *a*.

not to be done on Sunday, 357.

the council the agent of, *id*.

responsible for acts of council, 360.

powers of paving, lighting, &c., in,
361, 362.

how to enforce bye-laws, 364.

old debts of, how provided for, 365.

how to sell, mortgage, &c., real pro-
perty, 365, 366.

what leases may grant, 366 and n. *g*,
367.

whether indictable for breach of sect.
94 of Municipal Corporations Act,
366, 367.

watch committee in, 367, 368.

constables in a, 367—375.

expenses of, 372 and n. *y*.

expenses of prosecutions by, for pro-
tection of borough constables, 372,
334.

may be visitor of another corporation,
534 n. *c*.

when to hold elections, &c., 379.

bond of, how put in force, 382 n. *t*.

action by, against officers, 382—385.

remedy to recover books, &c., with-
held by their officers, 383—385.

nuisances in a, 386.

parliamentary franchise in a, 411—
413.

resignation of offices in, 414.

disqualification of aldermen in, 416,
417.

contributing to county lunatic asy-
lum, 499.

action for tolls due to, where main-
tainable, 464.

may levy fines, &c., other than those
given by the Municipal Corpora-
tions Act, 487 n. *k*.

real property of a, not held by the
treasurer, 439.

how indictable for non-repair of high-
way, 501, 502.

MUNICIPAL CORPORATIONS — *continued.*

neglect to cleanse water-course,
502.
how to dispose of advowsons in their
gift, 440.
liable to bridge, church, sewers, &c.,
rates, 500, 501.
account of expenditure, &c., of, to be
sent annually to secretary of state,
441.
when restrained from getting act of
parliament, 499.
cannot amove a recorder, 446 *n. k.*
prescribe to hold a court of equity,
468.
capital jurisdictions, &c., abolished,
464, 499 *n. r.*
obliged to account for charity funds,
&c., 548 *n. g.*
grant of a court of record to, cannot
be neglected, 462.
appointment to schools formerly vest-
ed in, 565, 566.
fining a, 464.
maintenance of gaol by, &c., 482—
486.
holds its property in trust, 489.

MURAGE,
what, 31 *n. l.*, 177.
how due, 177.

NAME,

an essential to every corporation, 13,
50.
by implication, 13, 14, 26, 53.
effect of change of, 24.
what an alteration of, 25.
an additional, *id.*
must be given by incorporating char-
ter, 30.
corporations must sue by their, 50.
and be sued, *id.*
unchangeable by the corporation, 50,
52.
peculiar, *id.*
single, and not with alias dictum, 51
and *n. i.*
by reputation, 50.
by grant and prescription, 50, 51.
what essential in name of corporation
by foundation, 50.
when evidence of incorporation, *id.*
several names, 50, 51.
how may take by devise, 51.
pleading, *id.*
of foreign corporation, 50.
what judicially noticed not to be the
name of a corporation, 50 *n. b.*
in affidavits, 51 *n. k.*, 53.
declarations, 52, 53.

JANUARY, 1854.—46

statutes, 52.
pleadings, 52 *n. a.*
bill in equity, 53.
writs, 52.
indictments by the corporation or
others, 53.
inquisitions, *id.*
presentation to living, *id.*
how may be changed, 52.
as to stating, in a demise, 145, 146.
maxim as to, 146.
pleading the, 185 *n. b.*
in indictments, 190 *n. g.*
citation to spiritual court, 285.
alteration of does not defeat prescrip-
tions, &c., 301 *n. n.*, 323.
what evidence of, 310.
of municipal corporations, 342.
how far judicially noticed, 349.
place an essential part of, in hospi-
tals, 568.
founder's, *id.*
nicety with respect to, in hospitals,
568—570.
addition to, not material, 571.
in devise to hospital, *id.*
effect of royal grant to corporation
by a new, 571 *n. m.*
of guardians of poor, 619, 620.
joint stock company, when not to
be changed, 625 *n. s.*
of sole corporation, use of, in grants,
630, 632, 633.
suits, 635, 636.
must be correctly stated, 636 *n. z.*

NEWCASTLE-ON-TYNE,
company of cooks of, 12.
coopers of, *id.*
custom of, 82 *n. d.*
sheriff of, 353.

NEW MALTON,
borough of dissolved by judgment in
quo warranto, 301 *n. k.*

NEW RIVER COMPANY,
mandamus to the, 272.

NORWICH,
freemen of, 508 *n. d.*
consuance of pleas in, 47.
custom of, 335, 336, 339.
sheriff of, 353.

NOTICE OF APPEAL,
to quarter sessions, 450.

NOTICE TO QUIT,
how to be served in ejectment,
278.
by dean and chapter, 597.
churchwardens, 605 *n. m.*
overseers, 611.
form, 613 *n. y.*

NOTTINGHAM,
sheriff of, 353.

NUISANCES,

bye-laws as to removal of, 95, 96, 362.
 mandamus for removal of, &c., 372
 and *n. t.*
 council how may remove, 386.
 action by master of school for a, 558
n. e.
 hospitals not, 568.

NUMBER,

of corporators generally, 48.
 in a free school, 558.
 of churchwardens, 604 and *n. x.*
 and overseers, 608 *n. y.*

OATH,

corporation cannot take, and consequences, 56 and *n. u.*
 power of enforcing an, 76, *n. h.*
 of imposing, 210.
 refusal of oath of office, 82 *n. x.*
 cannot be administered by officer to himself, 217.
 what sheriffs of counties of cities, &c., must take, 353, *n. e.*
 refusal to take, 243 and *n. c.*, 369.
 acting after, 255 *n. o.*
 of clerks, &c., on a discovery, 287, 288.
 of parliamentary electors in boroughs, &c., 412 *n. o.*
 affirmation instead of, 414 *n. b.*
 may be administered at revision courts, 423.
 to be taken by Roman Catholic elected mayor, 425.
 whether indictment lies for breach of general, 428.
 to be taken by recorder, 447.
 borough justices, 469.
 may be tendered by justices, 471.
 on admission of freemen, 507 and *n. u.*
 alteration of one, by the crown, 518.
 not necessary to plea of privilege of University, put in in equity, 523 *n.*
 substitution of declaration for, in the Universities, 528.
 whether visitor may examine on, 535.
 statutory, of fellows of colleges, 539.
 of master of a school, 556.
 of canon, 594.
 churchwardens, 600 *n. n.*
 cannot be imposed by a bye-law, 594
n. d.

OFFICE,
 of entitling necessary to enable crown to enter for alienation in mortmain, 100, 103.

OFFICER,
 a corporate, cannot be removed without cause, 33, *n. f.*

appointed for life, 34, 217.
 borough coroner not a, 41 *n. z.*
 quo warranto against, 41.
 money had and received against, *id.*
 effect of surrender on, 47.
 appointment of, 58, 60.
 discharge, *id.*
 when only can bind the body, 61.
 penalty for refusal of office, 82, 87
 for resignation, 82.
 when may sue the corporation, 88, 89.
 take by devise, &c., 115 *n. u.*
 when corporation may bring action in behalf of, 171, 172, *n. i.*, 190, 191.
 when indictable, 172 *n. i.*, 175 *n. k.*, 192 *n. t.*, 221.
 when may prescribe, &c., 196 and *n. b, c.*
 cannot be judge also, 197.
 when actions lie against, 203 *n. q.*
 incapacity or disqualification to be, 205, 207.
 when a candidate becomes, 210.
 as to common seal to appointment of, 210 *n. n.*, 378 *n. c.*
 when quo warranto necessary to try right of, 211.
 presiding at an election, 203, 208, 212, 213.
 attachment for refusing to swear in an, 214 *n. k.*
 when an usurper, 216 *n. a.*, 255 *n. o.*
 officer de jure, &c., 216, 217.
 officer de facto, 261.
 cannot administer oath to himself, 217.
 effect of judgment of ouster on, *id.*
 by whom to be elected, 218 and *n. r.*
 refusing to act, in municipal corporations, 221, 222.
 who exempted from being, 222.
 resignation of, in boroughs, 223, 224, 414.
 must take declaration, &c., 224 *n. e.*
 when mandamus goes to inferior, 225
n. a.
 when for life, 227 *n. x.*
 when freehold, 243, 244.
 ministerial, liable to actions, 232 *n. a.*
 mandamus to admit, 384 *n. a.*
 to restore, 384 *n. c.*
 de facto, how removed, 233, 244.
 his acts, 261.
 when acts of, good, in boroughs, &c., 418.
 modes of trying rights to offices, 237, 238.
 compelling to do duty, 239.

OFFICER—*continued*.

stamp on appointment of, 240 n. *i*,
379 n. *g*.
amotion of, 240—247.
corporation may be, 245 n. *u*, 277
n. *f*.
resignation of, 246 n. *e*, 268.
mandamus to restore, 244—250.
compel to perform duties, 250—
252.
municipal, to have their titles im-
pugned, when, 254.
when not corporate, 258 n. *i*.
acts of, when void, 306 n. *f*.
evidence of, in trespass by corpora-
tion, 316.
custom to pay fees to, 321.
evidence of appointment of, 357 n. *k*.
when acting is *pri. fac.* 379 n. *g*.
indictable for neglect of duty, 370.
what officers may be compensated,
379—382.
appointed *durante bene placito* how
removable, 379 n. *g*, 382 n. *a*.
elections of, when to be held, 379.
fees when due to a, 380 n. *h*.
responsibility of, how secured, 382—
385.
quo warranto does not lie for a mi-
nisterial, 385 n. *f*.
action against, for misbehaviour, 385
and n. *k*.
person how disqualified to be a mu-
nicipal, 407.
mandamus, when lies to admit an
excluded, 409.
how to state acceptance by 410.
vacancy in office of, how to be de-
clared, 417 n. *s*.
what municipal, may have security
for costs, &c., 418.
when shall recover full costs, *id*.
have notice of action, *id*.
of hospital, when rateable to poor,
&c., 580 n. *u*.
penalty for refusing office or neglect-
ing duty of, 419.
elected by void election when must
be ousted by *quo warranto*, 421,
n. *g*.
acting without making declaration
under 9 Geo. 4, c. 17, s. 2, 425.
effect of Annual Indemnity Acts, 425
and n. *h*.
coroner, how far a corporate, 445.
recorder, whether a corporate, 446 n.
k.
mandamus to restore officer of court
of record, 465 n. *g*.
clerk to justices not an, 474.
payment of costs of prosecution in-

stituted on behalf of, 489.
of University, appointment of, 518.
master of free school a public, 556
n. *o*.

OLD AGE,
not in general cause of *amotion*, 241
n. *o*.

when cause of exemption, 401.

OPTIONS,
the, of a bishop, &c., 632.
whether devisable, 632 n. *p*.

ORDER,
of council for payment of money,
357 n. *l*, 360, 439 and n. *f*.
removing, by *certiorari*, 437.
for removing proceedings, 463 n. *p*.
payment of money to predecessor of
churchwarden, 602 n. *g*.
of quarter sessions, 452.
of college bad, without common seal,
546.

for payment of expenses of prisoners,
&c., 454 n. *o*, 473.

for removal of pauper, 475.

levying borough rate, 490 n. *b*.
491.

payment of poor rates, 496.

dissolution of board of guardians,
621, 622.

of Lord Chancellor respecting charity
estates vested in corporations, 512,
513.

ORDINANCE,
the Board of the, a quasi corporation,
279, 624.
not objects of ejection, 279.

OUTLAWRY,
as to mandamus to restore, 246 n. *x*,
247 n. *h*.

OVERSEERS,
of poor, duties in making out burgess
lists, 392, 393.
omissions by, 393 n. *g*.
effect of their putting councillor off
the burgess roll, 405.
neglect of duties respecting burgess
lists by, 406.

penal action against, 406 n. *a*.

duties of, as to register of voters for
members of parliament in bo-
roughs, &c., 411 n. *g*.

assistant overseers, *id*.

when have right of action against
mayor, 428.

precept to, under Reform Act, 435.
form thereof, 435 n. *x*.

copy of their lists of burgesses, 435.
levying rate for borough rate, 491
and n. *h*, 494, 495.

when to be appointed by council, 493,
494.

OVERSEERS—*continued*.

account for watch rate, &c., 495.
had custom to appoint, 498.

Vid. CHURCHWARDENS AND OVERSEERS.

OXFORD, CITY,

bye-law of, 80.
foreign attachment in, 330.
custom as to exposing goods for sale, 333.

to bring dower by plaint, 338.

sheriff of, 353.

power of sheriff of the county in, 353
n. e.

OXFORD UNIVERSITY,

reincorporated by statute, 19 n. h.
power of, over streetwalkers, &c., 516 and n. h.

how visited, 517 n. u.

statutes of, 519 n. u.

plea of privilege of, 288 n. o.

exemptions of servants, &c., of, 368
n. q.

jurisdiction of Chancellor's Court of, 520, 521.

privilege of that court, 522.

power of asserting privilege of its courts and members, 520, 521.

the halls in, 529 n. o.

power of discommuning, 520, 521.

arresting, 521.

privilege, registration, &c., of servants, 522 and n. d. 523.

privilege of, may be pleaded, 523 and n. n, 524.

both at common law and in equity, 523—525.

claim of conusance, how made by, 525.

appoints clerks of the market, 526
n. u.

franchises of, as to ale, beer, wine, bread, &c., 526, 527.

Chancellor of,

has power to incorporate, 15, 515
n.

is intended to be commorant, 515
n. d.

seems to be a corporation sole, id.

is a justice of the peace, &c., id.

has qualified power to alter statutes, 519 n. u.

Vice-Chancellor of, justice of peace, 527.

PAINTERS,

the company of, 92.

PANNAGE,

what, 164.

PARISH,

how to pay a borough rate, 491, 493

—495.

prima facie liable to repair highways, 501.

PARLIAMENT,

may confer on individual power to incorporate, 15.

have conferred it on registrar of joint stock companies by 7 & 8 Vict. c. 110, 15 n. f.

may erect a corporation for a limited period, 16.

have empowered the crown to do so, id.

reincorporates the Universities, 19
n. h.

necessity of proof of acceptance of parliamentary incorporation, 20.

act of, why necessary to open trading corporation, 26, 27.

supposed origin of every custom, 29 and n. t.

necessary to convey a monopoly, &c., 34.

when presumed, 39.

when not, 586 n. d.

declaring charter void, 39, 41.

when necessary to repeal charter, 45, 46.

how operates on charters, 47.

misnomer of corporation in, 52.

as to bye-laws, 84, 90.

application to, for alteration of constitution of a trading corporation, 159, 290.

enforced by mandamus, 251.

offences against, not cognizable by visitor, 531.

incorporating a trading body, how interpreted, 271.

in favour of a college, 539.

when in nature of a bargain, &c., 289, 290.

cannot be relieved against, 292.

dissolving corporations, 302.

disuniting part of a county of a city, 348.

right of voting for members of, 346
n. k, 411—413.

personating voters for members of, 348, 349.

local acts of, in corporate places, 359, 361 n. d, 362.

costs of obtaining act of, for improvement of borough, 488 n. o, 499.

corporation restrained from petitioning against bill before, 499 n. g.

PARSON,

alienation of lands, &c., to a mortmain, 104.

power to exchange, &c., 104 n. g.

property in the church in, 606.

PARSON—*continued.*

where patron of, presents to advowson in gift of, 632.
 presentations by, 632 n. r.
 parol contract of, as to tithes, 634.
 leases of tithes by, id.
 agreement for compensation of, for tithes, 651, 652.
 grant of presentation of vicarage by, 644.
 annuity, 646.
 how to try right to be a, 635.
 prohibition to stay waste, 644.
 resignation of a, 635.
 sequestration, 639 n. g.
 dilapidations good cause to deprive, 644, 645.
 how to sue, 635.
 presumed rightly appointed, 637.
 when equity restrains from waste, 637, 644.
 the fee whether in abeyance or in, 637.
 leases of lands by, 639, 640.
 parson de facto, 640.
 usurping, 641.
 license to lease to, 640.
 land tax to be reserved in lease of, 651 n. l.
 confirmation of lease of, 640.
 rent-charge binding on, 639, 640.
 by, id.
 arrears of annuity payable by, how recoverable, 639.
 of pension, 639 n. d.
 de facto, acts of a, 640, 641.
 reputed, 640 n. l.
 usurper, 641.
 successor of, when fully entitled, 640 n. i.
 lease by, between presentation and induction, 641.
 contract by, 641 n. n.
 may appoint to clerkship of parish by parol, 648.
 concurrent lease by, 641, 642 n. z.
 building lease by, 641, 655.
 in London, 655 n. e.
 farming lease by, 641.
 consent of patron and ordinary, when necessary, 643.
 executors of, when to have apportionment of rent against successor, 643, 644.
PASSAGE,
 what, 164.
PATTEN MAKERS' COMPANY,
 Quo warranto for mastership of the, 261, 262.
PAUPER,
 order for removal of a, 475.

removal, &c., of lunatic pauper, 499.
PAVING RATES,
 distress for, &c., 362 n. k.
 jurisdiction of equity as to, 493.
PEACE,
 as to police office in boroughs having a separate commission of the, 367.
PENALTY,
 how to sue for, against municipal officers, &c., 418.
 distribution of, on its recovery, &c., id.
 for refusal of office, 419.
 neglect of duty of office, id.
 under Weights and Measures Act, 424.
 for acting as mayor without taking declaration, &c., 425.
 on mayor for attending nonconformist place of worship, &c., 426.
 for acting as assessor, without making declaration, &c., 432.
 as auditor, 442.
 for acting as clerk to justices, &c., 443, 473.
 antedating admission of freeman, 508.
 in a statute cannot be recovered in University courts, 522.
 always payable to the borough fund, 487 and n. k.
 for non-residence, 550.
PENNAGE,
 what, 177.
PENRYN,
 corporation of, refuse to accept a new charter, 19 n. c.
PERPETUAL CURATE,
 a corporation sole, when, 657, 658.
 may take by devise, 657 n. e.
 how must demise lands, 658.
 establish the right to, id.
 whether in parson or vicar, id.
 what constitutes a, id.
PERSON,
 how far applicable to a corporation, 4, 66 n. z, 150.
 limited in bye-laws, 80.
 does not extend to corporation, when, 118 n. b, 165 n. h.
 when does, 521 n. p, 574 n. a.
PERSONATION,
 of voters for members of parliament, 349.
 councillors, 400, 410.
 at corporate elections, 214 n. p.
PETITION,
 for a charter of municipal incorporation, law relative to, 16, 17.
 for a scire facias, 43.

PETITION—*continued.*

- to parliament, 55 n. *s.*
- against bill pending there, 499 n. *g.*
- to Lord Chancellor, 489.
- to fill up vacancy in charitable estate trustees, 512.
- in respect of schools, &c., 553 and n. *c.*
- to great seal, for visitation, &c., 540, 544 n. *c.*
- for new distribution of funds of a charity, 562, 563.

PEW,

- council may repair the corporation, 488 n. *m.*

PHYSICIAN,

- to a hospital, mandamus for, 250.

PHYSICIANS,

- college of, their power to imprison, 86 n. *d.*

PICCAGE,

- what, 176.
- customary claim of, 177 n. *x.*
- distress for, 177.

PIE POWDRE COURT,

- incident to a market, 181.
- prescriptive whether lost by subsequent grant of, 324.
- may be held by custom, without market, &c., 467.
- is a court of record, *id.*
- justifying under process out of, *id.* n. *c.*
- may commit for contempt, 567 n. *d.*
- prescribing for a, 467 n. *c.*

PISAGE,

- what, 165 n. *y.*

PISCARLE,

- grant of, 32, 186, 187.

PISCATIONES,

- what passes under grant of, 32.

PLACE,

- formerly every corporation must be constituted of some, 14, 53, 54.
- not now, 54.
- restriction as to, 48.
- geographical truth not necessary as to, 53, 54.
- of corporate meeting, 164, 211 n. *x.*
- essential to name of a hospital, 568.
- not to existence of a spiritual corporation, 598.

PLEADING,

- how to plead a charter, 24 n. *h, l.*
- corporator cannot plead ignorance of charter, 23.
- how to plead after change of name, 24 n. *l.*
- usage explanatory of a charter, 27.
- in contravention of a charter, 28 n. *o.*

custom of foreign bought and foreign sold, 29 n. *s.*

prescribing to discharge from tolls, 30 n. *e.*

have profit in alieno solo, *id.*

burgesses to have gildam macatorium, 31 n. *g.*

prescription to hold court, 34 n. *s.*

exemplification of charter, n. *e.*

charter with a profit, *id.*

under what seal, *id.*

oyer of a, when not demandable, 39 n. *f.*

nul tiel record, *id.*

non concessit, 39 n. *f.*, 40 n. *r.*

where corporation has been differently named at different times, 51 n. *d, e.*

corporation may prescribe in several names, 51.

deed made to them by a wrong name, 51 n. *l.*

true name must be used in pleadings, 52 n. *a.*

especially criminal pleadings and forms, 53.

act done by corporation, 57.

acceptance of assignee of lessee, *id.*

by a stranger a corporate act, *id.* n. *p.*

in trespass by a servant justifying, &c., 59 n. *k.*

cognizance by bailiff, 60 n. *s.*

non est factum, 64 n. *n.*

majority, 70 n. *e.*

bye-laws, &c. 77 n. *v.*

to quo warranto information, 80.

how to declare on bye-law respecting a corporate office, 82.

founded on a custom, 85 n. *y.*

referring to former bye-laws, *id.*

generally, 88 n. *s.*

how to justify and make cognizance under a bye-law, 88 n. *s.*

plaintiff, what to show in action on bye-law, 89 n. *b.*

how to plead a lost bye-law, 91 n. *r.*

when not necessary to show letter of attorney, &c., 110 n. *p.*

custom in London to devise in mortmain, 112 n. *g.*

how to plead seisin in a corporation, 136 n. *r.*

a lease by corporation, 146 n. *b.*

deed of corporation 147 n. *l.*

declaring on parol demise, &c., 149 n. *t.*

entry for forfeiture, 151 n. *k.*

justifying same, *id.*

declaring for duties, 153, 160 and notes 161.

PLEADING—*continued.*

toll-thorough, 160 *n. a.*
 toll-traverse, *id.*
 port dues, *id.* and *n. c.*, 161.
 tolls generally, 160 *n. b.*
 petit customs, 160 *n. c.*
 justifying for taking toll, &c., 161
n. i.
 in action on case against a corpora-
 tion, 161 *n. p.* 162 *n. x.*
 to action for tolls, &c., 162.
 who to be sued in such actions, 163,
 164.
 corporation, how to justify seizing
 port dues, &c., 163 *n. a.*
 distraining for toll-thorough, 165
n. z.
 prescribing for same, *id.*
 justifying for toll-traverse, 164 *n. q.*
 making cognizance under prescrip-
 tion to distrain for market toll,
 167 *n. r.*, 170 *n. y.*, 171 *n. a.*
 in assumpsit for market tolls, 171
 and *n. b.*
 replying, to allegation of prescriptive
 right to a tensary, 171 *n. c.*
 in debt or assumpsit for stallage, 175.
 case for defrauding of stallage,
 175 and *n. l.*
 setting up market, 179 *n. t.*
 claim of exemption by charter, 182
n. b.
 in covenant to exempt from toll, 184
n. p., 191.
 prescribing in a corporation, 185 *n.*
y.
 by a corporator, 185, and *n. b.*
 name of corporation, *id.*
 by bailiff in justification of distress
 for an amercement, 188 and *n. n.*
 and in replevin, *id. n. o.*
 in ejectment, 189, 190.
 quare impedit, 191, and *n. m.*
 case for disturbance of ferry, 192
n. z.
 right of way, 193, 194.
 in equity, 199 *n. f.*, 286.
 at law in case of a foreign corpora-
 tion, 201 *n. s.*
 whether must show how incorpo-
 rated, 201, 202.
 to information for not serving office,
 207 *n. j.*
 in action for bribery, 233 *n. o.*, 235
n. c.
 office, 247 *n. f.*
 in mandamus and quo warranto, 225
 —250, 253 *n. t.*
 custom, 249 *n. z.*
 certainty in information in quo war-
 ranto, 258 *n. h.*, *i.*

pleas in quo warranto, 258.
 replications, 259.
 declaring on promissory note of a
 joint stock company, 276 *n. b.*
 on bond given by a corporation,
 277 *n. e.*; plea, *id.*
 plea in trespass against corporation,
 280 *n. g.*
 of nul tiel corporation, when avail-
 able, 282, 283 and 282 *n. q.*
 precedents of indictments of corpo-
 rations, 284 *n. d.*
 alleging damage in action on the
 case for breach of chartered duty,
 284 *n. f.*
 a record of a London court, 288.
 plea of privilege of University, *id.*
n. o.
 customs of London, 288 *n. p.*
 Statutes of Limitation, 294.
 to the jurisdiction, by corporation,
 294.
 nol. pros. demurrer, confession of
 plea, &c., in quo warranto, 299 *n.*
v., 300 *n. f.*
 to a quo warranto information, 299
n. z.
 plea of claim of liberties, 299 *n. a.*
 relying on a charter which does
 not support it, 299.
 charter must not be pleaded as a
 grant and as a confirmation, *id.*
 crown how may plead, &c., in quo
 warranto, 299, 300.
 corporator how to prescribe, &c., 320
 and *n. l.*
 prescribing for tolls, 321, 322.
 traverse of prescription, 325.
 a custom generally, 321, 326, 327.
 consideration for toll-traverse, 322
n. z.
 where there are two distinct customs,
 334.
 declaring at common law and reply-
 ing a custom is a departure, 335.
 custom contrary to rules of, not bad,
 336.
 in concessit solvere, 336; assumpsit
 solvere, 337.
 covenant made ore tenus, 336.
 in a borough court, 460 *n. m.*
 a custom in general, 337.
 particular customs, *id.*
 whether borough court may be plead-
 ed to be held by charter, &c., 339.
 statutes respecting municipal corpo-
 rations to be pleaded, 343.
 prescribing for common by freeman,
 &c., 346 *n. k.*
 bye-law made by municipal council,
 364 *n. g.*

PLEADING—*continued.*

acts of council, 386, 387 *n. s.*
 acceptance of office, 410.
 declaration under 19 Geo. 2, c. 28,
 412 *n. o.*
 mayor may prescribe to be escheator,
 421 *n. l.*
 plead general issue, &c., 429.
 application to the crown for grant of
 quarter sessions, 446.
 commencement of declaration in su-
 perior court after removal from in-
 ferior, 463 *n. q.*
 grant of consuance of pleas, 464.
 as to declaring in borough courts, 465
 and *n. k.*
 common counts in, 465 *n. k.*
 pleas in, *id.*
 justification under process out of Pie
 Poudre Court, 467 *n. c.*
 prescription of a court of record, &c.,
 467, 468.
 Pie Poudre Court, 467 *n. c.*
 a court of equity, 468.
 retorna brevium, 468 *n. y.*
 a bridge &c., 500 *n. i.*
 to indictment for non repair of high-
 way, 502 *n. d.*
 in replevin, by freeman, 510.
 custom of University, to distrain,
 &c., 522 *n. b.*
 privilege of University, 522—525.
 plea of, 523 *n. n.*
 to the jurisdiction of University
 courts, 524 *n. p.*
 to claim of consuance by University,
 526 *n. t.*
 as to names of head of college, 529
n. o.
 unreasonableness of a visitor's power,
 530 *n. y.*
 power of visitor to decide elections,
 &c., 533 *n. r.*
 deprivation, &c., by visitor, 536 *n. y.*
 need not state in what power of a
 visitor consists, *id.*; nor the
 cause of deprivation, &c., 537
n. d.
 deprivation of head of a college, 537
n. g., 538 *n. n.*
 seisin of a college, 538 *n. l.*
 expulsion, by a visitor, *id. n. n.*
 to information in equity against elec-
 tion of fellow of a college, 539.
 entry of bailiff for condition broken,
 541 *n. m.*
 to bond given to a college, 544.
 18 Eliz. c. 6, 544 *n. i.*
 in replication to plea of lease by a
 college, 547 *n. a.*
 defect in stating name of a hospital,

569, 571.

seisin of a hospital, 569 *n. x.*
 names, &c., of a hospital, 570.
 addition to real name not material
 in, 571.
 when to plead non est factum, &c.,
 571 *n. n.*
 by hospital in debt, 577 *n. s.*
 master of hospital, 577.
 acceptance of estate or right of way
 by hospital, 579.
 right of way, *id.*
 consuance by bailiff of hospital, *id.*
n. l.
 avowry by hospital, *id.*
 lease for years, &c., by dean and
 chapter, 598 *n. h.*
 prescription by dean and chapter, 381
n. a.
 reason for deprivation, 582.
 acceptance of rent by dean and chap-
 ter, 588 *n. s.*
 entry for forfeiture by them, *id.*
 by their license, *id.*
 release by dean and chapter, 596.
 acceptance of rent by churchwardens
 and overseers, 612 *n. q.*
 entry of their servant, &c., *id.*
 excommunication of corporation sole,
 637, 638.
 by successor to, in *sci. fa.* 639 and
n. b.
 lease under exchequer seal, 628.
 grant of crown, *id.*
 seisin by parson, 635.
 in actions by corporation sole, 637
n. n.
 stat. 1 Eliz. c. 19., 639 *n. d.*
 in actions for dilapidations, 644 *n. k.*
 sentence of deprivation, 645 *n. s.*
 resignation to ordinary, 645 *n. z.*
 an office, 647 *n. l.*
 by officer for arrears of annuity, 648.
 resignation, &c., 659 *n. p.*

PLENARTY,

of office excludes mandamus, 252,
 593.

PLUMBERS,

the company of, their power to im-
 prison, 86 *n. f.*

POCKLINGTON SCHOOL,

incorporation of, 558 *n. d.*
 leases of lands of, 563.

POLICE,

of boroughs may be consolidated with
 the county constabulary, 368 *n. s.*

superannuation fund of,

POLICE MAGISTRATE,

appointment and salary of, 367.

POLICE OFFICE,

where must be provided, 367.

- PONE**,
attachment in the nature of, 284.
- PONE PER VADIOS**,
against corporation, 231 n. *x*.
- PONTAGE**,
what, 164.
- PONTEFRACT**,
how incorporated, 9 n. *s*.
- PONTENARII**,
the, of Maidenhead, 6 n., 387 n. *x*.
- POOLE**,
sheriff of, 353.
- POOR RATES**,
corporations when liable for, 285, 496—499.
in district newly added to a borough, 347 n. *l*.
local acts for, 362.
payment of, entitling to be on burgess roll, 387 n. *y*, 388.
to vote for member, 411 and n. *k*.
claim to be rated, 412 n. *l*.
rule to justices to sign, 477 n. *l*.
must be allowed by two justices, *id*.
borough rate, when payable out of, 491.
indictment for refusal to pay, 496.
waterworks corporation, how, &c., liable to, 496, 497.
corporation, when rateable to, for pastures, &c., common, &c., *id*.
for tolls, 498.
when for property not actually though potentially profitable, 497 n. *p*.
municipal property, when exempt from, 498.
colleges, how rateable to, 541 n. *k*.
hospitals, how, 580 n. *u*.
founder cannot exempt lands from, 552 n. *b*.
guardians of union, when rateable to, 629.
visitor and guardians, when, 620 n. *x*.
- POPE**,
the, might formerly incorporate, 11.
- PORT**,
definition of, 160 n. *c*.
duties incidental to a, 160 n. *h*.
effect of grant of a, *id*.
extent of a, 161 n. *i*, *p*.
evidence of a, 162 n. *q*.
- PORT DUES**,
claim for, 160 n. *a*, *c*, *g*.
when corporation may have, 160 n. *e*.
import consideration, 160, 161.
whether extend to new articles of import or export, 161 n. *o*, 163 n. *g*, 170.
tolls, customs, &c., defined, 161 n. *o*.
consolidating actions for, 162, 163.
liable to the poor, 285.
when liable to jurisdiction of equity, 493.
- PORTREEVE**,
quo warranto for, 262.
- POTWALLERS**,
votes, of in boroughs, &c., 411.
- POUNDAGE**,
of sheriff of county of a city, &c., 354 n. *o*.
- POVERTY**,
when cause of amotion, 241 n. *o*.
disfranchisement, 264 n. *p*.
- PRECINCTS**,
exempt from municipal jurisdiction, 344 and n. *f*.
added to same, 346, 347.
felonies committed in, 347.
- PRESCRIPTION**,
nature of, 301 n. *n*.
proof of, 320.
differs from custom, 327.
must be pleaded, 320.
corporations by, 6, 7, 167, 516 n. *f*.
how to plead, 7 n. *d*, 24 n. *l*.
evidence of, 6 n. *a*.
to be exempt from tolls, &c., 30.
to take toll, 32 n. *n*.
how proved, notwithstanding a charter, 33.
for port duties, 160, 161.
toll-thorough, 165.
toll of pigs, 167 n. *r*.
toll generally 167.
stallage, 174 n. *z*, *b*, 175.
exemption from tolls, 174.
fair in alieno solo, 172 n. *m*.
market, 179 n. *t*.
common, 185, 510 n. *i*, *k*.
of estovers, 185 n. *b*.
right of fowling, 187, n. *z*.
using pew in church, 202.
various franchises, 299 n. *v*.
to hold a court of equity, 468.
tenere placita, 329.
retorna brevium, 468 n. *g*.
metage, 327 n. *b*.
common, &c., 327 n. *d*.
keyage, 329.
by dean and chapter, 381 n. *a*.
corporation liable by, to repair bridges, &c., 500.
Chancellor of Oxford a justice of peace by, 515 n. *d*.
a, not abrogated by new charter, &c., 301 n. *n*.
grant of same thing, 301 n. *n*.
other custom, &c., 334.
corporation by, how dissolved, 307.

PRESCRIPTION—*continued.*

by city of London, 510.
 not destroyed by variation in thing
 to which it is annexed, 323.
 whether destroyed by subsequent
 grant, 323—325.
 implies a grant, 324 *n. a.*
 contrary to common right, bad, 325.
 to levy money, 328, 329.
 when may be made, 325.
 by whom, 326, 327.
 a canon may be, by, 656 *n. t.*
 by corporation sole, 636.
 parson charged by, 636 *n. c.*
 with pension, 639 *n. d.*

PRESENTATION,

to living, how made by corporation,
 56, 60, 540, 597 *n. z.*
 mastership of hospital, 60 *n. p.*
 by college to head, void, 149 *n. y.*
 550.
 grant of presentation to vicarage,
 644.

PRIEST,

corporation holding lands charged
 with stipend to *a.*, may augment it,
 492 *n. r.*
 obligation to maintain, 492.

PRIMAGE,

what, 164, 165.

PRISAGE,

what, 165 *n. y.*
 grant of exemption from, 31 *n. m.*
 182, *n. a.*

PRISONERS,

expenses of prosecuting, &c., 454—
 456, 484.
 order for payment of, 454 *n. o.*
 treasurer to keep an account of, 455.
 trial at quarter sessions during
 assizes, 457 *n. f.*
 punishment for discharging out of
 borough gaol groundlessly, 463.
 contract for expenses for mainte-
 nance, &c., of, 473, 482—484.
 mode of calculating such expenses,
 482 *n. h.*
 when may be entered into, 483.
 trial of from district prison, *id.*

PRIVILEGE,

of Universities, *vid.* UNIVERSITIES.

PRIVY COUNCIL,

effect of advice to the crown to grant
 a charter of municipal incorpora-
 tion, 17.
 appeal to Judicial Committee of, 520.

PROCEEDINGS,

Vid. ACTS AND PROCEEDINGS.

PROCTORS,

powers of the, in the Universities,
 516.

privileges, &c., of proctors' men, 522
n. d., 527 *n. b.*

PROHIBITION,

to Chancellor's Courts in the Univer-
 sities, 520, 521, 524 *n. s.*
 to visitor of a college, &c., 534, 535.
 rule for *a.*, 535 *n. m.*
 to suit for keeping school, &c., 558
n. z.

Ecclesiastical Court respecting
 churchwardens, 600 *n. m.*, 602.

PROMISSORY NOTE,

only trading corporations can make,
 60.
they may make without common
 seal, 61.

when corporation may make, 276.
 churchwardens cannot make, 603.
 by churchwardens and overseers, 609
n. a.

PROPERTY,

power to take real, 98.
 license to hold, *id.*
 as to granting real, 99 and *n. m.*
 in fee farm rents, &c., 107 and *n. q.*
 tenure in which held by corporations,
 107, 108.
 of municipal corporations when trust
 property, 108.
 nature of property in lands of a cor-
 poration, 109, 110, 128.
 held in trust for public, when, 116
n. l.
 when may be granted, &c., 129—
 153.
 equity, when interferes in manage-
 ment of, 136, 137.
 of municipal corporations held in
 trust, 136 *n. r.*
 how disposed of, &c., 140, 141.
 collusive sales of, 142.
 settled to charitable use, how may be
 leased, 144.
 municipal, held in trust, 489, 493.

PROPERTY TAX,

college, how liable to, 541 *n. k.*
 hospital, how, 580, *n. u.*

PROTECTION,

of persons acting in pursuance of
 Municipal Corporations Act, 502.

PROXY,

voting by, 256 *n. q.*
 in dean and chapter, 592 *n. n.*
 594.

PUBLIC PURPOSES,

to which borough fund applicable,
 &c., 488—490.

QUAKERS,

declarations by, 408 *n. k.*, 507 *n. u.*

QUARE IMPEDIT,

against a corporation, 280.

QUARE IMPEDIT—*continued*.

cannot be brought in an University Court, 521.

for mastership of a hospital, 577 *n. s.*
 deanery, 586.
 canonry, 593.

QUARTERLY GAOL SESSIONS,

Vid. **QUARTER SESSIONS**; **GAOL**.

QUARTER SESSIONS,

the, of a borough, &c., held by recorder, 449.

who may appoint a second court, 449, 450.

of what has cognisance, 449—451.

of what not, 457, 458.

cannot try an appeal against refusal to grant ale license, 449 *n. s.*

how to try legality of grant of, 450, 453.

appeal against borough rate to, 490.

notice of appeal to, 450, 490 *n. a.*
 trial at, 451.

action against recorder, if proceeds after certiorari, &c., 451.

remedy for erroneous conviction at, 451, 452.

practice thereon, 451.

removal of indictments, &c., 451, 452,
 order of, how enforced, 452.

juries at, 479, 480.

as to expenses of maintaining, &c.,
 prisoners sent from, 454—456,
 484.

order for payment of these, 454 *n. o.*

qui tam informations triable at, 457
n. f.

prisoners triable at, during sitting of
 assizes, id.

of an united district, 457.

adjournment of, 457.
 attorney must deliver signed bill, &c.,
 for business at, 461 *n. s.*

quarterly gaol sessions, 474, 475, 484.

QUASI CORPORATION AGGREGATE,

the nature of a, 600.

Et vid. **CHURCHWARDENS**; **CHURCH-
 WARDENS AND OVERSEERS**; **BANK-
 ING COPARTNERSHIPS**; **ORDNANCE**,
 &c.

QUASI CORPORATIONS SOLE,

instances of, 661.

QUEEN'S BENCH,

when interferes with a visitor, 532.

the Court of, superintends corpora-
 tions, 225 *n. m.*, 269.

and London in some cases, 420.

and how, 226, 227, 253 *n. u.*

on what principles, 271.

when takes notice of customs in
 borough courts, 338.

grants leave to file quo warranto,
 409.

QUESTIONS,

to be asked at election of councillors,
 400.

QUO WARRANTO,

to try right to an exemption, 37 *n. u.*
 validity of a charter, 41.

information, when allowed, 41 *n. z.*
 effect of judgment of forfeiture in,
 41.

against corporations by prescription,
 42 *n. h.*

when applicable, id.

for levying tolls, &c., 164.

holding market, 169, 179 and *n. t.*,
 180.

setting up ferry, 186.

claiming fishery, 187.

when not required, 208.

to try right to office, 210, 211, 213
n. i., 215, 216.

void election, 229.

effect of judgment of ouster in, 217,
 235, 261, 296 *n. m.*

form of it, 259 *n. s.*

judgment of quod capiantur, &c.,
 282 *n. s.*, 296 *n. m.*

form of, &c., 297 *n. n.*

in case of London, 298 *n. g.*, 299 *n. y.*
 writ of error in, 262.

judgment on a disclaimer, 258 *n. l.*,
 299, 309.

for defendant, 299 *n. v.*

where corporation makes default,
 299.

on usurpation, 255 *n. o.*, 259 *n. t.*,
 260.

how expedited in case of municipal
 corporations, 226, 227.

for what offices lies, 238 and *n. s.*,
 253 *n. t.* and when, 252—258.

under stat. 9 Ann. c. 20 . . 262.

what necessary previous to granting,
 243, 244.

when officer turns out to be disquali-
 fied, 244 *n. f.*

one writ against several persons,
 253 *n. t.*

for several franchises, 254.

rule for, when refused, 253, 254.

user, not claim merely, essential
 to, 254, 256.

under 9 Ann. c. 20, &c., 255, 256.
 6 & 7 Vict. c. 89 . . 255 *n. n.*

consolidation of writs of, 256.

time of applying for, 256, 257.

nol pros. in 259 *n. y.*

ex officio informations of, 261, 262.
 friendly, 268, 269.

for claiming to be a corporation, 282.

QUO WARRANTO—*continued.*

against corporators, 282 *n. s.*
 by private relator, 282.
 when lies, and when *scire facias*
 against corporation, 295—298.
 instances, 297 *n. n.*
 difference between writ and informa-
 tion in nature of, 298.
 inspection of books for purpose of,
 298 *n. r.*
 want of appearance in, 298, 299.
 for holding market, 299 *n. v.*
 to try right to be a burgess, 392.
 brought in the Court of Exchequer,
 299 *n. v.*
 when court grants to private relator,
 299.
 what not within stat. of 9 Ann., 299
n. z.
 plea and replication, 299, 300 *n. e.*
 lies against persons assuming a com-
 mon seal, &c., 300, and how, *id.*
 does not lie to question a man's trade,
 300 *n. f.*
 nature of remedy of, 301 *n. l.*
 what not objection to granting, 304
n. z.
 lies against corporation which acts
 after having lost an integral part,
id.
 whether ought to be brought on a
 dissolution, 306.
 against a parliamentary corpora-
 ration, 307, 308.
 sources of evidence in, 311.
 trial of a, 348 *n. o.*
 for office of constable, 368.
 not for a merely ministerial office,
 385 *n. f.*
 vacancy in office, when to be ascer-
 tained by, 405.
 against councillor, 409.
 general rule as to relators of, 409, 410.
 discretion as to leave to file, *id.*
 affidavits for, against a councillor,
 410.
 costs of, &c., 414.
 to remove alderman, 416, 420.
 lies when statute declares election
 void, &c., 421 *n. g.*
 to remove mayor on disqualification
 for bankruptcy, &c., 426 *n. e.*, 427.
 the proper mode of removing from a
 freehold office, 430.
 for office of treasurer, 439, 441.
 borough coroner, 445.
 recorder, 446 *n. k.*
 registrar of Borough Court, 460
n. p.
 judge of Borough Court, 462.
 justice of a borough, 475.

freeman, 504 *n. l.*
 master of hospital, 577, 578.
 defence to, by council, 488.
 does not lie to try right to fellowship,
 539.
 cannot be brought in University
 Court, 521.
 right to inspect documents in a,
 527.
 whether lies for breach of bye-laws,
id.
 does not lie to remove churchwarden,
 and why, 604, 605; nor guardian
 of poor, 622.
 against corporation sole, 638.
 appearance in, 636 *n. a.*

RAILWAY CORPORATION,

mandamus to, compelling observance
 of their contract with the public,
 159.
 as to injunction to restrain from
 amalgamation, 199 *n. c.*
 as to infants becoming members of,
 211 *n. o.*
 mandamus to compel to restore their
 line, 270.
 how to recover statutory debt, 271
n. r.
 not compellable to declare dividends,
 272.
 suit in equity by shareholder against,
id.
 mandamus, when will not go to, 272,
 273.
 will go to compel them to pay
 money, 273.
 statutory remedy against, to be ad-
 hered to, *id.*
 case against, for injury to houses
 near a line, &c., 277 *n. g.*
 indictable for obstructing a highway,
 &c., 284.
 bill of discovery against, 287.
 to enable to defend action, 288
n. n.
 when action against, will not be re-
 strained in equity, *id.*
 when equity restrains from using
 their parliamentary powers, 289;
 from suing at law, 289 *n. c.*
 their statute how in nature of a bar-
 gain with the public, 289, 290.
 may be restrained at the instance of
 single shareholder, 290.
 application of strangers against, 290
n. g.
 cannot guarantee dividends of a
 steam-packet company, &c., 291.
 powers of Commissioners of Rail-
 ways, 291 *n. k.*

RAILWAY CORPORATION—*continued.*

- forfeiture of shares in, 292.
 - when not relieved against, *id.*
 - when restrained, 292, 293.
- may be bound by contract made before their incorporation, 294.
- when not by contract of agent, *id.*
 - their contract, not under seal, will not be enforced in equity, *id.*
- evidence in actions against, &c., 314 *n. r.*
 - of proprietorship of shares, 319 and *n. a.*
- when to have compensation jury from county of a city, 345 *n. h.*
- when one of the sheriffs is interested in, 354 *n. r.*
- sale of lands by dean and chapter to, 586, *n. l.*
- when proceeds of such sale not apportioned between dean and chapter and their lessee, 596.

RATES,

- for paving, lighting, &c., 361, 362, 388 *n. d.*, 493, 606.
- publication of, 362 *n. h.*
- summons for non-payment of, 362 *n. k.*
- jurisdiction of equity as to, 493.
- publication of, 494 note *c.*

Bridge rates, 500, 501.

remedy for, 501.

Watch rates, 375—377.

- appeal from district watch rates, 450 *n. d.*
- overseer to collect, where, 494.
- separate rate for, *id.*
- recovery of, 494, 495.
- accounted for, 495.

Baths and washhouse rates, 385, 386, 495.*Highway rates*, 501, 502,*District rates*,

- levying a, 493, 494.
- how to try validity of a, 490 *n. a.*
- imposition of, &c., 493, 494.
- amount of, 495.
- surplus of, *id.*
- what to be paid by burgess, 388.
- voter for member of parliament, 411 and *n. h.*

Water rates,

application of, 491.

County rates,

when borough, &c., exempt from, 452.

Museum rates,

when leviable, 495.

Hundred rates,

when borough liable to, 453.

Gaol rates,

mortgage of, 484.
how to be made, *id.*

READING,

devise to poor people of, &c., 120, 126, 127.

RECOGNIZANCE,

in quo warranto, 260.
whether corporation can enter into, 284 *n. c.* 496.
mayor may take, 339.
forfeiture of, in a county of a city, 351.
to pay costs of trying indictment, &c., 352.

RECORDER,

how appointed, &c., 446.
to appoint inspectors of weights, &c., where, 446 *n. i.*
a new officer, 446 *n. k.*
cannot be removed by the corporation, *id.*
nature of his office, *id.*
quo warranto lies against, *id.*
qualifications for, 446.
his precedence, *id.*
salary, 446, 448.
may be revising barrister, &c., 446.
may appoint deputy, &c., 447.
oath, *id.*
may try appeals from borough rate, 447 *n. p.*
may reserve cases for the judges, *id.* 457 *n. f.*
is judge of the Court of Record, &c., 447, 448.
may make a deputy judge, *id.* Vid. QUARTER SESSIONS; COURTS OF RECORD.
ex officio a borough justice, 469.
deputy recorder, 447, 448.
not ex officio justice of peace, 469 *n. m.*
of united district, 456, 457.
certifying as to repairs of gaol, 485 *n. d.*

REGISTRAR,

of corporation of Bedford Level, quo warranto for, 253 *n. t.*
of a borough, same, 262.
of Borough Court, his appointment and fees, 460 and *n. p.*
how to summon jurors, 479.
quo warranto for office of, 460 *n. p.*

RELATOR,

of quo warranto information, who, 253, 254.

RELEASE,

of right vested in corporation, bad, though made by every one of the members, 3.

of corporator's rights for purposes of evidence, 268.

of rent due to corporation, 429.

plea of, in Borough Court, 465 n. *k*.

RENT,

effect of grant of lands rendering, &c., 107, 108.

issuing out of estate in tail male, 111.

when a yearly, 140 n. *r*.

surplus rents of charity estates, 145 n. *x*, 561.

payment, &c., of, when evidence, 149.

acceptance of, what it affords presumption of, 148, 150, 587, 588.

must be acceptance as rent, 149 n. *u*.

how to demand, 150 and n. *b*.

acquittance for, id.

release of, 429.

buying of rent charged on corporate lands, 489.

on college leases, 544.

conusance for, by college bailiff, id.

acceptance of, by head of college, 549 n. *r*.

dean, 586, 587,

grant of rents and profits, 559, 560.

devise of surplus, &c., 561.

lessee, when to pay arrears of, under void lease, 563.

ordered to be paid under hospital lease, 575.

dean, when cannot demand, 586.

due to dean and chapter, and dean dies, 587, 588.

whether corporation sole may accept by parol, 634.

acceptance of, by successor to parson, 640; and bishop, 640 n. *k*.

right of successor of bishop to arrears of, 640 n. *k*.

apportionment of, against parson's successor, 643, 644.

debt for, on lease of tithes, 649.

parson rateable to the poor for corn rent, &c., id.

acceptance of, when does not bind corporation sole, the lord of a manor, 651.

ancient, what, 651 and n. *l*.

heriot not part of, 651 n. *o*.

copyhold, whether apportionable, 650.

need not be paid by lessee under lease forbidden by 6 & 7 Will. 4, 20, 654.

RENT-CHARGE,

due by a corporation, not determined by change of name, 24.

cannot be entry on, 614 n. *e*.

by parson, when binds not successor, 639, 640.

when does, 640.

REPLEVIN,

conusance by bailiff of corporation in, 189 n. *o*, 316.

against a corporation, 280.

plea in bar by freeman, 510.

avowry by freeman, id.

RESIGNATION,

of office in municipal corporations, 223—225.

how completed, 246 n. *e*, 268.

quo warranto after, 255 n. *n*.

of an usurper, 259 n. *y*.

of corporate character, 268.

for purposes of evidence, id.

intended to be by deed, when, 268 n. *s*.

must be so, when, 268.

of a corporation sole, 635, 656 n. *s*, 659.

is breach of contract to demise, &c., 645 n. *z*.

how to plead, &c., id.

to one of two founders enures to both, 659.

RESOLUTION,

effect of resolution not under common seal, 55, 57, 546.

when void, 158.

RETORNA BREVIVM,

franchise of, 349 n. *g*, 353 n. *e*.

prescribing for, 468 n. *g*.

RETURNS,

to writs of mandamus, 228—240.

false, 228; punishment of, 240 and n. *h*.

demurring to, 228 n. *y*, 229, notes *h*, *i*.

of not duly elected, 230.

when certainty in, less necessary, 239.

damages on traverses to, 240 n. *h*.

REVERTER,

possibility of, after a fee granted, 110.

of lands, &c., 117.

ROMAN CATHOLICS,

donations, 99 n.

whether devise for praying for souls, &c., good, 125.

elected mayor, &c., 425.

SALE,

when municipal corporations may sell, &c., 140.

SCAVAGE,

what, 163.

SCAVENGER,
mandamus to admit a, 233 n. r.

restore a, 384, n. c.

SCHEDULE (A). (MUNICIPAL CORPORATIONS ACT) ENGLAND AND WALES.

Boroughs which are to have a Commission of the Peace.

SECTION I.—*Parliamentary Boundaries to be taken until altered by Parliament.*
5 & 6 Will. 4, c. 76. [Sch. (A.), s. 1.]

BOROUGH.	Wards.	Aldermen.	Councillors.	BOROUGH.	Wards.	Aldermen.	Councillors.
Aberystwith . . .	0	4	12	Liverpool . . .	16	16	48
Abingdon . . .	0	4	12	Macclesfield . . .	6	12	36
Barstaple . . .	2	6	18	Monmouth . . .	0	4	12
Bath . . .	7	14	42	Neath . . .	0	4	12
Bedford . . .	2	6	18	Newark . . .	3	6	18
Berwick-upon-Tweed	3	6	18	Newcastle-under-Lyne	2	6	18
Bridgewater . . .	2	6	18	Newcastle-upon-Tyne	7	14	42
Bridport . . .	2	6	18	Newport, Monmouth	2	6	18
Bristol . . .	10	16	48	Newport, Isle of Wight	2	6	18
Bury St. Edmund's	3	6	18	Northampton . .	3	6	18
Cambridge . . .	5	10	30	Norwich . . .	8	16	48
Canterbury . . .	3	6	18	Nottingham . . .	7	14	42
Cardiff . . .	2	6	18	Oxford . . .	5	10	30
Carlisle . . .	5	10	30	Pembroke . . .	2	6	18
Carmarthen . . .	3	6	18	Poole . . .	2	6	18
Caernarvon . . .	2	6	18	Portsmouth . . .	7	14	42
Chester . . .	5	10	30	Preston . . .	6	12	36
Chichester . . .	2	6	18	Reading . . .	3	6	18
Colchester . . .	3	6	18	Ripon . . .	0	4	12
Dartmouth . . .	0	4	12	Rochester . . .	3	6	18
Denbigh . . .	0	4	12	St. Alban's . . .	0	4	12
Derby . . .	6	12	36	Sarum, New . . .	3	6	18
Devizes . . .	2	6	18	Scarborough . . .	2	6	18
Dorchester . . .	0	4	12	Shrewsbury . . .	5	10	30
Dover . . .	3	6	18	Southampton . . .	5	10	30
Durham . . .	3	6	18	Stafford . . .	2	6	18
Evesham . . .	0	4	12	Stamford . . .	2	6	18
Gateshead . . .	3	6	18	Stockport . . .	7	14	42
Gloucester . . .	3	6	18	Sudbury . . .	0	4	12
Guildford . . .	0	4	12	Sunderland . . .	7	14	42
Harwich . . .	0	4	12	Swansea . . .	3	6	18
Haverfordwest . . .	0	4	12	Tiverton . . .	3	6	18
Hereford . . .	3	6	18	Truro . . .	2	6	18
Hertford . . .	0	4	12	Warwick . . .	2	6	18
Ipswich . . .	5	10	30	Wells . . .	0	4	12
Kendal . . .	3	6	18	Weymouth, and Mel-			
Kidderminster . . .	3	6	18	combe Regis . . .	2	6	18
Kingston-upon-Hull	7	14	42	Wigan . . .	5	10	30
King's Lynn . . .	3	6	18	Winchester . . .	3	6	18
Leeds . . .	12	16	48	Windsor . . .	2	6	18
Leicester . . .	7	14	42	Worcester . . .	6	12	36
Leominster . . .	0	4	12	Yarmouth, Great	6	12	36
Lichfield . . .	2	6	18				

SCHEDULE (A.) 5 & 6 Will. 4, c. 76, s. 2.

BOROUGH.	Wards.	Aldermen.	Councillors.	BOROUGH.	Wards.	Aldermen.	Councillors.
Andover . . .	0	4	12	Lincoln . . .	3	6	18
Banbury . . .	0	4	12	Liskeard . . .	0	4	12
Beverley . . .	2	6	18	Louth . . .	2	6	18
Bewdley . . .	0	4	12	Ludlow . . .	0	4	12
Bideford . . .	0	4	12	Maidstone . . .	3	6	18
Boston . . .	3	6	18	Maldon . . .	0	4	12
Brecon . . .	0	4	12	Newbury . . .	0	4	12
Bridgnorth . . .	0	4	12	Oswestry . . .	2	6	18
Clitheroe . . .	0	4	12	Penzance . . .	2	6	18
Chesterfield . . .	0	4	12	Plymouth . . .	6	12	36
Congleton . . .	3	6	18	Ponterfract . . .	0	4	12
Coventry . . .	6	12	36	Richmond . . .	0	0	12
Deal . . .	2	6	18	Romsey . . .	0	4	12
Doncaster . . .	3	6	18	St. Ives . . .	0	4	12
Exeter . . .	6	12	36	Saffron Walden . . .	0	4	12
Falmouth . . .	0	4	12	Stockton . . .	2	6	18
Grantham . . .	0	4	12	Tewkesbury . . .	0	4	12
Gravesend . . .	2	6	18	Walsall . . .	3	6	18
Grimsby . . .	0	4	12	Welchpool . . .	0	4	12
Hastings . . .	3	6	18	Wenlock . . .	3	6	18
Kingston-upon-Thames	3	6	18	Wisbech . . .	2	6	18
Lancaster . . .	3	6	18	York . . .	6	12	36

SCHEDULE (B.) 5 & 6 Will. 4, c. 76, s. 1.

Arundel . . .	0	4	12	Ruthin . . .	0	4	12
Beaumaris . . .	0	4	12	Tenby . . .	0	4	12
Cardigan . . .	0	4	12	Thetford . . .	0	4	12
Llandiloes . . .	0	4	12	Totness . . .	0	4	12
Pwllheli . . .	0	4	12				

5 & 6 Will. 4, c. 76, s. 2.

Basingstoke . . .	0	4	12	Launceston . . .	0	4	12
Beeches . . .	0	4	12	Llandovery . . .	0	4	12
Blandford Forum . . .	0	4	12	Lyme Regis . . .	0	4	12
Bodmin . . .	0	4	12	Lymington . . .	0	4	12
Buckingham . . .	0	4	12	Maidenhead . . .	0	4	12
Calne . . .	0	4	12	Malborough . . .	0	4	12
Chard . . .	0	4	12	Morpeth . . .	0	4	12
Chippenham . . .	0	4	12	Penryn . . .	0	4	12
Chipping Norton . . .	0	4	12	Retford, East . . .	0	4	12
Daventry . . .	0	4	12	Rye . . .	0	4	12
Droitwich . . .	0	4	12	Sandwich . . .	0	4	12
Eye . . .	0	4	12	Shaftesbury . . .	0	4	12
Faversham . . .	0	4	12	South Wold . . .	0	4	12
Folkestone . . .	0	4	12	South Molton . . .	0	4	12
Flint . . .	0	4	12	Stratford-on-Avon . . .	0	4	12
Glastonbury . . .	0	4	12	Tamworth . . .	0	4	12
Goldaming . . .	0	4	12	Tenterden . . .	0	4	12
Godmanchester . . .	0	4	12	Torrington . . .	0	4	12
Helstone . . .	0	4	12	Wallingford . . .	0	4	12
Huntingdon . . .	0	4	12	Wycombe, Chepping	0	4	12
Hythe . . .	0	4	12				

SCHEDULE—*continued*.

Berwick-upon-Tweed.
Bristol.
Chester.
Exeter.
Kingston-upon-Hull.
Newcastle-upon-Tyne.

SCHEDULE (C).

Northumberland.
Gloucestershire.
Cheshire.
Devonshire.
Yorkshire.
Northumberland.

SCHEDULE (D).

No. 1.

The list of burgesses of the borough of —, in the parish [or "township"] of —.

Christian Name and Surname of each person at full length.	Nature of the property rated.	Street, Lane, or other Place in this Parish [or "township"] where the property is situated for which he is now rated.
Ashton, John. Bates, Thomas.	Shop. House.	No. 23 Church Street. Brook's Farm.

(Signed) A. B. } Overseers of the said parish
C. D. } [or "township"]
See ante, sect. 15.

No. 2.

Notice of Claim.

To the town clerk of the borough of —.

I hereby give you notice, that I claim to have my name inserted in the burgess list of the borough of —; that I occupy [*here describe the house, warehouse, counting-house, or shop, then occupied by the claimant*] in the borough, and that I have been rated in the parish of — [*here state the parish, or several parishes, and the time during which the claimant has been rated in each of them within the borough, necessary for his qualification.*]

Dated the — day of —, in the year —.

(Signed) John Allen of [*place of abode.*]

See ante, sect. 17.

No. 3.

Notice of Objection.

To the town clerk of the borough of —, [*or "to the person objected to," as the case may be.*]

I hereby give you notice, that I object to the name Thomas Bates, of Brook's farm, in the parish of —, [*describe the person objected to as described in the burgess list,*] being retained on the burgess list of the borough of —.

Dated the — day of —, in the year —.

(Signed) John Ashton, of [*here state the place of abode and property for which he is said to be rated in the burgess list.*]

SCHEDULE D.—*continued.*

No. 4.

List of Claimants.

The following persons claim to have their names inserted on the burgess list of the borough of —.

Christian Name and Surname of each Claimant.	Nature of the Property for which he is now rated.	Situation of the Property for which he is now rated.	Parish [or "Parishes"] in which he has been rated, as stated in the Claim.
Allen John.	House.	No. 17, High Street.	Rated in the last year in Saint Mary's parish, in the borough, and in the two preceding years in Saint James's parish, in the borough.

(Signed) A. B., Town Clerk.

No. 5.

List of Persons objected to.

The following persons have been objected to as not being entitled to have their names retained on the burgess list of the borough of —.

Christian Name and Surname of each Person objected to.	Nature of the Property for which he is now rated.	Situation of the Property for which he is said to be now rated in the Overseer's List.	Parish in which is the Property for which he is now said to be rated in the Overseer's List.
Bates, Thomas.	House.	Brook's Farm.	Saint James's.

(Signed) A. B., Town Clerk.

See sect. 17, *supra*.

SCHOLAR,
of a college, mandamus for, 250.
SCIRE FACIAS,
to repeal charter, 40—45.
form, 42 n. *i*.
part of a charter, 40—42.
when a writ of right, 42.
issues in, how triable, 43 n. *o*.
judgment in, 44, 295 n. *k*.
to repeal grant of market, 168, 178,
179.

charter, when proper, 295—299,
306.
when a writ of right, 295 n. *k*.
to repeal letters-patent granting office
of recorder, 446 n. *k*.
court of quarter sessions, 450—
453.
on judgment of court of record, 466,
recovered by master of a hospital.
577.
dean and chapter, 592.

SCIRE FACIAS—*continued.*

and against corporation sole,
638, 639.

SEISIN,

definition of 3 *n. n.*

of real property in the corporation
and not the members, 3, 538.

leading; 136 *n. r.*, 538 *n. l.*, 569 *n. x.*
when livery of, necessary, 143.

of parson, 635.

SEPARATISTS,

declarations by, 408 *n. k.*, 507 *n. u.*

SEQUESTRATION,

writ of, in equity, 286.

for contempt, 289.

SERJEANT AT MACE,

mandamus for, 250.

SERVANT,

when corporation liable for tortious
act of, 59.

and how may bind them by contract,
id. 61.

command to, to cut trees, &c., 60.

contract to pay wages of, 62.

when need not be shown to be autho-
rized, &c., 63.

of University, privilege of, 522, 533.

hospital, exempt from duty, 580 *n. u.*

entry of, pleaded, 588 *n. s.*

SEWERS,

commissioners of, 279 *n. t.*

in the nature of a corporation,
640.

distress for sewers rates, 284 *n. f.*

corporation liable to rates, 501 *n. r.*

SHAREHOLDER,

proceedings by a single, 73, 286 and
n. c., 290.

when judge in the cause, 281.

each must pay calls, &c., equally,
292.

SHERIFF,

not disqualified to be councillor, &c.,
398.

of county of city, &c., *quo warranto*
for, 254 *n. c.*

executing criminals, &c., 321 *n. y.*
indispensable, 348.

in what cities and towns constituted,
353.

how long to hold his office, 353, and
n. c. 354.

information lies for refusing it, 353.

what oaths must take, 353, *n. c.*

who exempt from office of, 353, 354.

mandamus to proceed to election of,
354.

when defendant, how process to be
directed, id.

in contempt, id.

related to a juror, 354 *n. n.*

poundage, 354 *n. o.*

two sheriffs, and one interested in
the cause, 354 and *n. r.*, 444, 445.

dies, as to process, 355.

escape, 355 *n. u.*

his right to execute process, 355.

as to action for escape against, 355
n. u.

cannot be justice for the borough,
469.

quashing panel for unindifference of,
480 *n. x.*

as to changing venue for unindiffe-
rence of, 481.

when may be interested in the cause,
&c., id.

duty of, as to special juries, id.

to some purposes a quasi corpora-
tion sole, 661.

SHEWAGE,

what, 163.

SHOPS,

exclusive trading in, abolished, 322.

SIGN MANUAL,

appointment under the, 122, 123.

the, when grant under, good, 628.

SISTERS,

the, of a hospital, 580.

SOUTHAMTON,

sheriff of, 353.

SPECIAL CASE,

validity of a charter discussed on a,
41.

SPIRIT LICENSE,

as to granting, 454 *n. g.*

STALLAGE,

definition of, 174, 175.

when passes by grant of tolls, 32 *n.*
n., 166 *n. l.*, 173, 174.

who liable to, 171, 174, 175.

prescription for, 174 *n. z.*, *b.*

distress for, 176.

STAMFORD,

in what county the borough of, lies,
345 *n. h.*, 350 *n. k.*

STAMP,

on deed of appointment to a corpo-
rate office, 58 *n. t.*, 240 *n. i.*

to appointment of officer, 379 *n. g.*

none payable by burgesses on admis-
sion, &c., 392.

nor freemen, 507 *n. x.*

STATUTES,

of the realm, construction of, giving
power to toll or tax, 7, 8.

of Quia Emptores does not bind
the crown, 108.

statute of Charitable Uses, 114,
115.

9 Geo. 2, *c.* 36, 118 *n. b.*, 133.

instances, 120—122.

STATUTES—*continued.*

- titles of, 133 and note *x*.
- construction of, constituting corporations, 308, 309.
- affirmative, 322, 323.
- negative, 323 *n. n.*
- as to customs, 323.
- difficulty of construing Municipal Corporation Act, 363.
- keeper of gaol under 2 & 3 Vict. c. 56, s. 15..424 *n. u.*
- annual indemnity acts, 425.
- of University*, offences against, 519.
- whether new can be imposed, 515.
- dispensation with, 518, 530, *n. z.*
- of a founder*, *vid.* FOUNDER.
- power of interpreting, 518, 519, 529.
- offences against, 519.
- power of altering, where resides, 518, 519 and *n. u.*
- where not, 530.
- inspection of the, 527.
- of schools*, 555, 556 and note *q*, 557 *n. y*, 564.
- hospitals, 572 *n. s*, *semb.* imposed, 578.
- dean and chapter, 583.
- of colleges*, meaning of *domus* in, 529 *n. t.*
- dispensation with, 530 *n. z, a.*
- offences against, 530 *n. z.*
- bill of discovery of, 539.
- construction of, 539 *n. s, t.*
- as to new fellowships, 542.
- EDWARD 1,
 - 7 Edw. 1, stat. 2, c. 1..99, 132.
 - 13 id. c. 6..168 *n.*
- EDWARD 3,
 - 2 Edw. 3, c. 15..181 *n.*
 - 9 id. stat. 1, c. 1..329.
 - 28 id. c. 10..298 *n.*
- RICHARD 2,
 - 1 Ric. 2, c. 2..353 *n.*
 - c. 11..215.
 - 15 id. c. 5..99, 115, 132, 133.
- HENRY 6,
 - 8 Hen. 6, c. 9, s. 6..424 *n.*, 472 *n.*
 - 27 id. c. 5..168 *n.*
- HENRY 7,
 - 12 Hen. 7, c. 6..180 *n.*
 - 19 id. c. 7, s. 1..92.
 - c. 8, ss. 1, 2..163 *n.*
- HENRY 8,
 - 22 Hen. 8, c. 4..78 *n.*
 - c. 5, s. 3..283.
 - 23 id. c. 3..47.
 - c. 10..124.
 - 25 id. c. 21, s. 20..576 *n.*

HENRY 8—*continued.*

- 27 id. c. 16..104, 106.
- c. 28..493.
- 28 id. c. 5..78 *n.*
- c. 11, s. 3..585.
- 31 id. c. 13..493.
- c. 104, s. 3..492.
- 32 id. c. 1..112.
- c. 10..516.
- c. 28, ss. 1, 4..658.
- c. 30, s. 1..338.
- c. 38..642.
- 33 id. c. 13..480.
- c. 27..74, 531, 576.
- 34 & 35 id. c. 5..112.
- 37 id. c. 21..493.
- EDWARD 6,
 - 1 Edw. 6, c. 14..124.
 - 5 & 6 id. c. 19, s. 1..232 *n.*
- MARY,
 - 1 Mar. sess. 2, c. 8, s. 2..469.
 - 1 & 2 Ph. & Mar. c. 7..333.
- ELIZABETH,
 - 1 Eliz. c. 19..642.
 - 13 id. c. 10..642.
 - s. 2..646.
 - s. 3..574, 650.
 - c. 14..15 *n.*
 - c. 29..19 *n.*, 516, 526.
 - 14 id. c. 11, s. 17..568 *n.*, 574, 641.
 - 18 id. c. 5, ss. 1, 6..198 *n.*
 - c. 6..544, 549.
 - 27 id. c. 13..661.
 - 29 id. c. 4..354 *n.*
 - 31 id. c. 5..198 *n.*
 - 35 id. c. 4..568.
 - 39 id. c. 5..12, 98 *n.*, 106, 568.
 - 43 id. c. 2..285.
 - s. 10..424.
 - c. 4..113.
- JAMES 1,
 - 7 Jas. c. 5..429.
 - 21 id. c. 12..369.
 - s. 5..430.
 - c. 23, s. 2..463 *n.*
- CHARLES 2,
 - 12 Car. 2, c. 12..184 *n.*
 - c. 20..2 *n.*
 - c. 24..112.
 - 13 & 14 id. c. 4, s. 29..196, *n.*
 - c. 5..343.
 - c. 12..98 *n.*
 - 15 id. c. 17..139 *n.*
 - 17 id. c. 3..98 *n.*, 493.
 - c. 3, ss. 7, 8..630.
 - 22 id. c. 2, s. 21..164 *n.*
 - 29 Car. 2, c. 7, s. 1..168 *n.*
 - c. 8..548, 98 *n.*
 - c. 8, s. 2..633.

STATUTES—*continued.*

WILLIAM & MARY,

1 Will. & Ma. stat. 1, c. 16, s. 3 . .
641.
c. 18, s. 1 . .
370.

4 & 5 id. c. 12 . . 493.
c. 18 . . 260.
c. 22 . . 33.
s. 1 . . 24 n.

5 id. c. 29, s. 39 . . 65.

5 & 6 id. c. 11 . . 452.
c. 20 . . 139 n.

8 & 9 id. c. 20, s. 26 . . 139 n.

WILLIAM 3,

7 & 8 Will. 3, c. 25 . . 412, 413,
508 n.

s. 1 . . 412 n.

c. 36, s. 4 . . 24 n., 33.

c. 37 . . 98.

8 & 9 id. c. 11, s. 8 . . 339.

10 & 11 id. c. 5 . . 49.

c. 24 . . 165.

ANNE,

2 & 3 Ann. c. 11 . . 633.

5 id. c. 20 . . 179 n.

8 id. c. 14, s. 4 . . 143

9 id. c. 20 . . 299 n., 445.

s. 2 . . 228 n., 260.

s. 4 . . 253 n., 255.

s. 5 . . 259, 260.

9 id. c. 23, s. 50 . . 527.

10 id. c. 23 . . 412 n., 508 n.

12 id. stat. 2, c. 7, s. 7 . . 626.

GEORGE 1,

1 Geo. 1, c. 1 . . 627 n.

stat. 1, c. 10 . . 633.

c. 13, s. 13 . . 539 n.

3 id. c. 15, s. 21 . . 353 n.

5 id. c. 4, s. 2 . . 426.

9 id. c. 7 . . 610.

s. 3 . . 475 n.

s. 4 . . 607.

11 id. c. 4, s. 6 . . 423, 424.

GEORGE 2,

2 Geo. 2, c. 23, s. 11 . . 461.

c. 24, s. 7 . . 233 n.

c. 29 . . 531 n.

5 id. c. 18, s. 2 . . 469.

7 id. c. 7 . . 4 n.

9 id. c. 36, s. 1 . . 118, 119, 150,
545.

s. 3 . . 125.

s. 4 . . 126.

11 id. c. 19, s. 21 . . 615.

17 id. c. 28 . . 285.

18 id. c. 18, s. 1 . . 412 n.

19 id. c. 28, ss. 4, 9, 10, 13 . . 412 n.

22 id. c. 46, s. 14 . . 443.

29 id. c. 19 . . 465.

31 id. c. 17 . . 368.

GEORGE 3,

31 id. c. 29 . . 527.

3 Geo. 3, c. 11 . . 527.

c. 15, ss. 3, 6 . . 508.

s. 7 . . 507 n.

s. 8 . . 508 n.

c. 24 . . 348, 349.

9 id. c. 16 . . 103.

12 id. c. 21, s. 1 . . 508, 509.

.. s. 243 n.

19 id. c. 23 . . 122.

c. 45, s. 1 . . 107.

c. 91 . . 579.

26 id. c. 13 . . 422.

c. 87, s. 10 . . 107.

31 id. c. 39, s. 17 . . 125 n.

32 id. c. 58 . . 301, 445, 433 n.

s. 1 . . 258.

s. 3 . . 257.

33 id. c. 54, s. 11 . . 661.

38 id. c. 52, s. 1 . . 349, 350, 352.

ss. 2—10 . . 351.

s. 11 . . 480.

c. 60, s. 99 . . 121.

39 & 40 id. c. 41 . . 650, 549.

s. 10 . . 652 n.

c. 88 . . 627.

41 id. c. 23, s. 9 . . 608.

c. 109, s. 38 . . 641

42 id. c. 116, s. 50 . . 107.

s. 69 . . 365, 651.

s. 88 . . 651.

43 id. c. 46, s. 4 . . 467.

c. 55 . . 365.

c. 95 . . id.

c. 107 . . 657.

c. 108 . . 104.

ss. 1, 2, 3 . . 105, n.

44 id. c. 95 . . 365.

45 id. c. 101 . . 126 n., 546.

48 id. c. 73, s. 3 . . 628 n.

49 id. c. 126 . . 232 n.

51 id. c. 115, s. 2 . . 105.

52 id. c. 101 . . 553.

c. 155, s. 9 . . 368 n. *g.*

53 id. c. 51, ss. 1, 12 . . 490 n.

55 id. c. 147, s. 12 . . 104.

c. 184, schedule, pt. 1 . .
240 n., 379 n.

58 id. c. 45 . . 105.

c. 81 . . 558 n.

59 id. c. 12, s. 7 . . 611.

s. 12 . . 279 n., 612.

s. 17 . . 609.

s. 18 . . 279 n., 612.

c. 91, s. 5 . . 562.

c. 94 . . 628.

GEORGE 4,

1 & 2 Geo. 4, c. 23 . . 641.

c. 28 . . 304 n.

c. 69 . . 624.

STATUTES—*continued.*GEORGE 4—*continued.*

- 3 id. c. 108..624.
 4 id. c. 64..485 n.
 c. 95, s. 68..284 n.
 5 id. c. 85..455.
 s. 1..473.
 5 Geo. 4, c. 85, ss. 1 & 2..456,
 482, 485 n.
 6 id. c. 7..4 n.
 c. 16, s. 46..197 n.
 c. 50, s. 36..481.
 c. 97, s. 3..516 n., 527.
 7 id. c. 22, s. 24..365.
 c. 55..id.
 c. 64..454.
 s. 12..503 n.
 s. 20..374 n.
 c. 77, s. 9..365.
 7 & 8 id. c. 31, ss. 2, 7..453.
 9 id. c. 17, s. 2..224 n. 401, 408,
 419, 425.
 s. 3..419.
 c. 46..625.
 c. 61, ss. 1, 2, 3, 7..454 &
 notes.
 s. 27..453 n.
 c. 85, s. 1..119 n., 508 n.
 10 id. c. 7, s. 2..125 n.
 s. 25..426.
 c. 50, s. 39..489.
 11 Geo. 4 & 1 Will. 4, c. 70, s. 8..
 262.
 WILLIAM 4,
 1 Will. 4, c. 21, s. 3..228 n.
 s. 4..215 n., 248 n.
 s. 6..250 n., 508 n.
 c. 60..4 n.
 c. 65..id.
 1 & 2 id. c. 41..374, 375.
 c. 42, s. 1..612 n.,
 c. 45, ss. 3, 4, 5, 11, 12..548.
 s. 14..549.
 c. 58, s. 8..215 n.
 c. 66, s. 28..66 n.
 2 id. c. 39, s. 3..274.
 s. 13..275.
 s. 21..274.
 s. 22..id.
 s. 23..id.
 c. 45, s. 27..411 and n. e.
 s. 32..507, 508.
 s. 33..411, 412.
 s. 58..412 n.
 2 & 3 id. c. 64, s. 35..185 n., 343
 n. 345.
 c. 69, s. 4..88.
 c. 71, s. 1..326.
 s. 3..337 n.
 c. 80..549.
 c. 115..125 n.

WILLIAM 4—*continued.*

- 3 & 4 id. c. 22, s. 24..365.
 s. 47..625, 640.
 c. 27..4 n. 103, 565.
 ss. 1, 2..203.
 c. 31, s. 1..213, 379.
 c. 42, s. 17..460.
 c. 74..4 n.
 c. 90..362.
 c. 105..4 n.
 c. 106..id.
 4 & 5 id. c. 27, s. 1..349 n.
 c. 69, s. 3..279 n.
 c. 115..4 n.
 5 & 6 Will. 4, c. 1..353 n.
 c. 20, s. 7..641.
 c. 28..353 n.
 c. 53..452.
 c. 62, s. 8..539 n.
 s. 9..600.
 c. 63, s. 33..424.
 c. 69, s. 3..608, 616 n.
 s. 7..616.
 s. 8..id. n.
 5 & 6 id. c. 76 (MUNICIPAL COR-
 PORATIONS ACT),
 s. 1..11 n., 18, 97, 233,
 341, 342.
 s. 2..85, 97, 183, 185,
 186, 263, 504.
 s. 3..506.
 s. 4..id.
 s. 5..435, 507.
 s. 6..241 n., 342, 387,
 421.
 s. 7..283, 343, 344.
 s. 8..346, 347, 486.
 s. 9..6, 206, 387.
 s. 10..389.
 s. 11..id.
 s. 12..389, 390.
 s. 14..83, 192.
 s. 15..390, 435.
 s. 16..390.
 s. 17..390, 391, 435.
 s. 18..435.
 s. 19..423.
 s. 21..224, 414 n.
 s. 22..393, 435.
 s. 23..435.
 s. 25..241 n., 355 n.,
 415.
 s. 26..356, 415.
 s. 27..415.
 s. 28..226, 417.
 s. 30..356.
 s. 31..69, 356.
 s. 33..399.
 s. 34..400.
 s. 35..400, 433.
 s. 36..430.

STATUTES—*continued.*WILLIAM 4—*continued.*

- 5 & 6 id. c. 76. s. 37.. 442.
 s. 39.. 402, 434.
 s. 40.. 402.
 s. 41.. 403
 s. 43.. id.
 s. 44.. 404.
 s. 45.. id.
 s. 46.. id.
 s. 47.. id. 405.
 s. 48.. 405, 423 n.
 s. 49.. 421, 430.
 s. 50.. 401, 407, 417, 425.
 s. 51.. 96, 97, 362, 382
 n., 401, 408, 419.
 s. 52.. 417 n., 405, 406.
 s. 53.. 417, 425.
 s. 54.. 233.
 s. 55.. 235.
 s. 56.. 235 n.
 s. 57.. 424, 427, 469.
 s. 58.. 378, 398, 433, 439.
 s. 60.. 242, 382, 434.
 s. 62.. 444.
 s. 63.. 445.
 s. 65.. 434.
 s. 67.. 382, 488 n.
 s. 69.. 415 n., 435, 357.
 s. 70.. 359.
 s. 71.. 511, 513.
 s. 72.. 361 n.
 s. 73.. 361.
 s. 75.. 362.
 s. 76.. 367, 368.
 s. 77.. 369.
 s. 78.. 371.
 s. 79.. id.
 s. 81.. 372.
 s. 82.. 367, 372.
 s. 83.. 374.
 s. 84.. 373 n., 375.
 s. 86.. 375.
 s. 87.. 362.
 s. 88.. id.
 s. 90.. 95, 96, 362.
 s. 92.. 184, 487, 488, 490.
 s. 93.. 440.
 s. 94.. 140, 365, 366.
 s. 95.. 141.
 s. 96.. 366 n., 141 n.,
 142.
 s. 97.. 366, 142 n. u.
 s. 98.. 469.
 s. 99.. 367, 440.
 s. 100.. 367.
 s. 101.. 469, 470.
 s. 102.. 473.
 s. 103.. 414 n., 469, 417,
 443, 446.
 s. 104.. 447, 469.

WILLIAM 4—*continued.*

- s. 105.. 449.
 s. 106.. id. n.
 s. 107.. id.
 s. 108.. id.
 s. 109.. 351.
 s. 111.. 453.
 s. 112.. 452.
 s. 113.. 453 n., 454.
 s. 114.. 440, 455, 482.
 s. 117.. 440, 452 n.
 s. 118.. 459—461.
 s. 119.. 460.
 s. 121.. 443, 479.
 s. 122.. 441, 470, 480.
 s. 123.. 37 n. u.
 s. 124.. 443, 460, 474.
 s. 126.. 440.
 s. 127.. 475 n.
 s. 128.. 470.
 s. 129.. 96, 471.
 s. 130.. 472.
 s. 131.. id.
 s. 132.. 360, 451, 463,
 471, 473.
 s. 133.. 369, 374, 475,
 479, 503.
 s. 134.. 463 n.
 s. 135.. 453 n., 463 n.,
 476 n.
 s. 136.. 453 n., 476 n.
 s. 139.. 440, 492.
 s. 141.. 16, 17.
 6 & 7 id. c. 20, s. 1.. 574, 643.
 s. 2.. 653.
 s. 3.. id., 654.
 s. 4.. 654.
 ss. 5—9.. id.
 c. 64.. 574.
 c. 70.. 549.
 c. 71, s. 46.. 191.
 c. 77, s. 26.. 492.
 c. 96, s. 3.. 617.
 c. 103, s. 1.. 344.
 s. 4.. 362.
 c. 104, s. 1.. 365.
 s. 2.. 365, 367, 141 n.,
 142 n.
 s. 8.. 223, 414, 427.
 s. 105.. 447 n.
 c. 105, s. 1.. 451.
 s. 2.. id.
 s. 4.. 421.
 s. 5.. 353.
 s. 8.. 387, 447.
 s. 9.. 183 n., 448, 461 n.
 s. 11.. 453, 476 n.
 c. 109, s. 9.. 191, n.
 c. 115, s. 31.. 641.
 7 id. & 1 Vict. c. 19, s. 1.. 449,
 450.

STATUTES—*continued.*WILLIAM 4—*continued*

- 7 id. & 1 Vict. c. 26 .. 162.
 c. 73, s. 26 .. 275, 278.
 c. 78, s. 1 .. 215 n.
 s. 3 .. 445.
 s. 11 .. 404 n., 405.
 s. 14 .. 209, 399 n., 415,
 424.
 s. 15 .. 398.
 s. 18 .. 398 n.
 s. 22 .. 357 n.
 s. 23 .. 256, 257.
 s. 24 .. 392, 393, 405,
 406 notes.
 s. 25 .. 212 n., 416, 421.
 s. 26 .. 405 n., 416 n.,
 421 n.
 s. 28 .. 365.
 s. 30 .. 475.
 s. 31 .. 362, 476.
 s. 33 .. 461.
 s. 35 .. 460.
 s. 36 .. 465.
 s. 37 .. 108 n., 485 n.
 s. 38 .. 485.
 s. 39 .. 407, 408, 417 n.,
 s. 426.
 s. 40 .. 108 n.
 s. 41 .. 486.
 s. 43 .. 440 n.
 s. 44 .. 360.
 s. 45 .. 487 n.
 s. 46 .. 513.
 s. 47 .. id.
 s. 48 .. 487 n., 513.
 s. 49 .. 16, 17, 41, 258.
 s. 50 .. 476.
 c. 81, s. 1 .. 376, 490 n.
 s. 3 .. 377, 490 n.
 c. 55, s. 2 .. 494 n.

VICTORIA,

- 1 Vict. c. 73, s. 29 .. 16.
 1 & 2 id. c. 5, s. 15 .. 408 n., 414
 n.
 c. 23, s. 5 .. 550.
 c. 31, s. 1 .. 492.
 s. 2 .. id.
 s. 3 .. id. n.
 c. 96 .. 275 n., 624.
 c. 106 .. 630.
 s. 37 .. 550.
 s. 73 .. id.
 s. 129 .. 389 n.
 c. 110, s. 18 .. 461 n.
 ss. 11, 28 .. 463 n., 464.
 2 & 3 id. c. 14 .. 481 n.
 c. 27 .. 461 n.
 s. 1 .. 459 n.
 s. 2 .. id.
 s. 3 .. id.

VICTORIA—*continued.*

- c. 28, s. 1 .. 377.
 c. 49 .. 105.
 s. 2 .. 659.
 c. 56, s. 15 .. 424 n., 485.
 s. 24 .. 485 n.
 c. 72, s. 1 .. 352.
 3 & 4 id. c. 28, ss. 1, 2 .. 377.
 c. 47, s. 1 .. 216 n., 421.
 c. 60, s. 17 .. 106.
 c. 77, s. 1 .. 552, 553.
 s. 2 .. 554.
 s. 3 .. 555.
 s. 4 .. id.
 s. 5, 6 .. id.
 ss. 7, 8, 9 .. 556.
 ss. 13, 14, 15, 16, 17, 18,
 19, 20, 21, 22 .. 557.
 s. 24 .. 558.
 c. 86 .. 582.
 s. 23 .. 583.
 c. 88, s. 14 .. 368 n.
 c. 97, s. 8, 9 10 .. 94.
 c. 113, s. 1 .. 581.
 s. 24 .. 592.
 s. 25 .. id.
 s. 26 .. id.
 s. 28 .. 588.
 s. 38 .. 593.
 s. 42 .. 632.
 s. 44 .. 582, 584, 591.
 s. 45 .. 593.
 s. 47 .. 583.
 s. 50 .. 581, 588, 633.
 s. 52 .. 588.
 s. 57 .. 585.
 s. 68 .. 588.
 s. 69 .. 550.
 s. 71 .. id. n.
 4 & 5 id. c. 38 .. 549, 550.
 s. 6 .. 558.
 s. 7 .. 106, 558.
 ss. 17, 18 .. 564 n.
 c. 39, s. 6 .. 585.
 s. 9 .. 656.
 s. 14 .. 593.
 s. 15 .. id.
 s. 18 .. id. n.
 ss. 21, 22 .. 635.
 c. 48 .. 285 notes.
 5 id. sess. 2, c. 18, s. 2 .. 616 n.
 c. 27 .. 576, 641.
 5 & 6 id. c. 35 .. 541 n.
 c. 38, s. 1 .. 457.
 c. 44 .. 454 n.
 s. 6 .. id.
 c. 53 .. 456, 482, 483.
 s. 2 .. 483 n.
 s. 5 .. id.
 s. 6 .. 457.

STATUTES—continued.

VICTORIA—continued.

- 5 & 6 id. c. 53, s. 18..483.
s. 36..457.
ss. 37, 38..479 n.
ss. 39, 40..id.
s. 42..457 n.
s. 43..457.
c. 55..291 n.
c. 57, s. 8..622 n.
s. 16..616 n.
s. 17..622 n.
5 & 6 id. c. 97, s. 2..369, 429
n., 615.
c. 97, s. 4..369
c. 98, s. 3..484.
s. 4..id. n.
s. 5..484.
s. 6..id.
s. 13..id.
s. 14..482 n.
s. 17..315 n.
s. 18..454, 456, 484.
s. 19..454, 484.
s. 22..484.
s. 31..355 n.
c. 104, s. 1..398.
s. 2..357 n.
s. 7..417 n. s.
s. 8..353, 398.
c. 108..574, 576, 655.
s. 8..652 n.
c. 111..17 n.
s. 2..380, 381.
c. 122, s. 12..198.
s. 93..197.
6 & 7 id. c. 18..411.
s. 10..435.
s. 13..411 n.
s. 14..508 n.
s. 18..411 n., 508.
s. 20..508 n.
s. 23..id.
s. 72..349.
s. 75..411.
s. 76..387, 507.
s. 78..412 n. 507.
s. 79..508.
s. 100..id.
c. 37, s. 22..106 n.
c. 67, s. 1..228 n., 229 n.
s. 2..228 n.
c. 73..461.
s. 21..245 n., 277 n.
s. 24..469 n.
c. 85..315.
s. 1..166 n., 269, 316.
c. 89, s. 1..257, 409, 427.
s. 2..417.
s. 5..213 n., 226, 255 n.,
416.

VICTORIA—continued.

- s. 6 .. 378, 439.
 s. 8 .. 447.
 c. 112, s. 62 .. 440 n.
 7 & 8 id. c. 32 .. 276.
 c. 37 .. 558.
 s. 4 .. 605
 c. 50, s. 1 .. 482 n.
 c. 76, s. 2 .. 140 n.
 c. 94 (sched.), 106 n.
 c. 96, s. 28 .. 198.
 c. 101, s. 44 .. 623, 624.
 s. 61 .. 611.
 s. 70 .. 615 n.
 c. 102 .. 125.
 c. 110 .. 15 n., 106 n.
 s. 25 .. 59.
 s. 44 .. 625.
 s. 45 .. 276.
 s. 47 .. 93.
 c. 113 .. 276, 625.
 8 id. c. 16, s. 124 .. 93.
 s. 127 .. id.
 s. 135 .. 275, 278.
 c. 18, s. 15 .. 365.
 8 & 9 id. c. 4 .. 541 n.
 c. 20, s. 109 .. 84, 94.
 s. 110 .. 94.
 s. 111 .. 95.
 c. 43 .. 386.
 s. 1 .. 495.
 s. 2 .. 495 n.
 s. 4 .. id.
 c. 81, s. 4 .. 491 n.
 c. 87, s. 96 .. 478.
 c. 89, ss. 5, 12, 13 .. 201.
 c. 100, s. 7 .. 58 n. *a.*, 67 n. *h.*
 c. 106, s. 2 .. 140 n.
 s. 3 .. 65, 279 n.
 c. 110, s. 1 .. 491, 493, 494.
 s. 2 .. 494.
 s. 4 .. 495.
 s. 6 .. 494
 s. 8 .. 494 n.
 c. 111, s. 23 .. 452 n.
 c. 113 .. 633
 s. 1, 66, 310.
 c. 126 .. 450.
 9 & 10 id. c. 74 .. 386.
 c. 95, s. 49 .. 484 n.
 c. 96 .. 372.
 c. 99 .. 188 n.
 c. 105 .. 291 n.
 c. 110 .. 377, 450 n.
 10 id. c. 14, s. 3 .. 4 n.
 s. 13 .. 165, n. *h.*, 168 n.,
 176.
 c. 15, s. 3 .. 4 n.
 c. 16, s. 3 .. id.
 10 & 11 id. c. 34, s. 192 .. 372.
 c. 78, s. 1 .. 106 n.

STATUTES—*continued.*VICTORIA—*continued.*

11 & 12 id. c. 42..367, 430 n.,
454 n., 469 n.

s. 6..477.

s. 16..470 n.

s. 17..id.

c. 43..430 n., 469 n.

s. 27..472 n.

s. 30..443 n., 474 n.

s. 31..475.

s. 33..367.

c. 44..430 n., 469 n.

s. 5..450 n., 475, 477-8.

c. 45..309.

s. 3..4 n.

s. 5..472 n.

c. 63..4 n.

s. 104..372.

c. 78, ss. 1, 2..457 n.

c. 93..17 n.

c. 123..372, 386.

s. 1..386 n. q.

s. 2..id.

12 id. c. 8..424 n.

12 & 13 id. c. 18, s. 1..367, 474.

c. 31, s. 6..450 n.

s. 7..id.

s. 10..451 n.

c. 45, s. 2..450 n.

c. 49..558.

s. 3..550.

c. 50, s. 7..284 n.

c. 64, s. 1..475.

c. 82, s. 1..484 n.

s. 2..451 n.

s. 3..451.

c. 101, s. 2..484 n.

c. 106, s. 164..197 n.

c. 108..309.

c. 111..372.

c. 123, s. 8..568.

STEWARD,

the, of the Turners' Company, 87.

of a borough, quo warranto for, 254
n. i.

compensation to, 382.

ST. GERMAINS, 58 n. b.

ST. MARY MAGDALEN COLLEGE,
Oxford, heriot to, 109 n. h.

STRANGERS,

who, 6.

as to inspecting charters, 38 ; books,
298 n. r, 311, 312.

when may question validity of a charter,
41.

bound by bye-laws, 77.

penalty in bye-law must not be reserved to, 86.

when not to be sued in corporation courts, 87.

evidence against, 90.

of custom to exclude, id.

as to distraining, 151.

applying to equity against a corporation, 290 n. g.

cannot appeal to visitors, 533.

whether may receive deed to use of a college, 544.

SUBURBS,

meaning of, 283 n. y, 344 n. f.

SUCCESSION,

of members of a corporation, how kept up, 26.

effect of, 151.

interruption of the, 302, 303. Vide CORPORATIONS SOLE.

SUCCESSOR,

when responsible for misdeeds of predecessor, 547 n. c, 548. Vid.

CHURCHWARDENS.

of a corporation sole, 638 n. s, 640 and n. i. Et. vid. CORPORATIONS SOLE.

SUMMONS,

to corporate meeting, when necessary, 155 and n. b, 156, 157.

writ of in Borough Court, 459 n. i.

to corporate meetings, 211, 212.

for amotion, 245, 246.

disfranchisement, 265, 266.

of justices, 470, 471.

jurors, 479, 480 n. q.

meetings of municipal council, 358.

to defaulter of rates, &c., 362 n. k.

SUNDAY,

acts appointed for, when to be done under Municipal Corporations Acts, 357, 379, 415.

notice of claim to be rated, 412 n. l. elections as to, 421.

SUPERSTITIOUS USES,

statutes of, 124.

what are, 124, 125.

blended with charitable, 125.

what not, id.

forfeited, 598, 599.

SURGEONS' COMPANY,

what good bye-law of the, 81.

SURPLUS,

of charitable funds, when belongs to corporation, 559, 560.

devise of, 561.

SURRENDER,

of a charter, when valid, 21, 22.

fabricating, indictable, 63 n. i, 306 n. h.

void charter, no consideration for grant of a new one, 22 n. t, 39.

necessity of enrolment of, 39, 46 n. n.

SURRENDER—*continued*.

of acceptance of, by crown, 46
n. *a*.

effect of, on offices, 47.

of possessions, 46.

of a lease for years, 56, 65, 127, 128,
152.

of charter, when enjoined against,
158, 293.

may be made, 306, 307.

effect of, and how to be made, 306
n. *h*.

cannot be made by parliamentary
corporations, 308.

form of, 307 n. *h*.

of lease to dean and chapter, 597 n. *y*.

SUSPENSION,

of a corporator, 267; *vid.* VISITOR.

SWEARING IN,

mode of, 254 n. *l*.

of itself an user of an office, 256 n. *u*,
259 n. *z*.

SWORD BEARER,

mandamus to restore a, 384 n. *c*.

TAIL MALE,

corporation takes rent issuing out of
lands in, 111; or on estate in, 127.

TANESTRY,

custom of, 332.

TAUNTON,

dissolution of corporation of, 304 n. *z*.

TENANCY AT WILL,

authority from the corporation to cre-
ate, when presumable, 57 n. *p*.

to determine, 190 and n. *c*.

TENANCY FROM YEAR TO YEAR,

when will be presumed, 148—150.

results from a holding under void
lease, 547 n. *a*, 587.

what evidence of an, under church-
wardens, 606 n. *p*.

churchwardens and overseers, 611.

when created by successor of corpo-
ration sole, 641.

TENANCY IN COMMON,

what grant establishes between king
and subject, 630.

TENANT IN COMMON,

corporation when may be a, 109.

TENSARY,

distress for a, 171 n. *c*.

TEWKESBURY,

charters of, 11 n. *i*.

TITHES,

colleges, how may grant, &c., 548,
549.

corporations, how to demand, 564, n.
u.

master of hospital, how, 577 n. *y*.

leases of, by parson, 634.

parol contract of parson respecting,
id.

leases of, 634, 649.

debt for rent under, 649.

for more years than one, 649 n. *f*.

fine not to be taken for, 649 n. *g*.

agreement for compensation for
tithes, 651, 652.

TOLLS,

definition of, 161 n. *o*.

grant of exemption from, 2, 30 and
n. *c*.

statutory power of exacting, 7.

what words will not pass, 32.

stallage, when passes under grant of,
32 n. *n*.

not incident to a market, *id*.

exemption from, 37 n. *u*, 97 n. *e*.

lease for years of, 57 n. *p*.

actions for, 61.

objects to which applicable, 73.

effect of grant of, for repair of bridges,
&c., 116.

grant of money secured on, 121.

claim for, 160 n. *a*, *b*.

evidence of claim, 162 n. *q*.

remedies for, 162, 163.

decree for account of, 163.

at fairs, 166.

markets, 166—175.

what reasonable, 167 and n. *p*, 169
and n. *k*.

on pigs brought to market, *id*. n. *r*.

proof of right to market toll, 166, 167
n. *u*.

when due in a market, 166 n. *m*,
167.

not incident to a market, 166 n. *n*.

unreasonable, 169.

what goods liable to pay, 169, 170,
177.

demise of market tolls, 170.

from the crown, *id*.

distress incident to, 170, 171.

subtraction of, 171, 172.

exemption from, 174, 182—184.

grant of, for murage, 177 n. *d*.

how to sue several persons for, 177.

account for arrears of, *id*.

use and occupation for, 178.

suing for particular amount of, *id*.

unauthorized exaction of, 180 n. *a*.

exaction of outrageous toll, 181.

parliamentary, 181 n. *o*.

equity as to, 181.

of manors, 187, 188.

indictment for misapplication of, 192
n. *t*.

case for disturbing collector of, 192.
assumpsit for differences of tolls, 276
n. *z*.

TOLLS—*continued.*

navigation tolls liable to poor rate,
285 and *n. x*, 498.

and so market tolls, 498.

evidence in action for tolls, 312 *n. e*,
321.

prescribing for toll, 321, 322 and *n. z*.
328, 329, 330 *n. o*.

claim of exemption from, 327, 505.

whether action for, can be tried in
borough court, 464.

where to be rated, 498.

TOLL-THOROUGH,

how claimed, 160 *n. a*, 165.

distress for, 165 *n. a*.

bill for, 181, 182.

TOLL-TRAVERSE,

how claimed, 160 *n. a*, 164.

a custom of, 164.

evidence of right to, 164 *n. r*.

TOLL-TURN,

what, 177.

TOWN,

meaning of, 341 *n. t*.

the liberties of a, 344 *n. f*.

evidence of boundaries of a, 345
n. h.

TOWN CLERK,

effect of resolution to increase salary
of a, 55.

quo warranto for, 254 *n. i*.

must sign summons to council meet-
ings, 358.

duties as to burgess lists, 390, 391.

roll, 393, 394.

registering freemen, 506, 507.

voting papers, 401.

freemen's roll, 507.

freemen's list, 507, 508.

particulars of numbers of council-
lors in each ward, 403.

neglect of these, 406.

duty as to giving notice of vacancy
of office, 407.

voting papers for aldermen, 415.

duration of office of the, 433.

attorney may be, *id*.

appointment of, *id*.

office of, a new office, 433, 437.

security for due execution of office
of, 433.

declaration to be taken by, *id*.

office of, a ministerial one, *id*.

duties of, 433—436.

his lien, &c., 434.

actionable for breach of duties, *id*.

cannot recover against corporation
without retainer, &c., 433 *n. m*.

has no claim for payment for duties
cast upon him by statute, 436.

nature of his salary, *id*.

resolution to compensate, must be
under common seal, *id*.

money appropriated in payment of
his charges, &c., *id*.

liable in equity for breach of trust,
&c., 437.

not liable for costs on certiorari, &c.,
427.

what offices cannot fill, 437.

what sufficient amotion of, 437, 438.

mandamus to restore, 437.

resignation of, 438.

punishable for misconduct at election,
id.

exempt from serving on juries, 480.

TOWN HALL,

notices to be fixed on, 435.

TRADE,

charter in hindrance of, void, 23 *n. a*.

presumption against charter in re-
straint of, 28 *n. n*.

right of exclusive, 34.

contract binding a trading corpora-
tion, 55.

customs and bye-laws in restraint of,
83, 84.

bye-laws regulating, 84.

how construed, 88.

incident of corporation for purposes
of, 159.

what not such incident, 271.

corporation for purposes of, will not
be compelled to declare dividends,
271, 272.

when mandamus goes to such corpo-
rations, 272, 273.

service of writ of summons on cor-
poration for purposes of, 274, 275.

corporations constituted for, may
issue notes, &c., 276.

ejectment against, 278 *n. p*.

when accountable in equity, 287.

when obliged to show their books,
&c., 314.

when will be restrained in equity,
291.

shareholders in, must not be une-
qually taxed, &c., 292.

forfeiture of shares in, *id*.

quo warranto, does not lie to question
people's trades, 300 *n. f*.

customs of exclusive trading abo-
lished, 322.

TREASON,

corporation said to be incapable of
committing, 3, 284 *n. d*.

how triable in Universities, 519 *n. b*.

does not forfeit a foundership, 531.

TREASURER,

of New River Company, mandamus
for, 250.

TREASURER—*continued.*

of borough, appointed during pleasure, 378.

what security to be taken from, 439.

salary of, *id.*

quo warranto lies for office of, 439, 441.

duties and charge of, 439—441.

to whose order to pay money, 439.

how compellable to pay costs of witnesses, &c., *id.*

duration of office of, 439 *n. b.*

how dismissible, *id.*

summary remedy against, 440.

exemptions and disqualifications of, 441, 480.

to keep account of costs of prosecution, &c., of prisoners, 455.

duty as to proceeds of sale of corporation church property, 492.

surplus of district rate, 495.

of county, accounts to be kept by, 456.

of district prison committee, 483 *n. m.*

TREASURY,

power of lords of, as to corporation property, 141 and *n. s.* 365—367, 484, 492 *n. r.*

TRESPASS,

when corporation may bring, 171, 174 *n. y.*, 186, 190, 191.

liable to, 278.

against a corporation and individual jointly, 278 *n. n.*

solely, plea in, 280 *n. g.*

evidence of officer in trespass by corporation on his behalf, 316.

against mayor, for issuing illegal warrant, 428.

a mode of trying validity of borough rate, 490 *n. a.*

quare clausum fregit does not lie in University courts, 522.

lies against a corporator *and* a stranger or member, 591; but not against them *and* their head, 591.

by churchwardens, 601, 602.

TROVER,

common seal when presumed in action of, against a corporation, 62, 63.

by corporation, 192.

against, 277, 278.

town clerk, 434 *n. n.*

by churchwardens, 601, 602, and *n. d.*

TRUSTEES,

of schools, &c., 552 *n.*, 554 *n. e.*

appointment and nature of estate of, in lands, &c., formerly vested in municipal corporations for charitable purposes, 511, 512.

not to mix charitable funds, 548, 552 *n. b.*

clerk of, &c., 513; his duty, *id.*

when new, will not be appointed in case of a college, 548.

TRUSTS,

lands settled to trusts cannot be conveyed to corporations even to same trusts, 108, 109.

corporations may hold lands in trust, 109.

what not a devise of a trust, 109 *n. b.*

devise to a corporation on private trusts, good, 116.

bequest for charitable trusts, 117.

devisee compelled to disclose, 117. *n. u.*

effect of a corporation undertaking public, 136 *n. t.*

corporation may hold on private, 139.

estates settled to, when cannot be leased, 149 *n. y.*

other than charitable, in municipal corporations, 361 *n. d.*

municipal corporations, how far divested of estates of which they were seised for charitable, 511 and *n. p.*, 512.

where the lands are vested in municipal corporation reincorporated by another name, 511 *n. o.*

leases of lands granted on charitable, 511 *n. p.*

choice of trustees respecting such lands, &c., 512.

petition for filling up vacancy in them, 512 and notes.

orders in chancery respecting, 512, 513.

stock, and other personal property of charitable, how disposed of, 513.

vested in a college cannot be enforced by the visitor, 532 and *n. k.*; will be by chancery, 532 *n. o.*; when not, 548.

are to be performed by college, how, 542.

TURKEY COMPANY,

mandamus to admit to freedom of, of, 509 *n. f.*

TURNERS,

the company of, their power to imprison, 86 *n. f.*

refusal of office in, 87.

UNION,

of corporations, how effected, 8.
operation of, on the rights of
each, id.

UNIVERSITIES,

the, of Oxford and Cambridge, rein-
corporated by statute, 19 *n. h.*,
126 *n. e.*, 516.

excepted out of 9 Geo. 2, c. 36 ..
124—126.

plea of privilege of, in equity, 288
n. o.

granting ale licenses in, 454 *n. i.*

what meant by The Universities, 515
and *n. b.*

definition of, 515.

character of corporations of, 515,
517, 518.

membership of, how acquired, 515.

new statutes cannot be imposed on,
id.

mandamus to admit, remove, and
restore, &c., 515 *n. e.*

to affix seal, 518 and *n. q.*

when incorporated, 516.

claim to be corporations by prescrip-
tion, 516 *n. f.*

powers given by charter over prosti-
tutes, &c., 516 *n. h.*

effect of stat. 13 Eliz. c. 29 .. 516,
519; 32 Hen. 8, c. 10 .. 516.

powers of the proctors of, 516, 522 *n. d.*
banishing members, 516; and
effect of, 518 *n. s.*

conferring degrees, 516 *n. i.*,
528.

cannot accept in part, statutes given
them, &c., 527, 528.

may substitute declarations for oaths,
528.

residence in, 520 *n. e.*

return members to parliament, 528.

offences against University statutes,
where not cognizable, 519; how
not pardonable, id.

how to be visited, 517, 518.

appointment of officers of, 518.

dispensing with statutes of, id.

effect of power of interpreting sta-
tutes of, 518, 519.

exclusive jurisdiction of, 519, 521,
522.

what actions triable in courts of, and
what not, 519 and *n. a.*, *b.*

what process adopted in courts of,
519, 520.

treason, mayhem, and felony, com-
mitted by member of University,
how triable, 519 *n. b.*

chancellor's courts of, are courts of
record, 520.

appeals from, id.

how prohibited, 520, 521.

contempt of, 516 *n. i.*

chancellor, courts of,

citation in, how to be served, 520
n. c.

removing cause from, id. *n. e.*

entitling affidavit, &c., id.

arresting in, 521.

process, id. *n. r.*

have equitable jurisdiction, 521.

not as to specific performance,
id. *n. n.*

privilege of, cannot be waived by
defendant, 521.

cannot award a distringas, id. *n.*
p.

jurisdiction of, 519, 521 and *n. m.*,
522.

cannot hold plea of freehold, 519.

penalty on statute cannot be reco-
vered in, 522.

prohibition of the, 524 *n. s.*

judicially noticed, id. *n. z.*

exclusive jurisdiction of courts in,
extends to cases where a corpo-
ration is defendant, 521.

practice in such case, id. *n. p.*

not where the Chancellor is, 523.

nor where attorney, id.

privilege of, may be waived by per-
son sued in superior court, 521
n. q.

will not be invaded by the supe-
rior courts, id. *n. m.*

will be allowed on information in
Exchequer, 522.

what residence to be proved, id.

pleading custom of, to distrain, id. *n. b.*
servants of, 522, 523.

must be registered, &c., 522 *n. d.*
but not for the sake of the claim

of privilege, 523.

privilege of, does not extend to
Chancellor or Vice-Chancellor
when sued, id.

nor to attorneys, id.

but it does to the Commissary, id.
early allowance of, id. *n. n.*, 525 *n.*
k.

may be either pleaded or claimed,
523—525.

how pleaded, 524, 525.

how claimed, 525, 526.

plea of, when not good, to infor-
mation in Exchequer, 524 *n. n.*

plea of, in equity, 524 *n. n.*, 525.

inspection of statutes, records, &c.,
of, when refused, 527.

plea to the jurisdiction of courts of,
524 *n. p.*

UNIVERSITIES—*continued.*

claim of copunance by, when only allowable, 525.

when and how to be made, 525, 526 and notes.

pleading to such claim, 526 n. *t.*

claim of, for Esquire Bedell, 526 n. *n.*

devise to an, 545.

rights of, as to ale and beer measures, 526, 527.

licensing alehouses, 527.

court leet, *id.*

retail of wine, *id.*

appointing constables, *id.*

quo warranto against Chancellor, *id.*

lectureship in a, 543 n. *n.*

USAGE,

strong evidence of a right, 564, 565.

inconsistent with a new charter, overthrown by acceptance of latter, 19.

otherwise not, *id.* n. *i.*

since a statute evidence of what the usage was before it, 647 n. *o.*

contemporaneous, effect of, 27.

defined, *id.*

effect of usage of visitation, 534.

proof of usage limiting words of a charter, 28, 552.

not ground for presuming a charter, when, 38 n. *d.*

certifying in courts at Westminster, 63.

in accordance with a bye-law, 91 n. *r.*

inconsistent with college statutes, 530 n. *z.*

USE AND OCCUPATION,

when corporation may sue for, 57, 178.

by dean and chapter, 597.

USER OF OFFICE,

when requisite, 254, 256.

what sufficient, 256 n. *u*, 410.

USURPER,

corporate officer when is an, 216 n. *a*, 217 n. *f*, 255 n. *o.*

resignation of an, 259 n. *y.*

acts of an, 261, 426, 641.

VENUE,

in actions on bye-laws, 88 n. *s.*

in action against mayor, 430.

justices, 475.

as to laying, in indictment, 347 n. *n*, 349, 350, 503.

changing, 428 n. *x*, 481.

changing to a county of a city, 352 n. *y.*

requisite of affidavit in moving to

change venue in county of city, &c., 355.

action against constables, 369.

when cured, 374 n. *f.*

VETO,

power of, at an election, 220.

granting, to master of hospital, 578.

VICAR,

corporate capacity of, 658 n. *h.*

VICTUALLERS,

granting license to, in the Cinque Ports, 476 n. *d.*

VISITOR,

how constituted, 517, 530 and n. *x.*

his province, 517, 529, 536.

cannot order a new distribution of revenues, 562.

cannot take cognisance of common law, &c., offences, 517.

of *University of Oxford*, *id.* n. *n.*

Cambridge, 518.

of *free grammar school*, 557.

may deprive master, *id.*

when presumed to be a general, 530 n. *x.*

when crown is, of a school, 554 n. *e.*

of a school refusing to act, 557.

whether power of interpreting, &c., statutes of foundation suffices to constitute a, 518, 519, 529, 558 n. *z.*

pleading acts of a, 537 n. *d.*

of *free school*, maintaining ejection, &c., 556 n. *o.*

must be one to every ecclesiastical foundation, 529.

of *college*, *id.*

equity will not relieve except when, 548.

when king becomes, by devolution, how to exercise power of, 529

532.

compelled to perform a trust, 562.

his interpretation of statutes binds superior courts, 529.

corporation may be a, 561.

cannot impose fresh statutes, 530 n. *v.*

but may alter, 536, 537.

when interested, right of visitation devolves to the crown, 562.

crown, when visitor, may visit by commission, 529 n. *s.*

and without complaint made, 557 n. *y.*

power of, may be divided, 529, 530 n. *u.*

when results to crown, 529.

when part results, 530 n. *u*, 562 n. *a.*

his general powers, 530 n. *u*, *v*, 536, 537.

VISITOR—*continued.*

as to pleading unreasonableness of his power, 530 n. *y*.
 in right of office, 531 n. *a*.
 corporation may be a, 534 n. *c*.
 cannot visit himself, 531 n. *a*, 534.
 power of, how confined, 531, 532, 536.
 how legality of motion by, to be tried, 532 n. *k*.
jurisdiction of a, not known to common law, 532 n. *k*.
 nature of jurisdiction of, 534 n. *h*, 536, 537.
 is to decide on elections, 532.
 plea of his power, &c., to do so, 533 n. *r*.
 college bound to submit to, 536.
 has power of appointing on a vacancy when, 532 and n. *n*, 537 n. *e*.
has right of entry for purpose of a visitation, 536.
 return to mandamus of acts of a, 537 n. *d*.
 cannot compel specific performance, &c., 532.
 nor to affix common seal, *id.* n. *p*.
 when Queen's Bench does not interfere with, 532.
 nor Chancery, 533, 537 n. *f*.
 mandamus, when goes to, 532 and n. *n*, 533.
 courts do not take notice that a college has a, 533 n. *q*.
 abuse of powers by, how repressed, 533.
 excess of, how, 534.
ex officio visitation of a, 535 and n. *q*, 536.
 visitation of a, on complaint, 535, 536.
 information in chancery against, when lies, 533.
 may deprive, when, 535 n. *s*, 536 and n. *d*, *y*, 537 and n. *e*, 557.
 may suspend from office, 537 and n. *h*.
 how far bound to receive complaints, 533.
 when may proceed without, 535 n. *s*.
 appeal to, does not lie from a stranger to the corporation, 533, 534.
 may examine evidence *viva voce*, 535 n. *r*.
 complaint to, and answer how to be made, 534.
 of annexed foundation, 542 and n. *s*, *t*.
 how to take an inquiry, 535, 536.

citation by a, 536.
 whether may examine on oath, 535.
 action on the case against, 534.
 may inquire by commission, 535.
 how to frame this commission, 535, n. *m*.
 prohibition of a, 534, 535.
 injunction to revoke sentence, 535.
 periodical visitation of a, 535, 536.
 question who is, how to be decided, 534.
 of head of college, 536 n. *x*.
 his decision final, 534.
 appeal from sentence of the ordinary visiting, 534, 558 n. *z*.
 has no cognisance over matters where strangers are concerned, 536.
 cannot contract with the corporation, 576.
 may suspend or adjourn his court, 536 n. *y*.
 not compellable by mandamus to restore canon, 593.
 nature of his power need not be pleaded, 536 n. *y*.
 but the fact of there being a, must be returned to a mandamus, *id*.
 power of, over annexed portions, &c., 542.
costs of visitation, 534 n. *c*, 536 n. *a*.
 when may charge expenses on the college, 536.
 may adjudicate as to letting rooms in college, 537 n. *k*.
 of a hospital, 572 n. *s*, 576 n. *r*.
 how to plead expulsion by a, 538 n. *n*.
 neither mandamus nor bill lies on an motion by a, 538 n. *o*.
 is to decide respecting internal disputes, &c., of a college, 538, 539.
of hospital, how appointed, 576.
 mandamus in vacancy of office of, 538.
 empowered by crown to alter statutes, 578 n. *h*.
 not competent to adjudicate on acts of parliament, &c., 539.
 nor on facts to be ascertained by a jury, 544.
cannot summon a jury, *id*.
 crown is, when no special visitor appointed, 540.
of dean and chapter,
 the crown is, when, 582.
 appeal from, *id*.
 may deprive, 583.
 the bishop, when, 582, 583.
 when interested, Queen's Bench to be applied to, 584.

- VISITOR AND GUARDIANS**,
 of the poor, what lands may hold,
 &c., 624.
 nature of incorporation of, 624.
 rateability to poor, 620, *n. x.*
- VOTING PAPERS**,
 for aldermen, how to be kept, &c.,
 399, *n. r.*, 415, 433.
 for councillors, how, *id.*
 examination of, &c., 400.
 how long to be kept, 401, 433.
 to be inspected, 401,
 action lies against mayor for destroy-
 ing, 427, *n. o.*
 when not records, 433, *n. c.*
 search for, 433 and note *d.*
- WAGES**,
 contract to pay, 62.
- WALLINGFORD**,
 charter of, 31, *n. g.*
- WARD LISTS.** *Vid.* **WARDS.**
- WARDS**,
 how to set out, 17.
 elections, &c., in boroughs, divided
 into, 402—404.
 number of councillors in, 402, 403.
 burgesses how to vote for, 404.
 burgess roll, how to be made up in,
id.
 disqualification of aldermen, &c., in
 boroughs having, 416.
 election of councillors in, 419.
 assessors of, 432.
 particulars of division of boroughs
 into, how kept, 434.
 expenses of making up ward lists,
 &c., 487, 488.
- WARRANT OF ATTORNEY**,
 not under seal, 60.
 to claim consuance, &c., 526.
 to receive deed of grant, 544.
 rent of dean and chapter, 586,
 587.
 churchwardens cannot make, 603.
- WASTE**,
 what is not, by a parson, 636, 637.
 prohibition to corporation sole to
 prevent, 644.
 injunction against, 637, 644.
- WATCH COMMITTEE**,
 the, in municipal corporations, how
 appointed, &c., 367, 368.
 award of compensation to constables
 by, 372, 373.
 of expenses of constables, 373,
 374.
 to report to secretary of state, 375.
- WATCH RATES.** *Vid.* **RATES.**
- WEIGHAGE**,
 claim for, 160, 163.
- JANUARY, 1854.—48**
- WESTBURY**,
 fined by House of Commons, 413.
- WESTMINSTER**,
 school of, 124, 558.
- WHARFAGE**,
 what, 164 and *n. i.*
 validity of lien for rates, 8.
 bill in equity for, 181.
- WINCHESTER**,
 school of, 124, 588, 565 *n. f.*
 identity of lands, &c., of, 549.
- WINE LICENSE**,
 in the Universities, 527.
- WOMEN**,
 in general cannot be corporators, 6.
 instances of their being corporators,
 6, 627.
 of a municipal corporation, 6.
 when may be corporators sole, 627.
- WORCESTER**,
 sheriff of, 353.
- WORCESTER COLLEGE**,
 death of provost of, 109 *n. h.*
- WORDS** *interpreted*,
 admission to office, 529 *n. t.*
attachiamenta placitorum coronæ,
 34 *n. s.*
bannitus, 267, 515 *n. e.*
 barons of Cinque Ports, 30 *n. f.*
 borough, 341 *n. t.*
 building, 411 *n. e.*
burgenses habeant gildam mercato-
riam, 30, 31.
burgesses, 31 *n. g.*
camerarius, 86.
canonica portio, 585 *n. y.*
 citizens and inhabitants, 26 *n. z.*
 college, 529 *n. o.*
 commonalty, 12 *n. g.*, 26 *n. z.*
communia, 12 *n. g.*
concessimus et confirmavimus, 32,
 33.
consuetudines, custumagia, theolo-
nia, &c., 32 *n. r.*
damus et concedimus, 33 *n. c.*, 37.
 disqualifying, 33.
domus, 529 *n. t.*, 568 *n. n.*
erigimus, 37.
ex certâ scientâ, mero motu, &c., 21
n. g.
 exemptions, 33.
 fine, 362 *n. n.*
 "for the time being," 35, 36, 625.
 founder's kin, 539.
habendum sibi et successoribus suis,
 30.
homines et cives, 31 *n. m.*
homines sui, 32 *n.*, 595 *n. m.*
omnes homines et omnes cives, 183,
 184.
 house, 507 *n. y.*

WORDS—*continued*.

immediately, 356.
 inhabitants, 26 n. *z*.
 "in pursuance of an act," 503 n. *i*.
 "it shall be lawful," 35 n. *y*.
 liberæ consuetudines, 32.
 "liberties and customs," *id*.
 and suburbs of a city, 283.
 "may and shall," 34 n. *s*, 539 n. *s*,
 572 n. *s*, 609.
 nullus faciat merchandizam, 34 n. *q*,
 vid. Fitz. N. B. 227 F.
 omnes piscariæ, &c., 32.
 persona, 521.
 place of abode, 508 n. *z*.
 sacerdos, 2 *Phill. Chanc. R.* 521.
 scot and lot, 183 n. *e*, 346 n. *k*.
 tenere placita, 464.
 tolnetum, 166 n. *l*.
 "town with all its appurtenances,"
 in a grant, 32.

Universitas, 515.

WRIT OF INQUIRY,
 whether lies in debt, 339.
 WRIT OF SUMMONS,
 against corporation, 274.
 defendant resident in county of a
 city, 352 n. *y*.
 in borough court, 459 n. *i*.
 WRIT OF TRIAL,
 may be directed to recorder sitting
 in borough court, 460.

YORK,

sheriff of, 353.
 custom of city of, 78.
 foreign bought and foreign sold in,
 85, 322, 329, 354.
 feme covert taking by gift from
 baron, 330.
 ancient lights in, 337 n. *p*.



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